RECENT DEVELOPMENTS IN MEDIA, PRIVACY, AND DEFAMATION LAW

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I. DEFAMATION LAW

The year in defamation law saw parties of all kinds, including a pilot, an ex-wrestler and governor, a rock star, and a funeral home owner. Beyond the you-can't-make-this-stuff-up fact patterns, each case explored important concepts in defamation law such as statutory immunity, material falsity, prior restraint, and the unpredictability of a jury trial.

A. *Defamation Claims Against Airlines for Reports of Security Threats Will Be Difficult to Get Off the Ground*

In its first defamation case since 1991, the U.S. Supreme Court held that an airline could not be denied statutory immunity from a defamation lawsuit without a finding that the statements made by an airline employee to Transportation Safety Administration (TSA) officials were materially false.[1] In *Air Wisconsin Corp. v. Hoeper*, after a former pilot for Air Wisconsin, William Hoeper, failed to pass his flight proficiency test for the fourth time, he allegedly became angry at the test administrators.[2] Hoeper was supposed to leave on a flight to Denver after the test, but a manager for Air Wisconsin reported to the TSA that he might be dangerous and was potentially armed.[3] Based on the manager's report, TSA officials detained Hoeper until they confirmed he was not armed. [4] After he was fired for failing his fourth attempt to pass the test, Hoeper sued for libel.[5] Under the Aviation and Transportation Security Act (ATSA),[6] the airline was immune from his suit unless the manager acted with actual malice. Finding that the manager did act with the requisite intent, the jury awarded Hoeper $1.4 million in actual and punitive damages.[7]

The Supreme Court granted the writ of certiorari to decide "whether ATSA immunity may be denied without a determination that the air carrier's disclosure was materially false."[8] The Court was unanimous in holding that immunity could be denied only for falsehoods that were material,[9] and that, because the jury had not been instructed on the issue of materiality, the judgment could not be affirmed.[10] In reaching its conclusion, the Court emphasized the meaning of material falsity, relying on *Masson v. New Yorker*, which established that when comparing the literal truth with the allegedly defamatory statements, courts must decide whether the two would create a "different effect on the mind of the reader."[11] The Court also noted that "the identity of the relevant reader or listener varies according to context."[12] Legal commentators have noted that the importance the Court placed on analyzing the audience creates

1. Air Wisconsin Airlines Corp. v. Hoeper, 134 S. Ct. 852 (2014).
2. *Id.* at 855.
3. *Id.*
4. *Id.*
5. *Id.* at 859–60.
6. 49 U.S.C. § 44941.
7. *Air Wisconsin*, 134 S. Ct. at 859–60.
8. *Id.* at 861.
9. *See generally id.* at 858.
10. *Id.* at 856.
11. 501 U.S. 496 (1991).
12. *Air Wisconsin*, 134 S. Ct. at 863.

one more obstacle for defamation plaintiffs and could provide more opportunities for the early dismissal of these claims.[13]

B. *What Do a Wrestler and Ex-Governor Have in Common with an Ex-Rock Star? A Jury Trial*

In *Doe v. Hagar*, ex-Van Halen singer Sammy Hagar was sued for libel by a former lover based on a statement he made in his autobiography, *Red: My Uncensored Life in Rock*.[14] According to Hagar, plaintiff (referred to as Jane Doe) extorted him over twenty years ago, claiming she was pregnant with his child.[15] At that time the two negotiated a confidential agreement in which Hagar paid Doe for her silence and she agreed to paternity testing.[16] The district court granted summary judgment in favor of Hagar, but the Eighth Circuit reversed.[17] The court rejected Hagar's argument that Doe's claims were barred by Iowa's prohibition against self-publication because she told family and friends that she was mentioned in the book, concluding that "[i]t is for the jury to determine whether Doe's actions amount to self-publication."[18] The court also disagreed with Hagar's contention that his statements were not "of and concerning the plaintiff" because those who already knew the story would recognize her as the subject of Hagar's statements.[19] Finally, the Eighth Circuit rejected Hagar's substantial truth and non-actionable opinion defenses, finding that there was sufficient evidence to submit to the jury the following questions: (1) whether "Doe, a relative stranger to Hagar, approached him to engage in sexual intercourse," and (2) whether "Doe subsequently lied about the identity of the father of her child in order to extort him."[20] Moreover, the court reasoned that an "accusation of a crime is laden with factual content."[21]

Nearly a month earlier, a federal jury in Minnesota awarded boa-wearing, former Minnesota governor Jesse Ventura $1.8 million in his defamation suit against the estate of Chris Kyle, a former Navy SEAL and author of the best-selling book *American Sniper*.[22] In a subchapter of the

13. Charles D. Tobin, Jerrold J. Ganzfried & Judy R. Nemsick, *U.S. Supreme Court Adds "Relevant Reader or Listener" to "Material Falsity" Defamation Analysis*, *available at* http://www.hklaw.com/publications/us-supreme-court-adds-relevant-reader-or-listener-to-material-falsity-defamation-analysis-01-28-2014/ (Jan. 28, 2014) (last visited Jan. 14, 2015).
14. 765 F.3d 855 (2014).
15. *Id.* at 858.
16. *Id.* at 858–59.
17. *Id.* at 865–66.
18. *Id.* at 861.
19. *Id.* at 862.
20. *Id.* at 863.
21. *Id.*
22. Ventura v. Kyle, Civ. No. 12-472, jury verdict (D. Minn. July 29, 2014). Factual background and the procedural background are contained in the district court's order denying Kyle's motion for summary judgment. 8 F. Supp. 3d 1115 (D. Minn. 2014).

book titled "Punching Out Scruff Face," Kyle referred to a bar fight with an unnamed celebrity frogman during a wake for a fallen Navy SEAL. According to the book, the man, referred to as "Scruff Face," said that he hated America and that he thought the U.S. military was killing innocent civilians in Iraq and that the SEALs "deserved to lose a few." Kyle then punched Scruff Face, whom Kyle later identified in interviews as Jesse Ventura. Ventura sued Kyle claiming defamation, misappropriation, and unjust enrichment. The jury awarded Ventura $500,000 in damages for libel, finding that Kyle published false statements with actual malice.

C. *Ninth Circuit Holds Blogger and Other News Media Entitled to Protection Under* Gertz

In the latest development in the ongoing saga of *Obsidian Finance Group, LLC v. Cox*, the Ninth Circuit reversed a $2.5 million jury verdict and remanded the case for a new trial.[23] Obsidian's defamation claims were based on several blog posts published by Cox, which accused a principal of Obsidian of fraud, corruption, money laundering, and other illegal activities.[24] The Ninth Circuit found error with the district court's jury instruction that "[d]efendant's knowledge of whether the statements at issue were true or false, and defendant's intent or purpose in publishing those statements, are not elements of the claim and are not relevant to a determination of liability."[25] The court also rejected plaintiffs' claim that the Supreme Court's holding in *Gertz v. Robert Welch, Inc.*[26] is limited to suits involving the institutional press and held that Cox's blog post involved speech that was a matter of public concern.[27]

D. *Everything's Bigger in Texas, Including the Fight Over What Role Injunctions Should Play in the Digital Age*

First Amendment advocates felt some relief when the Texas Supreme Court rejected an argument that the state's long-standing ban on prior restraint should be relaxed in light of developments in communication technology.[28] The court did hold, however, that a permanent injunction requiring the removal of statements from a website that had been adjudicated defamatory did not violate the state or federal constitutions.[29]

After working for BCG Attorney Search as a legal recruiter, plaintiff Robert Kinney left to start a competing firm.[30] BCG's president later

23. Obsidian Fin. Grp., LLC v. Cox, 740 F.3d 1284 (9th Cir. 2014).
24. *Id.* at 1287.
25. *Id.* at 1288.
26. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
27. *Cox*, 740 F.3d at 1290–91.
28. Kinney v. Barnes, 2014 WL 4252272, at *1 (Tex. Aug. 29, 2014).
29. *Id.* at *12.
30. *Id.* at *1.

posted statements on his firm's website suggesting Kinney was part of a kickback scheme while at BCG.[31] In his suit Kinney sought an injunction (1) requiring the president to remove the offending statements from the website, (2) mandating that requests be sent for the statements to be removed from third-party websites, and (3) enjoining BCG's president from making similar statements in the future.[32] The court held that an injunction ordering a party "to remove the statements at issue from his websites (and to request that third-party republishers do the same) is not an unconstitutional restraint on speech."[33] As for the injunction barring the president from making similar statements in the future, the court found that to be "the essence of prior restraint."[34]

In a companion case to *Kinney* argued the same day, the court considered a dispute over a family funeral home business.[35] Kirk Burbage sued his brother Chad (who had not inherited any ownership in the business) for statements made on Chad's website, in flyers distributed around town, and in a letter to Kirk's customers, accusing Kirk of "elder abuse" and being known "to abuse the dead."[36] The jury awarded Kirk millions in damages, and the trial court entered a permanent injunction setting out four pages of specific statements and categories of statements that Chad was barred from making in the future. The Texas Supreme Court vacated the injunction and reduced the damages award to $2,000, holding the injunction was an impermissible prior restraint, as are all "[p]robative injunctions of future speech that is the same or similar to speech that has been adjudicated to be defamatory."[37]

II. PRIVACY

A. *Misappropriation*

A federal court in California held that college athletes may be entitled to compensation for use of their names and likenesses during live game broadcasts. The court rejected the NCAA's argument that the First Amendment precludes student-athletes from asserting such rights of publicity.[38] The ruling follows a 2013 decision by the Ninth Circuit holding that the First Amendment does not bar a college football player's state-

31. *Id.*
32. *Id.* at *1–2.
33. *Id.* at *4.
34. *Id.* at *5.
35. Burbage v. Burbage, 2014 WL 4252274, at *1 (Tex. Aug. 29, 2014).
36. *Id.*
37. *Id.* at *1, 11.
38. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 2014 WL 1410451 (N.D. Cal. Apr. 11, 2014).

law right-of-publicity claims in a putative class action against a video game manufacturer.[39]

In another high-profile sports case, the Seventh Circuit reversed the district court and held that a Chicago-area grocery chain's advertisement in *Sports Illustrated* that congratulated Michael Jordan on his induction into the Basketball Hall of Fame and included the grocer's logo above a pair of basketball shoes bearing the number "23" was commercial speech.[40] The most significant holding in this case was the Seventh Circuit's conclusion that even though the advertisement did not involve or propose a specific commercial transaction, it still qualified as commercial speech because it was considered brand advertising.

B. *False Light*

The Eighth Circuit's decision in *Doe v. Hagar* (*see supra* Part I.B.) also involved a claim for false light.[41] Although the district court granted Hagar summary judgment because the memoir did not specifically name the plaintiff,[42] the Eighth Circuit reversed, finding a question of fact as to whether Hagar's statements, even if understood only by those who knew plaintiff, could satisfy the publicity element of a false light claim.[43]

The Third Circuit affirmed a jury verdict of $196,000 in damages for an orthopedic surgeon, who claimed that a newsletter from the American Academy of Orthopedic Surgeons (AAOS) portrayed him in a false light.[44] The newsletter reported a grievance that had been filed against the plaintiff in connection with an expert witness report he provided in a medical malpractice case; the plaintiff argued that the article omitted key facts and implied wrongful conduct.[45] The AAOS argued that the jury's finding that it had not made any false statements foreclosed liability.[46] The court, however, held that even if a publication is literally true, "discrete presentation of information in a fashion which renders the publication susceptible to inferences casting one in a false light entitles the grievant to recompense for the wrong committed."[47]

39. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013).
40. Jordan v. Jewel Food Stores, Inc., 743 F.3d 509 (7th Cir. 2014).
41. Doe v. Hagar, 765 F.3d 855 (8th Cir. 2014).
42. Doe v. Hagar, 2013 WL 1827670, at *11–13 (N.D. Iowa Apr. 30, 2013).
43. *Hagar*, 765 F.3d at 864.
44. Graboff v. Colleran Firm, 744 F.3d 128 (3rd Cir. 2014).
45. *Id.* at 131–32.
46. *Id.* at 132.
47. *Id.* at 136–37 (citing Larsen v. Philadelphia Newspapers, Inc., 543 A.2d 1181, 1189 (1988)).

C. *Intrusion*

A federal district court in West Virginia allowed a plaintiff to proceed with a claim of intrusion upon seclusion after the defendant—a business competitor—created a fake Craigslist advertisement, which included plaintiff's telephone number. The ad prompted "scores of calls from strangers 'at all hours of the day and night.'"[48] The court noted that although occasional telephone calls would not constitute intrusion upon seclusion, repeated and persistent calls at inconvenient hours could be.[49]

The Indiana Court of Appeals found that a church's press release and press conference about the death of the plaintiffs' child did not intrude upon their seclusion because the church did not intrude upon their physical space.[50] Reversing a trial court's denial of the church's motion for summary judgment, the court noted that "there have been no cases in Indiana in which a claim of intrusion upon seclusion was proven without physical contact or invasion of the plaintiff's physical space."[51]

D. *Publication of Private Facts*

The mailing of six letters—two letters sent to three people—was insufficient to meet the publicity element of a claim for publication of private facts. The D.C. Court of Appeals held that the publicity element of the tort "means that the matter is made public by having been communicated to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge," and that mailing "a handful of letters to a handful of [people]" did not meet that test.[52]

The Ninth Circuit declined to dismiss a former inmate's claim for public disclosure of private facts when his identity was disclosed in a documentary about street gangs.[53] Affirming the denial of the documentary producer's anti-SLAPP motion, the Ninth Circuit found that the plaintiff had established a "reasonable probability" of prevailing on the claim, specifically noting that because the documentary's focus was on a gang to which the plaintiff did not belong, he had a reasonable probability of showing that his identity was not of legitimate public concern.[54]

48. Imagine Medispa, LLC v. Transformations, Inc., 999 F. Supp. 2d 873, 886 (S. D. W. Va. 2014).

49. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977)).

50. Westminster Presbyterian Church of Muncie v. Yonghong Cheng, 992 N.E.2d 859 (Ind. Ct. App. 2013).

51. *Id.* at 869.

52. Armstrong v. Thompson, 80 A.3d 177, 188–89 (D.C. Cir. 2013).

53. Doe v. Gangland Prods., 730 F.3d 946 (9th Cir. 2013).

54. *Id.* at 958–61.

III. INTERNET LAW DEVELOPMENTS

A. *Efforts to Unmask Anonymous Speakers*

The standards that courts employ for determining whether to require disclosure of identifying information about anonymous online speakers continue to expand. Departing somewhat from the higher standards established in *Doe v. Cahill*[55] and *Dendrite International, Inc. v. Doe No. 3*,[56] courts are demonstrating an increasing willingness to apply lower burdens, even when expressive speech is at issue, if that speech is criticism of a business.

Two more courts joined a growing chorus that describes speech critical of businesses as "commercial speech." In *Taylor v. Does 1-10*, a federal district court in North Carolina held that the plaintiff, who alleged that an anonymous speaker falsely disparaged his company, needed only to demonstrate that at least one of his claims could survive a hypothetical motion to dismiss in order to successfully unmask the speaker.[57] The court reasoned that the "expression related solely to the economic interests of the speaker and its audience" and thus was less deserving of First Amendment protection.[58]

Not all courts are following suit in adopting this standard. For example, in *Kuwait & Gulf Link Transport Co. v. Doe*, the court stated in *dicta* that evidence that speech is economically motivated is "insufficient to compel the classification of the [speech] as commercial speech."[59] In *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, the Virginia Court of Appeals interpreted the state's statutory standard for unmasking anonymous online speakers in a more speech-protective manner.[60] Although the court upheld the constitutionality of the statute, which permits a plaintiff to obtain identifying information about an anonymous speaker upon a mere showing that the plaintiff has a "legitimate, good faith basis" to contend it has been the victim of actionable conduct, the court held that the statute requires the submission of evidence to support such a showing. In *Digital Music News LLC v. Superior Court*, the California Court of Appeal invoked, for the first time, the state constitution's right of privacy in quashing a subpoena seeking the identity of a newspaper commenter.[61] The court held that the commenter's privacy rights outweighed the

55. 884 A.2d 451 (Del. 2005).
56. 342 N.J. Super. 134 (App. Div. 2001).
57. 2014 WL 1870733 (E.D.N.C. May 8, 2014).
58. *Id.* at *2–3.
59. 92 A.3d 41, 50 (Pa. Super. Ct. 2014).
60. 752 S.E.2d 554 (Va. Ct. App. 2014), *cert. granted*, No. 140242 (Va. May 29, 2014).
61. 171 Cal. Rptr. 3d 799, 808–10 (Ct. App. 2014).

subpoenaing party's need for the information because the commenter possibly faced retaliation from his employer if his identity were revealed.

In an unusual case involving subpoenas implicating associational (rather than speech) rights under the First Amendment, a human rights lawyer whose identity was already known moved to quash a subpoena seeking information that would have revealed date, time, and location information for the times she logged into her email account. The California federal court quashed the subpoena under the standard set forth in *Perry v. Schwarzenegger*,[62] finding that the plaintiff did not show that the information was "highly relevant" to its libel case or "carefully tailored" to minimize the intrusion on the associational rights of the attorney.[63]

Courts appear to be increasingly willing to reject efforts to unmask anonymous speakers on procedural grounds. In *In re John Doe aka "Trooper,"* the Texas Supreme Court halted a court-ordered, pre-suit deposition of Google when the anonymous blogger whom the plaintiff sought to unmask made a limited appearance and contested the court's personal jurisdiction over him.[64] In *AF Holdings, LLC v. Does 1-1058*, the D.C. Circuit held that the plaintiff in a mass copyright infringement lawsuit alleging unlawful file-sharing failed to adequately demonstrate that the hundreds of anonymous defendants were likely subject to the personal jurisdiction of the court, a task the court noted the plaintiff could have accomplished with the use of commonly available geolocation tracking software.[65]

Courts have recently addressed subpoena recipients' efforts to recover their attorney fees for moving to quash. While the Ninth Circuit previously rejected a motion for attorneys brought under the Federal Rules of Civil Procedure, this year courts did award such fees in two cases litigated under state anti-SLAPP statutes, which expressly provide for fee-shifting.[66]

B. *Immunity for Third-Party Content Under Section 230*

By far the most watched Internet case of 2014 was the appeal to the Sixth Circuit in the "The Dirty" case, which was reported in the last two years' surveys. Sarah Jones, the plaintiff, was a Ben–Gals cheerleader for the Cincinnati Bengals and a high school teacher. Jones was the subject of a series of anonymous, user-posted comments on the website www.-TheDirty.com. The posts accused her of having "slept with every . . .

62. 591 F.3d 112 (9th Cir. 2009).
63. Drummond Co. v. Collingsworth, 2013 WL 6074157 (N.D. Cal. Nov. 18, 2013).
64. No. 13-0073 (Tex. Aug. 29, 2014).
65. 752 F.3d 990, 995–98 (D.C. Cir. 2014).
66. Doe No. 1 v. Burke, 91 A.3d 1031 (D.C. 2014); Lightspeed Media Corp. v. Smith, 761 F.3d 699, 708–09 (7th Cir. 2014).

Bengal football player" and contracting several sexually transmitted diseases in the process. In response, Nik Richie, the website's owner, remarked on the site: "Why are all high school teachers freaks in the sack?" Jones sued Richie and the website for defamation, libel, false light, and intentional infliction of emotional distress. The district court found that "a website owner who intentionally encourages illegal or actionable third-party postings to which he adds his own comments ratifying or adopting the posts becomes a 'creator' or 'developer' of that content and is not entitled to immunity."[67] The Sixth Circuit, however, held that defendants were entitled to immunity under Section 230.[68] In deciding "[h]ow narrowly or capriciously the statutory term 'development' . . . is [to be] read," the court adopted the test in the Ninth Circuit's *Roommates.com* decision.[69] Under that holding "development" refers "not merely to augmenting the content generally, but *to materially contributing to its alleged unlawfulness*."[70] The court held that the mere fact that Richie had encouraged website visitors to post information that was embarrassing or critical of others in general did not render him responsible for the particular postings at issue.[71] The court also noted that "[u]nlike in *Roommates*, the website that Richie operated did not *require* users to post illegal or actionable content as a condition of use."[72]

In yet another case against the consumer gripe site RipoffReport.com, a plaintiff's novel claim of copyright infringement survived a motion to dismiss, but all of his tort claims were deemed subject to Section 230 immunity.[73] Attorney Richard Goren was the subject of two negative online reviews, posted by the same author, Christian DuPont, who accused him of misconduct. In his prior suit, Goren sued DuPont for libel and interference with advantageous relations and obtained a default judgment, the terms of which transferred ownership in the copyright of DuPont's postings to Goren. Goren and DuPont turned around and jointly sued RipoffReport.com, alleging the website's refusal to take down DuPont's two postings constituted copyright infringement as well as libel and intentional interference. The court determined that, in the context of a motion to dismiss, the record was unclear whether DuPont had transferred an

67. Jones v. Dirty World Entm't Recordings, LLC, 965 F. Supp. 2d 818, 821 (E.D. Ky. 2013), *rev'd*, 755 F.3d 398 (6th Cir. 2014).

68. Jones v. Dirty World Entm't Recordings, LLC, 755 F.3d 398 (6th Cir. 2014).

69. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc).

70. *Jones*, 755 F.3d at 411 (quoting *Roommates.com*, 521 F.3d at 1167–68 (emphasis added)).

71. *Id.* at 414–15.

72. *Id.* at at 416 (emphasis added).

73. Small Justice LLC v. Xcentric Ventures LLC, 2014 WL 1214828 (D. Mass. Mar. 24 2014).

irrevocable license to RipoffReport.com when he posted his comments to the site. Thus, Goren's claims for copyright infringement remained viable[74] and fell within a Section 230 exception for intellectual property claims. The court granted RipoffReport.com's motion to dismiss the defamation and intentional interference claims, rejecting the argument that "an ISP becomes an information content provider when, assuming arguendo, it receives an exclusive license to the content posted by a third party."[75]

The D.C. Circuit held that Section 230 immunity insulated Facebook and its founder against claims brought by conservative activist Larry Klayman.[76] Klayman alleged that Facebook had committed an intentional assault and negligent failure to abide by its stated pledge to do its "best to keep Facebook safe, but we cannot guarantee it."[77] Klayman sued because he had encountered a page on Facebook entitled "Third Palestinian Intifada," which called for an uprising to take place after the completion of Islamic prayers on May 15, 2011, proclaiming that "judgment day will be brought upon us only once Muslims have killed all the Jews."[78] Klayman alleged that the Intifada pages "amounted to a threat of use of force against non-Muslims, and particularly Jews," causing him "reasonable apprehension of severe bodily harm and/or death." He sought a permanent injunction as well as more than $1 billion in damages.[79] The court granted defendants' motion to dismiss because the complaint itself alleged that the offensive Intifada page had been posted by third parties and the defendants' delay in removing the offensive material is plainly within "the exercise of a publisher's traditional editorial functions," making it subject to immunity under Section 230.[80]

One significant outlying case came from the Ninth Circuit in *Jane Doe No. 14 v. Internet Brands, Inc.*[81] Jane Doe, an aspiring model, posted information about herself on the defendant's website, Model Mayhem, a networking website for people in the modeling industry. As a result of the post, two rapists "lured Doe to a fake audition where they drugged her, raped her, and recorded the rape for a pornographic video."[82] Doe sued the website, alleging a claim for negligent failure to warn and asserting that the website operator knew about the rapists.[83] The Ninth Circuit

74. *Id.* at * 5.
75. *Id.* at *7.
76. Klayman v. Zuckerberg, 753 F.3d 1354 (D.C. Cir. 2014).
77. *Id.* at 1356.
78. *Id.*
79. *Id.* at 1357.
80. *Id.* at 1359.
81. Doe No. 14 v. Internet Brands, Inc., 2014 WL 4627993 (9th Cir. 2014).
82. *Id.* at *1.
83. *Id.*

noted that defendant denied all of the allegations in the complaint, including that the two rapists had contacted Doe through the Model Mayhem website.[84] Nevertheless, the court reversed the district's court dismissal on Section 230 immunity grounds.[85] Relying in part upon its earlier ruling in *Barnes v. Yahoo!, Inc.*,[86] the court held that Doe's claim did not seek to treat defendant as a publisher or speaker of the content posted on the Model Mayhem website or to hold Internet Brands liable for failing to remove that content. Therefore, Section 230 did not bar the claim.[87]

C. *Application of Single Publication Rule to Internet Publications*

The Texas Court of Appeals applied the single publication rule to a TV station's posting its news report to its website, noting "that every court that had decided the issue . . . [has] held the single publication rule applies to information publicly available on the Internet."[88]

The Arizona Court of Appeals held that the single publication rule did not bar plaintiff's defamation claims based on defendant's postings on RipoffReport.com, which accused the plaintiff of sexual and criminal misconduct.[89] David Brown, the ex-husband of plaintiff Mindi LaRue, and his second wife Sarah Brown posted two articles on RipoffReport.com in November 2008, accusing LaRue of being a "despicable mother" who allowed her four-year-old daughter to be sexually abused by her boyfriend.[90] The second article accused the boyfriend of having "molested and tortured" the daughter and having put "tabasco sauce in her panties."[91] Thirteen months later LaRue and her boyfriend sued the Browns, who, in turn, moved to dismiss, arguing that the one-year statute of limitations barred the plaintiff's claims.[92] The trial court denied the Browns' motion, and the appellate court affirmed, finding that defendants effectively republished the information in March and June 2009 when they responded to two reader comments about their original 2008 postings.[93] While their 2009 responses did not defame plaintiffs, the comments addressed the 2008 articles and urged the readers to look up public records that would substantiate their earlier claims.[94] Although "adding information unrelated to the defamatory statement [is] not a republication," the

84. *Id.* at *5 n.1.
85. *Id.* at *4.
86. 570 F.3d 1096 (9th Cir. 2009).
87. *Doe No. 14*, 2014 WL 4627993, at *3–4.
88. Mayfield v. Fullhart, 2014 WL 4100403, at *5 (Tex. Ct. App. 2014).
89. Larue v. Brown, 333 P.3d 767 (Ariz. Ct. App. 2014).
90. *Id.* at 769.
91. *Id.*
92. *Id.* at 772.
93. *Id.* at 772–73.
94. *Id.* at 769–70.

court found that "the updates to the defamatory material in this case were not simply technical changes to the website or the addition of new, unrelated material."[95] Rather, the defendants' updates and comments "added to and altered the substance of the original material . . . re-urging the truth of the original articles in response to another reader's criticism."[96] Accordingly, the plaintiffs' claim was not time-barred.

D. *Personal Jurisdiction Based on Internet Publication*

In *Walden v. Fiore* the Supreme Court expressly sidestepped the question of whether an online publication of defamatory material about a jurisdiction's resident confers personal jurisdiction on the out-of-state author.[97] The Court held that Nevada did not have personal jurisdiction over a law enforcement officer who seized cash from two Nevada residents in Atlanta as they were preparing to fly home.[98] Justice Thomas, writing for the unanimous Court, noted that "this case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State. . . . We leave questions about virtual contacts for another day."[99]

Appellate courts in Texas and Colorado both reaffirmed holdings in those states that simply publishing allegedly defamatory material about a state resident online is not sufficient contact to justify personal jurisdiction. The Texas Court of Appeals affirmed dismissal of a defamation lawsuit filed against the *British Medical Journal* by Dr. Andrew Wakefield, the lead author of a now-discredited study finding a link between vaccines and autism.[100] Wakefield, a British citizen, had relocated from England to Texas before the *Journal* published a series of articles detailing the flaws in Wakefield's research.[101] Holding that "simply making an alleged[ly defamatory] article accessible on a website is insufficient to support specific jurisdiction in a defamation suit," the Texas court reiterated that "the plaintiff must establish that the nonresident defendant's Internet activity was intended to target and focus on the forum."[102] The court found that there was no question that the *British Medical Journal* articles did not target or focus on Texas, as they discussed medical research performed and published in the United Kingdom.[103] Similarly, the Colorado

95. *Id.* at 773.
96. *Id.*
97. Walden v. Fiore, 134 S. Ct. 1115 (2014).
98. *Id.* at 1119.
99. *Id.* at 1125 n.9
100. Wakefield v. British Med. J. Publ'g Grp., Ltd., 2014 WL 4723556 (Tex. App. Sept. 19, 2014).
101. *Id.* at *1.
102. *Id.* at *12.
103. *Id.*

Court of Appeals held that online statements published on a website with a national audience were not sufficiently aimed at Colorado to support exercising personal jurisdiction over the nonresident defendants.[104]

E. *Twibel*

As courts continue to confront issues related to allegations of defamation via Twitter and other social media, a federal court in the Western District of Virginia has apparently become the first to hold that a hashtag may be actionable.[105] In denying a motion to dismiss a defamation complaint by a government software vendor against a competitor, the court held that the plaintiff had sufficiently alleged that hashtags in the competitor's tweets had sufficient factual content to support a defamation action.[106] The plaintiff alleged that hashtags such as #RedDragon, #SinkingREDShip, and #MadeinCHINA falsely implied that the plaintiff's software was developed in China, a particularly significant allegation given that both companies competed for military contracts.[107] The court held that the hashtags made verifiable statements of fact about the country of origin of the plaintiff's products and found that the fact that the plaintiff alleged that the tweets actually influenced its customers weighed against their being considered nonactionable opinion.[108]

Several courts, meanwhile, held that the off-the-cuff nature of tweets and other social media postings make them less likely to be understood by readers as objective statements of fact.[109] For example, a federal court in Massachusetts held that a tweet addressing the plaintiff that said, "you are fucking crazy!" was, as understood in the context of an online "flame war," a nondefamatory statement of opinion rather than a factual allegation of mental instability.[110] Similarly, the Minnesota Court of Appeals held that that a city councilman's tweets were "inherently informal," and thus his use of terms such as "hostage," "ransom," "extortion,"

104. Giduck v. Niblett, 2014 WL 2986670, at *7.

105. AvePoint, Inc. v. Power Tools, Inc., 981 F. Supp. 2d 496, at 505–08 (W.D. Va. Nov. 7, 2013). Hashtags are words and phrases in tweets, preceded by an # symbol, meant to designate how the tweet should be categorized. Twitter and third-party services track hashtags to gauge how frequently users are discussing a particular topic. *See Using Hashtags on Twitter*, TWITTER HELP CENTER, https://support.twitter.com/entries/49309# (last visited Oct. 13, 2014).

106. *Id.* at 511.

107. *Id.* at 506–09, 519.

108. *Id.* at 506–07.

109. *See, e.g.*, Feld v. Conway, 2014 WL 1478702 (D. Mass. Apr. 14, 2014); Rochester City Lines, Co. v. City of Rochester, 2014 WL 1344320, at *18–19 (Minn. Ct. App. Apr. 7, 2014); Patterson v. Grant-Herms, 2013 WL 5568427, at *4 (Tenn. Ct. App. Oct. 8, 2013); *see generally* Matthew E. Kelley & Steven D. Zansberg, *A Little Birdie Told Me: "You're a Crook"—Libel in the Twittersphere and Beyond*, 30:2 COMMC'NS LAWYER 1 (Spr. 2014).

110. *Feld*, 2014 WL 1478702, at*3.

"robbery," and "stole" in reference to a city contractor constituted hyperbolic expressions of opinion, not assertions of verifiable fact.[111] The Colorado Court of Appeals held that postings on Facebook, and in other online forums, accusing the plaintiff of being a "charlatan" and engaging in resumé exaggeration, were nonactionable opinions.[112]

Social media is by no means a defamation safe harbor, however. A California appellate court, for example, held that defendants' Facebook posts accusing the plaintiff of videotaping his teenage daughter through her bedroom window were "meant to be taken seriously" and were thus potentially defamatory statements of verifiable fact.[113]

IV. ACCESS

A. *Access Under FOIA Laws*

The Virginia Supreme Court examined two issues under the state's FOIA law related to a request to the University of Virginia for information sent to or by a climate scientist and former professor: (1) whether the information was "proprietary," and (2) whether the requestor could be charged for the time UVA spent reviewing the information to determine if an exclusion applied for withholding.[114] On the first issue, the requestor argued that "information of a proprietary nature" is limited to that which gives the governmental body a commercial competitive advantage.[115] The court rejected this contention, holding that, in the context of the higher education research exclusion, competitive disadvantage implicates not only financial injury, but also harm to university-wide research efforts, damage to faculty recruitment and retention, the undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression.[116] On the issue of costs, the statute in question provides that "[a] public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for requested records."[117] In the context of the Virginia statute, the court explained that "searching" includes "inquiring or scrutinizing" documents to determine if an exclusion may apply.[118]

111. *Rochester City Lines*, 2104 WL 1344320, at *18–19.

112. *Gidduck*, 2014 WL 2986670, at *10 ("The fact that these statements were placed in an online community where anonymous individuals express highly biased opinions weighs in favor of finding these statements to be opinion.").

113. Walsh v. Latham, 2014 WL 618995, at *5 (Cal. Ct. App. Feb. 18, 2014) (unpublished).

114. Am. Tradition Inst. v. Univ. of Va., 756 S.E.2d 435 (Va. 2014).

115. *Id.* at 441.

116. *Id.* at 441–42.

117. *Id.* at 443 (citing VA. CODE ANN. § 2.2–3704(F)).

118. *Id.*

The Vermont Supreme Court affirmed the release of records connected to an investigation of police department employees who were disciplined for viewing and sending pornography on work computers while on duty.[119] The city argued that the records should be withheld under the "personal records" exemption because their disclosure would subject the employees to embarrassment. The city also urged the court to recognize that the employees must have some expectation of privacy while performing "work related functions," whether those actions may have been improper.[120] The court noted that there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct. The internal investigation records would "allow the public to gauge the police department's responsiveness to specific instances of misconduct" and assess "whether the agency is accountable to itself internally, whether it challenges its own assumptions regularly in a way designed to expose systemic infirmity in management oversight and control, the absence of which may result in patterns of inappropriate workplace conduct."[121] Employees cannot reasonably expect much privacy when viewing and sending pornography on work computers while on duty at a public law enforcement agency, the court added.[122] To the extent that such activities are considered a "personal pursuit," the purported claim to privacy in exclusively personal pursuits enjoyed at public expense on public time is one of those situations where the employee's right to privacy must properly give way to the public's need for the information "to review the action of a governmental officer."[123]

The Second Circuit issued an opinion regarding federal FOIA requests seeking disclosure of documents prepared by the Department of Justice's Office of Legal Counsel setting forth the government's reasoning regarding the lawfulness of targeted drone killings of U.S. citizens.[124] The primary issues were the applicability of Exemption 1, whether the information was properly classified; and Exemption 5, the "deliberative process privilege," which requires disclosure of all opinions and interpretations that embody the agency's effective law and policy, but permits the withholding of all papers which reflect the agency's group thinking in the process of working out its policy.[125] Both Exemptions 1 and 5 may be waived where the government has "officially" disclosed the information sought and where it has relied upon and repeated in public the arguments in

119. Rutland Herald v. City of Rutland, 84 A.3d 821(Vt. 2013).
120. *Id.* at 824.
121. *Id.* at 825.
122. *Id.* at 826.
123. *Id.*
124. N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100 (2d Cir. 2014).
125. *Id.* at 114.

the requested material.[126] In finding waiver, the court noted the numerous statements of senior government officials discussing the lawfulness of targeted killing of suspected terrorists, which the district court had characterized as "an extensive public relations campaign" to convince the public of the merits of the administration's positions regarding drone killings.[127] The court held that even if these statements were not sufficient to show waiver, they established that the context in which a DOJ white paper entitled "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al–Qaida or an Associated Force," which was disclosed to the public after the district court's decision, should be evaluated.[128] The Second Circuit found that the white paper "virtually paralleled" the analysis of the memorandum the DOJ sought to withhold.[129]

The Second Circuit also issued an opinion on the issue of a federal FOIA action filed against the National Archives and Records Administration (NARA) seeking research requests made on behalf of former President George W. Bush and former Vice-President Richard B. Cheney for records from their own administration.[130] At issue was whether the responsive information fell within Exemption 6, which allows the withholding of personal, medical, and similar files, the disclosure of which may infringe privacy rights.[131] Under the Presidential Records Act of 1978, presidential and vice-presidential records are the property of the United States entrusted to NARA.[132] The records are not publicly available until NARA has processed and organized them. Before leaving office a president or vice-president may designate certain records to remain unavailable to the public for up to twelve years, but the former officials may still access them by submitting special access requests.[133] These requests reveal the identity of the requestor and the item or information sought.[134] The plaintiff asked for records of these special requests, but NARA refused, insisting that it must protect the privacy of researchers and invoking Exemption 6.[135] The Second Circuit concluded that Exemption 6 applied given that the phrase "similar files" sweeps broadly and has been interpreted by the Supreme Court to mean "detailed Government records on an individual which can be identified as applying to

126. *Id.* at 113.
127. *Id.* at 114.
128. *Id.* at 115.
129. *Id.* at 116.
130. Cook v. Nat'l Archives & Records Admin., 758 F.3d 168 (2nd Cir. 2014).
131. *Id.* at 170 (citing 5 U.S.C. § 552(b)(6)).
132. *Id.* at 171 (citing 44 U.S.C. § 2202)).
133. *Id.*
134. *Id.*
135. *Id.* at 172.

that individual."[136] Moreover, because the requested information would reveal personal details, i.e., "what the former officials were thinking, considering, and planning as they transitioned back to private life after their years of service to the country," the release of the information would also constitute an unwarranted invasion of privacy that was not outweighed by whatever interest the public may have regarding how NARA carried out its public service obligations.[137]

Three years ago, the D.C. Court of Appeals held that the Department of Justice must disclose case names and docket numbers for prosecutions in cases where the defendant had been acquitted or had the charges dismissed.[138] This year, the court issued a follow-up opinion, holding that there is no right under the federal FOIA for docket information pertaining to use of warrantless cell phone tracking in criminal investigations and prosecutions in cases where the defendant had been acquitted or had the charges dismissed.[139] The court revisited the application of Exemption 7(C), which provides that an agency may withhold "records or information compiled for law enforcement purposes" if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[140] The court held that defendants whose prosecutions ended in acquittal or dismissal have a much stronger privacy interest in controlling information concerning those prosecutions than defendants who were ultimately convicted.[141] While the indictment of these defendants may have garnered them attention initially, once the charges were dropped or the individuals were acquitted, they had a significant privacy interest in avoiding additional and unnecessary publicity.[142] Weighed against this privacy interest, the court considered the broader public interest in information related to warrantless cell phone tracking but concluded that such an interest "pales in comparison" to the privacy rights at stake.[143]

B. *Access to Court Proceedings and Records*

The Fourth Circuit overturned a district court order effectively sealing the records and proceedings in a case brought by a corporation to protect its reputation.[144] The plaintiff in the underlying proceedings, known to

136. *Id.* at 174 (citing U.S. Dep't of State v. Wash. Post Co., 102 S. Ct. 1957 (1982)).
137. *Id.* at 176.
138. Am. Civil Liberties Union v. U.S. Dep't of Justice, 655 F.3d 1 (D.C. Cir. 2011) (*ACLU I*).
139. Am. Civil Liberties Union v. U.S. Dep't of Justice, 750 F.3d 927 (D.C. Cir. 2014) (*ACLU II*).
140. 5 U.S.C § 552(b)(7).
141. *ACLU II*, 750 F.3d at 933.
142. *Id.* at 934.
143. *Id.* at 935.
144. Doe v. Pub. Citizen, 749 F.3d 246 (4th Cir. 2014).

the public only as "Company Doe," filed suit under the Administrative Procedure Act to enjoin the U.S. Consumer Product Safety Commission from publishing in its online, publicly accessible database a "report of harm," attributing the death of an infant to a product manufactured and sold by Company Doe.[145] The district court not only granted the injunction, but also redacted virtually all of the facts, expert testimony, and evidence from its memorandum opinion, and sealed virtually the entire record of the case.[146] Three consumer advocacy groups filed a post-judgment motion to intervene for the purpose of appealing the district court's sealing order as well as its decision to allow Company Doe to proceed under a pseudonym.[147] On appeal, the Fourth Circuit held that the First Amendment right of access attaches to documents and materials filed in connection with a summary judgment motion and that access to docket sheets is integral to providing meaningful access to civil proceedings.[148] The court ruled that an "unsupported claim of reputational harm falls short of a compelling interest sufficient to overcome the strong First Amendment presumptive right of public access."[149] The Fourth Circuit also found that the district court erred by allowing the company to litigate under a pseudonym.[150]

C. *Access to Other Governmental Proceedings*

The Georgia Supreme Court rejected a death row inmate's First Amendment challenge to a new law designating "identifying information" about the people and entities participating in executions, such as those who procure the execution drugs, to be confidential state secrets.[151] The court examined the issue using the *Press-Enterprise* test,[152] which involves an assessment of (1) whether access has been granted historically and (2) whether public access would play a positive role in the functioning of the process.[153] The court held that while public access to execution proceedings has been allowed under long-standing proceedings, there has also been a long-standing tradition of concealing the identities of those who carry out executions and who, without guaranteed anonymity, may otherwise be unwilling to participate in the process.[154]

145. *Id.* at 252.
146. *Id.* at 252–53.
147. *Id.* at 253.
148. *Id.* at 268–69.
149. *Id.* at 270.
150. *Id.* at 272–73.
151. Owens v. Hill, 758 S.E.2d 794 (Ga. 2014).
152. Press–Enter. Co. v. Super. Ct., 478 U.S. 1 (1986).
153. *Owens*, 758 S.E.2d at 805.
154. *Id.*

V. NEWSGATHERING

A. *Drones*

Drones have been the hottest topic around the newsgathering water coolers this year. In May 2014, the National Transportation Safety Board (NTSB) held that the Federal Aviation Administration (FAA) had no valid regulations in place to regulate drones.[155] According to the NTSB, the regulation purporting to govern drones, Notice 07-01, did not satisfy the criteria for valid legislative rulemaking because it had been published with inadequate public notice.[156] The FAA has since appealed, and a decision is pending.

In the meantime, the FAA has been pushing ahead to promulgate new drone regulations. In July 2014, the FAA announced that rules for small drones were being drafted and would be available later in the year. The FAA also requested public comment on its interpretation of rules that apply to model aircraft, sparking rumors that those standards may be applied to drones, too. If so, the FAA could limit drones strictly to recreational use, which would undermine (if not eliminate) newsgathering uses. Separate from the FAA's efforts, President Obama plans to issue an executive order empowering the National Telecommunications and Information Administration to develop privacy guidelines for commercial drone use.

In the vacuum left at the federal level, drone regulation has flourished at the state level. North Carolina, for example, passed legislation prohibiting people, entities, or state agencies from photographing an individual by drone for the purpose of publication, except for newsgathering, "newsworthy events," or "events or places to which the general public is invited."[157] The statute creates a civil cause of action for individuals who are subjected to surveillance or photography in violation of the law, providing recovery of $5,000 for each photograph or video published or otherwise disseminated, as well as court costs and attorney fees. Several other states, including Idaho[158] and Wisconsin,[159] have also banned drone photography without the subject's consent. Of recent state legislation, Texas's new drone law most severely restricts newsgathering activities.[160] That law makes drone use by the public generally impermissible, leaving exceptions only for police; military; state agencies; professional or scholarly research; development by a person acting on behalf of an institution of higher education; and certain commercial interests, such as real estate

155. Huerta v. Pirker, NTSB Docket CP-217, 2014 NTSB Lexis 22 (Mar. 6, 2014).
156. *Id.* at *11.
157. 2014 N.C. Sess. Laws 100, 227–31.
158. 2013 Idaho Sess. Laws 859–60.
159. Wis. Stat. § 942.10 (2013).
160. Tex. Gov't Code Ann. § 423.001–.008.

and oil and gas.[161] Other states, including Florida,[162] Illinois,[163] Virginia,[164] and Utah,[165] have enacted drone legislation regulating law enforcement use, but not addressing newsgathering. Generally speaking, those statutes ban the warrantless use of drones by law enforcement with limited exceptions.

B. *Other Newsgathering Developments*

The Tenth Circuit held that broadcasting edited portions of undercover footage might be misleading enough to create a claim for defamation.[166] NBCUniversal (NBCU) produced a *Dateline* television broadcast revealing the tactics plaintiff used to sell annuities to senior citizens.[167] Plaintiff Brokers' Choice sued NBCU for defamation.[168] The district court granted NBCU's motion to dismiss, but the Tenth Circuit reversed.[169] On appeal, the court determined that Brokers' Choice had stated a claim that *Dateline*'s excerpts were misleading and therefore defamatory.[170] The panel held that the correct inquiry was not whether the statements made in the training videos were substantially true, but rather whether *the characterization of Broker's Choice* in the broadcast was substantially true.[171] Under that standard, the complaint had adequately alleged that *Dateline* "selected bits and pieces [of Brokers' video] to project an undeserved and shocking image to the audience, leaving it with a false impression."[172]

Additionally, a recent case reaffirmed the clearly established right to record police officers performing their official duties in public. In *Buehler v. City of Austin*, Buehler was arrested for resisting arrest after he filmed two police officers making a traffic stop.[173] Buehler claimed that one of the officers approached him aggressively to inquire about his filming the incident and then pushed him and placed him in a choke hold when he asserted his right to do so. He was later arrested twice more for filming police stops. Buehler filed suit in the Western District of Texas, alleging under 42 U.S.C. § 1983 that five officers and unnamed John Does violated

161. Tex. Gov't Code Ann. § 423.002.
162. Fla. Stat. § 934.50 (2013).
163. 725 Ill. Comp. Stat. 167/0 (2014).
164. 2013 Va. Acts 755.
165. Utah Code Ann. §§ 63G-18-101-05.
166. Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125 (10th Cir. 2014). Levine Sullivan Koch & Schulz, LLP, the firm of Ms. Kissinger and Messrs. Zansberg and Kelley, represented the defendant.
167. *Id.* at 1131.
168. *Id.* at 1132.
169. *Id.*
170. *Id.* at 1139–40.
171. *Id.* at 1139.
172. *Id.*
173. Buehler v. City of Austin, A-13-CV-1100 ML (W.D. Tex. July 24, 2014).

his First and Fourteenth Amendment rights when they interfered with his efforts to film and publish their public conduct. Buehler sought to hold the chief of police and the City of Austin liable for failing to establish a policy for how officers should proceed when a private citizen records official conduct. Denying defendants' motion to dismiss, a magistrate judge determined that Buehler's right to film was clearly established at the time of his arrests as it had been widely recognized by the federal courts.[174] Thus, a reasonable official would have known that arresting Buehler for his peaceful recording of their public actions violated Buehler's First Amendment rights. Buehler was recently acquitted of the criminal charges.

Also, a federal court in New York dealt with whether there is a right to use another's photographs that are shared on social media.[175] The photos had been taken by plaintiff in the aftermath of the 2010 Haitian earthquake.[176] Defendant Agence France Presse (AFP) argued that, by posting the images to Twitter, the photojournalist had effectively granted a license to use them.[177] The district court disagreed, finding the defendants liable for copyright infringement.[178] In a trial on damages, a jury awarded plaintiff $1.2 million, the maximum statutory penalty available under federal copyright law, as well as an additional $20,000 in statutory damages under the Digital Millennium Copyright Act.[179]

Finally, the Ninth Circuit addressed the legal implications of Google's Street View service.[180] The plaintiffs alleged that Google violated wiretapping laws when it "intentionally intercepted data packets, including payload data, from Plaintiffs' Wi-Fi networks utilizing specially designed packet sniffer software installed on [its] Google Street View vehicles."[181] First, the court held that data transmitted over WiFi is not a "radio communication" as defined by the Wiretap Act, and thus the exemption from liability specific to radio communications did not apply.[182] Second, the court held that WiFi communications do not otherwise constitute an

174. *See also* Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014) (holding that an individual's First Amendment right to record a traffic stop was clearly established and that this right may be limited by reasonable restrictions when justified under the circumstances, but that the officers in that case had not imposed any such restrictions on the plaintiff).

175. Agence France Presse v. Morel, 934 F. Supp. 2d 547, 583–84 (S.D.N.Y. 2013), *superseded in part by* 934 F. Supp. 2d 584 (S.D.N.Y. 2013).

176. *Id.* at 551–52.

177. *Id.* at 559.

178. *Id.* at 583.

179. Amended Judgment, Morel v. Agence France Presse, No. 1:10-cv-02730-AJN (S.D.N.Y. Dec. 11, 2013).

180. Joffe v. Google, Inc., 746 F.3d 920 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2877 (2014).

181. *In re* Google Inc. St. View Elec. Commc'ns Litig., 794 F. Supp. 2d 1067, 1070 (N.D. Cal. 2011).

182. Joffe v. Google, Inc., 729 F.3d 1262, 1267–68 (9th Cir. 2013).

"electronic communication . . . readily accessible to the general public" as the phrase is commonly understood, and thus the exemption related to such communications does not apply.[183] On rehearing, however, the court issued an amended opinion limiting its holding to the first point that WiFi communications are not radio communications.[184]

VI. REPORTER'S PRIVILEGE

A. *Revised DOJ Guidelines*

The Department of Justice's new media regulations went into effect, which include guidelines for media subpoenas, questioning news media, and arresting or charging journalists.[185] For example, the DOJ must give "reasonable and timely notice" to media organizations and journalists prior to the use of a subpoena, court order, or warrant, unless it would either present a "clear and substantial" threat to the investigation in question, "risk grave harm to national security," or present potential risk of injury or death.[186] The new guidelines also provide that a subpoena "should not be used to obtain peripheral, non-essential, or speculative information"[187] and encourage narrowly drawn requests.[188] Before seeking media records, the government "should have made all reasonable attempts to obtain the information it is seeking from alternative, non-media sources."[189] Further, DOJ officials cannot question a journalist, seek a warrant, or present information to a grand jury for any suspected offense that took place while the journalist was "engaged in the performance of his official duties as a member of the news media" without notice to the Director of the Office of Public Affairs and the express authorization of the Attorney General.[190]

B. *Federal Decisions*

Reporters had mixed results in privilege battles in the federal courts this year. In a case in the Southern District of New York, the court denied plaintiff's motion to compel the New York Times to produce documents quoted in an article about the performance of improper cardiac procedures at a chain of hospitals.[191] These documents included emails

183. *Id.* at 1279 (quoting 18 U.S.C. § 2511(2)(g)(i)).
184. *Joffe*, 746 F.3d at 936.
185. 28 C.F.R. § 50.10
186. 28 C.F.R. § 50.10(e)(1)(i).
187. 28 C.F.R. § 50.10(c)(4)(i)(A).
188. *E.g.*, 28 C.F.R. § 50.10(c)(4)(vii).
189. *Id.* 28 C.F.R. § 50.10(c)(4)(ii).
190. *Id.* 28 C.F.R. § 50.10(f)(1)–(3).
191. New Eng. Teamsters & Trucking Indus. Pension Fund v. N.Y. Times Co., 2014 WL 1567297 (S.D.N.Y. Apr. 17, 2014).

among hospital executives, internal memos, and reports from outside consultants. The court found that plaintiff had failed to make a "clear and specific showing" that the documents were not obtainable from other sources because it had not searched its own documents, deposed witnesses, or attempted to compel production from others.[192]

A federal court in Colorado granted a motion to quash a subpoena issued to a newspaper reporter because the party seeking the information failed to demonstrate that she could not obtain the information from other available sources.[193] The plaintiff claimed the content of the newspaper's editorial column suggested that defendants made negative statements to the reporter about her, which amounted to adverse employment actions and supported her retaliation claim.[194] Although the court agreed that the information the plaintiff sought from the reporter was "relevant to a critical issue in her case," the court was not convinced that the reporter was the only source of the information, even in light of the plaintiff's multiple depositions and other discovery requests.[195]

However, in *Federico v. Lincoln Military Housing, LLC*, a television station moved to quash subpoenas seeking documents and outtakes relating to its extensive coverage of mold in military housing—an issue central to the litigation.[196] The court applied Fourth Circuit precedent, which recognizes a limited reporter's privilege in civil litigation regardless of the confidential nature of the information sought.[197] With limited analysis the court found that the information sought was "clearly relevant" and potentially very important to the outcome of the case. Because the materials could only be obtained from the station, the court ordered the station to produce outtakes, footage, and mold inspection results, but granted the motion to quash as to the station's and the reporter's social media posts.[198]

C. *State Decisions*

Journalists scored a significant win in New York's highest court when the Court of Appeals reversed the Appellate Division's ruling that ordered Fox News reporter Jana Winter to appear for testimony in the Colorado criminal case against James Holmes, the accused gunman in the 2012

192. *Id.* at *5.

193. Johnson v. Sch. Dist. No. 1 in Cnty. of Denver & State of Colo., 2014 WL 717003, at *8 (D. Colo. Feb. 25, 2014).

194. *Id.* at *1.

195. *Id.* at *7–8.

196. 2:12-CV-80, 2014 WL 3962823 (E.D. Va. Aug. 13, 2014).

197. *See* LaRouche v. Nat'l Broad. Co., Inc., 780 F.2d 1134 (4th Cir. 1986) (establishing a three-part balancing test for requiring reporters to disclose information, namely "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information").

198. *Id.* at *6.

movie theater mass shooting.[199] Winter cited confidential police department sources in an article and argued that the issuance of the subpoena by a New York court was "antithetical to New York's well-established public policy in favor of protecting the anonymity of confidential sources."[200] The court agreed and found that its ruling was "not tantamount to giving a New York law extraterritorial effect," as the defendant had argued.[201]

Two noteworthy decisions came out of Florida as well. In an appeal from a death row inmate challenging the constitutionality of the state's lethal injection procedures, the Florida Supreme Court affirmed the lower court's decision to quash a subpoena to two news reporters who had witnessed a prior execution.[202] To overcome Florida's statutory reporter's privilege, "the party [seeking information] must demonstrate that the journalist's information is relevant, that the information cannot be reasonably obtained from alternative sources, and that a compelling interest exists requiring disclosure."[203] The lower court found that the plaintiff had failed to satisfy any of those three prongs given that there were dozens of other witnesses at the prior execution and the information discussed in the reporters' articles regarding the efficacy of the drug at issue had been reviewed and analyzed by the plaintiff's own experts.[204] Subsequently, a Florida circuit court quashed a trial subpoena to news reporters who had quoted the defendant for an article about the charges brought against him.[205] The prosecution sought the reporters' testimony solely for the purpose of impeaching the defendant's testimony if he testified at trial. The court quashed the subpoena on the grounds that prosecution had failed to show that "it cannot prove its case without the requested testimony" and, thus, could not establish the "compelling interest" prong to defeat the privilege.[206]

VII. INSURANCE

A. *Privacy*

1. Publication of Material That Violates a Person's Right of Privacy

In the context of liability policies providing personal and advertising injury coverage for "oral or written publication of material that violates a person's right of privacy," courts across the nation construed the unde-

199. Holmes v. Winter, 3 N.E.3d 694 (N.Y. 2013), *cert. denied*, 134 S. Ct. 2664 (2014).
200. *Id.* at 698.
201. *Id.* at 706.
202. Muhammad v. State, 132 So. 3d 176 (Fla. 2013), *cert. denied*, 134 S. Ct. 894 (2014).
203. *Id.* at 190.
204. *Id.*
205. State v. Bosque, 42 Med. L. Rptr. 2002 (Fla. Cir. Ct. June 13, 2014).
206. *Id.* at *3.

fined policy term "publication" as requiring publication to a third party. These opinions were issued in a myriad of contexts, including cases involving zip code collection,[207] lost data-storage tapes,[208] illegally recorded customer calls,[209] and information printed on credit and debit card receipts.[210] In each case, when there was no evidence of publication to a third party, courts consistently reaffirmed that insurance carriers had no duty to defend or indemnify.[211]

2. Impermissible Use of Zip Code Information

In a coverage dispute involving three underlying lawsuits alleging impermissible use of zip code information, a Pennsylvania federal court held that liability insurers had no duty to defend. In each of the cases, however, the court cited a different reason for its finding.[212] The first suit alleging zip code collection in violation of two District of Columbia statutory bans did not satisfy the "publication" requirement, as discussed above.[213] In the second, the court held that, while a lawsuit brought under California's Song-Beverly Act presented the potential for coverage under the policy provision for publication of material that violates a person's right of privacy, exclusions for statutory violations applied to bar defense or indemnity obligations.[214] Finally, the court ruled that there was no coverage for a third suit under a Massachusetts statute for alleged use of zip code

207. OneBeacon Am. Ins. Co. v. Urban Outfitters, Inc., No. 13-5269, 2014 WL 2011494 (E.D. Penn. May 15, 2014) (discussed *infra*).

208. Recall Total Info. Mgmt., Inc. v. Fed. Ins. Co., 83 A.3d 664 (Conn. App. Ct. 2014). In *Recall Total*, a Connecticut appellate court held lost data storage tapes containing personal information did not result in "publication" of material that violated person's right to privacy, despite the loss triggering statutes requiring notification of affected persons of invasions of privacy, because there was no evidence that personal information on the tapes was actually accessed by whoever took the tapes. *Id.* at 672.

209. Defender Sec. Co. v. First Mercury Ins. Co., 2014 WL 1018056 (S.D. Ind. Mar. 14, 2014) (slip copy) (order granting defendant's motion to dismiss). In *Defender*, an Indiana federal court rejected the ruling in *Encore Receivable Management, Inc. v. Ace Property & Casualty Insurance Co.*, 2013 WL 3354571 (S.D. Ohio July 3, 2013), holding that a liability carrier had no duty to defend against a class action for allegedly illegally recorded customer calls under policies that did not include a "recording exclusion." *Id.* at *2–6. The underlying plaintiffs' alleged sharing of personal information during recorded calls at most establishes the plaintiffs published information about themselves, not that the insured published information about plaintiffs to third parties. *Id.* at *9–10.

210. Ticknor v. Rouse's Enter., LLC, 2014 WL 668930 (E.D. La. Feb. 20, 2014) (applying Louisiana law). In *Ticknor*, the court held there was no "publication" and therefore no coverage for alleged violations of the Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681n(a)–(f) (FACTA), based on the insured grocers' alleged printing of prohibited information on credit and debit card receipts provided to the customer. *Id.* at *1, 3, 7–10.

211. *Urban Outfitters*, 2014 WL 2011494, at *8–9; *Recall Total*, 83 A.3d at 672; *Defender*, 2014 WL 1018056, at *2–6; *Ticknor*, 2014 WL 668930, at *7–10.

212. *Urban Outfitters*, 2014 WL 2011494, at *8–13.

213. *Id.* at *8–9.

214. *Id.* at *9–12 (citing Big 5 Sporting Goods Corp. v. Zurich Am. Ins. Co., 957 F. Supp. 2d 1135, 1138 (C.D. Cal. 2013)). For the language of the exclusions, see *id.* at *12.

information to send junk mail to plaintiffs because "privacy" coverage is confined to secrecy interests rather than an intrusion on seclusion.[215]

3. Unsolicited Telephone Calls, Text Messages, and Faxes

Courts continue to parse whether, and to what extent, insurance coverage exists for unsolicited telephone calls, text messages, and faxes that allegedly violate the Telephone Consumer Protection Act (TCPA)[216] and related state laws. Courts continue to hold policy exclusions for TCPA claims apply to bar coverage.[217] Courts addressing claims for unsolicited faxes continue to seek clarity with respect to a carrier's potential indemnity obligation. For example, a federal court construing Illinois law held a carrier had a duty to indemnify the $500 in liquidated damages available under the TCPA as damages for violation of privacy.[218] On the other hand, a federal court applying Missouri law found that the policy's annual, per-claim deductible of $1,000 applied to bar an insurer's indemnity obligation for a TCPA class action, despite having a duty to defend.[219]

In the context of a technology, media & professional liability policy that generally provided coverage for violations of privacy law, the court in *Certain Underwriters at Lloyd's, London v. Convergys Corp.*[220] held there was no coverage for TCPA claims for unsolicited autodialed calls based on a policy exclusion for violation of consumer protection laws.[221]

B. *Defamation*

1. Product Disparagement

In a case arising from the advertisement of a multiuse cart marketed to musicians, the California Supreme Court held that a CGL's coverage for disparagement was triggered only if there was a "false or misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business."[222] Gary-Michael Dahl, the manufacturer of a similar multiuse cart, sued for patent and trademark infringement; false designation of origin; and damage to his

215. *Id.* at *12–13 (citing Melrose Hotel Co. v. St. Paul Fire & Mar. Ins. Co., 432 F. Supp. 2d 488 (E.D. Penn. 2006)).

216. 47 U.S.C. § 227.

217. *See, e.g.*, Nat'l Union Fire Ins. Co. of Pittsburgh v. Papa John's Int'l, Inc., 2014 WL 2993825 (W.D. Ky. July 3, 2014) (applying Kentucky law); G.M. Sign, Inc. v. State Farm Fire & Cas. Co., 2014 WL 1775628 (Ill. App. Ct. May 2, 2014) (not released for publication).

218. Maxum Indem. Co. v. Eclipse Mfg. Co., 2013 WL 5993389 (N.D. Ill. Nov. 12, 2013) (not reported).

219. W. Heritage Ins. Co. v. Love, 2014 WL 2472267 (W.D. Mo. June 3, 2014) (applying Missouri law).

220. No. 12 Civ. 08968 (CRK), 2014 WL 3765550 (S.D.N.Y. Mar. 25, 2014) (slip copy).

221. *Id.* at *3–6.

222. Hartford Cas Ins. Co. v. Swift Dist., Inc., 326 P.3d 253 (Cal. June 12, 2014).

business, reputation, and goodwill. Although Dahl alleged the "false and misleading advertisements and use of a 'nearly identical mark' were likely to cause consumer confusion or mistake," the advertisements attached to the complaint did not specifically name his product.[223] Drawing upon parallels to the "of and concerning" requirement, the court concluded the CGL's coverage for product disparagement had not been triggered.[224] In adopting a "specific reference" requirement for claims of product disparagement, the court disapproved of a prior California Court of Appeal case that found a disparagement claim to be implied.[225]

2. Business Pursuits Exclusion

In *Springer v. Erie Insurance Exchange*, the Maryland Court of Appeals held that a complaint did not sufficiently support application of the "business pursuits" exclusion in a homeowners policy.[226] The underlying case was brought by J.G. Wentworth Originations LLC against David Springer and a corporation registered to Springer's wife.[227] At issue were two websites that J.G. Wentworth claimed were defamatory: jgw-sucks.com and jg-wentworth-scam.com. Coverage for the J.G. Wentworth lawsuit was disclaimed based on a "business pursuits" exclusion.[228] The court issued a writ of certiorari on its own initiative and overturned the entry of summary judgment for the insurer, finding that the insurer "must consider the continuity of the insured's alleged business interests and the insured's profit motive" in making the alleged defamatory statements before the insurer could rely upon the "business pursuits" exclusion.[229]

223. *Id.* at 256–57.

224. "In the commercial context, as in the media context, '[t]he 'of and concerning' or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt." *Id.* at 263.

225. *Id.* at 263–65 (disapproving of *Travelers Property Cas. Co. of America v. Charlotte Russe Holding, Inc.*, 207 Cal.App.4th 969 (2012)).

226. 94 A.3d 75 (Md. June 24, 2014).

227. *Id.* at 82.

228. *Id.* at 79.

229. *Id.* at 91. In contrast, the U.S. District Court for the Western District of New York found the "business pursuits" exclusion applicable in *MacDonell v. OneBeacon American Insurance Co.*, 2013 WL 6181867 (W.D.N.Y. Nov. 25, 2013), holding the allegedly defamatory statements related "directly to the business profession" of the insured regardless of whether the insured made the statements for profit. The court also found the intentional acts exclusion to be applicable, noting New York state courts that "have held that where an insurance policy specifically excludes intentional conduct from coverage, the insurance company is not required to defend and/or indemnify the insured from a lawsuit which alleges that the defamatory words were uttered intentionally." *Id.* at *2.