RECENT DEVELOPMENTS IN MEDIA, PRIVACY, DEFAMATION, AND ADVERTISING LAW

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This article addresses a range of significant legal developments from October 1, 2014, to September 30, 2015, related to publishing—from the regulation of anonymous online speech to the use of drones in journalism. The first two parts address torts involving defamation and privacy. The third part recaps changes in Internet law concerning anonymous speech, immunity to interactive computer service providers under Section 230 of the Communications Decency Act, personal jurisdiction, application of the single publication rule, and defamation in social media. Parts Four, Five, and Six address emerging topics on the collection and publication of news, including access, newsgathering using drones, the right to police records, federal law protecting information on drivers' licenses, and protecting a reporter's confidential sources. Part Seven covers emerging trends in insurance coverage for content-based torts. Part Eight, which is new this year, sets forth developments in advertising law relating to sweepstakes and contests; endorsements; and testimonials as well as

changes to the Telephone Consumer Protection Act, which has become the bane of class action litigation.

I. DEFAMATION

A. *Anti-SLAPP Laws Do Not Apply in Two Federal Circuits*

Both the Eleventh Circuit and the D.C. Circuit issued opinions reflecting a split among federal circuit courts evaluating states'anti-SLAPP laws, i.e., laws aimed at limiting strategic lawsuits against public participation. The Eleventh Circuit refused to apply Georgia's anti-SLAPP statute after concluding that the statute directly conflicts with Rule 11(a) of the Federal Rules of Civil Procedure.[1] Specifically, Georgia's anti-SLAPP statute contains a verification requirement for filing a complaint in actions implicating free speech or petitioning rights. Because the statute's verification requirement directly conflicts with Rule 11, which does not require verified complaints, the Eleventh Circuit concluded that Georgia's anti-SLAPP statute does not apply in diversity actions in federal court.[2]

The D.C. Circuit similarly refused to apply Washington D.C.'s anti-SLAPP statute.[3] Affirming dismissal of a libel case, the D.C. Circuit concluded that the D.C. Anti-SLAPP Act conflicted with pre-trial judgment standards under Rules 12 and 56 of the Federal Rules of Civil Procedure.[4] Although several other federal circuits have applied the pretrial dismissal provisions of state anti-SLAPP statutes, notwithstanding Rules 12 and 56, the D.C. Circuit was not persuaded.[5] The court held that Rule 12(b)(6), not the D.C. Anti-SLAPP Act, required dismissal of the libel claim as a matter of D.C. common law.[6]

B. *Defamation Suit Against Coach Jim Boeheim Reinstated*

The blurred line between fact and opinion gained clarity when New York's highest court reinstated a defamation lawsuit filed by two former Syracuse University ball boys against famed basketball coach Jim Boeheim.[7] The lawsuit arose from comments made by Boeheim after two former Syracuse ball boys accused longtime assistant coach Bernie Fine of molesting them as children.[8] During a press conference, Boeheim called the ball boys liars out for money.[9] The trial court dismissed the case,

1. Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1362 (11th Cir. 2014).
2. *Id.*
3. Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1333 (D.C. Cir. 2015).
4. *Id.* at 1334.
5. *Id.* at 1335–36.
6. *Id.* at 1339.
7. Davis v. Boeheim, 22 N.E.3d 999, 1001 (N.Y. 2014).
8. *Id.*
9. *Id.* at 1002.

holding that Boeheim's comments were biased, personal opinions, and not assertions of fact. The intermediate appellate court affirmed.[10] The Court of Appeals, applying a three-part test, determined that Boeheim's comments involved easily understood language, were capable of being proven true or false, and his tone was one of authority since he was a well-respected member of the university community.[11] The court therefore could not conclude that Boeheim's statements were "pure opinion."[12] The court also found it relevant that the statements appeared in news articles rather than in sections devoted to opinion journalism.[13]

C. *Defense Attorney Headline Case Reinstated*

In *Brown v. Times-Picayune*, a Louisiana attorney sued the *Times-Picayune* newspaper and one of its reporters for publishing a headline stating: "Defense attorney deserts client midtrial."[14] The attorney, Claiborne Brown, claimed that he agreed to defend a man accused of aggravated child rape, provided he would act as co-counsel under the supervision of a more experienced lawyer.[15] When the case went to trial, his co-counsel was unavailable. Brown moved for a mistrial based on ineffective assistance of counsel but the judge denied the motion. Brown refused to continue with the trial, and a mistrial was declared.[16] After the *Times-Picayune* published a report on the incident, Brown sued the news organization and its reporter alleging that the headline was maliciously false.[17] The trial court granted summary judgment to the newspaper and reporter, holding the article, including its headline, was true.[18] The Louisiana Court of Appeal reversed the district court's ruling, finding that the newspaper's characterization of Brown's conduct as a "desertion" of his client was grossly inaccurate and defamatory as used in the headline.[19] Instead, the appellate court concluded that Brown's actions attempted to protect his client's interests and adhere to the fiduciary duties he owed to his client.[20]

10. *Id.* at 1003.
11. *Id.* at 1006–07.
12. *Id.* at 1008.
13. *Id.* at 1007.
14. 167 So. 3d 665, 667 (La. Ct. App. 2014).
15. *Id.* at 666.
16. *Id.* at 666–67.
17. *Id.* at 667.
18. *Id.*
19. *Id.* at 670.
20. *Id.*

II. PRIVACY

A. *Misappropriation*

The Ninth Circuit held that a video game's use of the likenesses of former professional football players was not protected under the First Amendment as an "incidental use."[21] In contrast, an Illinois district court denied summary judgment to Michael Jordan in a suit regarding a grocery store advertisement. As reported last year, the Seventh Circuit found 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.[22] On remand, the district court denied Jordan summary judgment on his right of publicity claim, disagreeing with Jordan as to whether the Seventh Circuit's commercial speech holding conclusively established that the ad served a commercial purpose.[23] The district court noted that Illinois courts have yet to decide whether image or branded advertising constitutes a commercial purpose under the Illinois right of publicity statute. The court further pointed to the Seventh Circuit's concern that the First Amendment commercial speech doctrine did not define the commercial element of Jordan's state law right of publicity claim.[24]

Outside the realm of professional sports, a photographer who, using a telephoto lens, secretly took photographs of his neighbors going about their lives and subsequently displayed, promoted, and sold those photographs was found not liable under New York's privacy statutes for a claim brought by photographed neighbors.[25] In affirming the dismissal of the plaintiffs' right of privacy claims, the Appellate Division held that the photographs, advertised and sold as prints, were expressive works of art excluded from the purview of the New York right of privacy statutes and entitled to the same First Amendment protection afforded to newsworthy matters and issues of public concern.[26] The court considered the facts of the case to be "troubling" and "call[ed] upon the Legislature to revisit this important issue."[27]

21. Davis v. Elec. Arts Inc., 775 F.3d 1172, 1175 (9th Cir. 2015). *Davis* also rejected other First Amendment arguments that the Ninth Circuit had previously rejected in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013).

22. Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 522 (7th Cir. 2014).

23. Jordan v. Jewel Food Stores, Inc., 83 F. Supp. 3d 761, 769–70 (N.D. Ill. Mar. 12, 2015).

24. *Id.* at 768. In a companion case against another Chicago grocer, Michael Jordan won an $8.9 million jury verdict for damages from the use of his image in a tribute ad. Jordan v. Dominick's Finer Foods, LLC, 115 F. Supp. 3d (N.D. Ill. 2015).

25. Foster v. Svenson, 128 A.D.3d 150, 152 (N.Y. App. Div. Apr. 9, 2015).

26. *Id.* at 159–60.

27. *Id.* at 163.

B. *False Light*

The Nevada Supreme Court for the first time recognized false light invasion of privacy as a valid cause of action.[28] In contrast, an Illinois appellate court upheld the summary dismissal of a false light claim brought by a television journalist.[29] The journalist complained of a rival station's broadcast showing her swimming in the backyard pool of a subject of news stories and walking about with a towel around her waist and talking on her cell phone.[30] The court rejected the journalist's claim that the video implied she was "using sex as a means to get a story," concluding that the plaintiff did not establish that the rival broadcaster acted with actual malice.[31] In a Second Circuit case, a person whose arrest record was expunged could not maintain a false light claim based upon the accurate reporting of her since-expunged arrest.[32] The Second Circuit concluded that a state's "Erasure Statute does not render tortious historically accurate news accounts of an arrest."[33]

C. *Intrusion*

Besides rejecting a false light claim, the Illinois court in *Jacobson* upheld the summary dismissal of the plaintiff's intrusion upon seclusion claim, holding she had no reasonable expectation of privacy in a backyard that was the focus of media and law enforcement attention and visible from the street and sidewalk.[34] The court also concluded that video showing the plaintiff walking around the yard in a bikini with a towel around her waist and talking on her cell phone captured no activities considered private.[35] In dismissing a nationwide class action suit against Google and Viacom, a New Jersey federal district court held that collecting and tracking browsing history of children who visited Nickelodeon's website is not the "highly offensive behavior" required to sustain a claim for intrusion.[36]

D. *Publication of Private Facts*

The organizer of a town planning commission and gas district, formed to allow several municipalities to earn natural gas royalties, could not maintain a suit for disclosure of embarrassing private facts against a newspaper

28. Franchise Tax Bd. v. Hyatt, 335 P.3d 125, 141 (Nev. 2014), *cert. granted in part sub nom*, Cal. Franchise Tax Bd. v. Hyatt, No. 14-1175, 135 S. Ct. 2940 (June 30, 2015).
29. Jacobson v. CBS Broad., Inc., 19 N.E.3d 1165, 1169 (Ill. Ct. App. 2014).
30. *Id.*
31. *Id.* at 1179–80.
32. Martin v. Hearst Corp., 777 F.3d 546, 548 (2d Cir. 2015).
33. *Id.*
34. *Jacobson*, 19 N.E.3d at 1181.
35. *Id.*
36. *In re* Nickelodeon Consumer Privacy Litig., MDL No. 2443, 2015 WL 248334, at *6 (D.N.J. Jan. 20, 2015).

that reported the plaintiff had once been declared a paranoid schizophrenic, a federal district court in Georgia held.[37] The court concluded first that the plaintiff's mental health condition was not "private" since it had been disclosed in public court files, and, second, that the condition was newsworthy because of the plaintiff's active involvement in a controversial local issue.[38]

An Illinois appellate court also held that a public hospital district's payment of public funds to a physician was a matter of legitimate public concern, affirming the dismissal of a privacy suit by a physician who was the subject of a news story headlined "Cook County Doc Gets Big Payout for No Work."[39]

III. INTERNET LAW

A. *Efforts to Unmask Anonymous Speakers*

This year's court decisions adjudicating requests by litigants to unmask anonymous speakers left this body of law largely unchanged from last year. The best news for anonymous speakers came from a trial court in Oregon, which was the first court to hold that the privilege provided by a state press shield law protects a nontraditional media entity—the popular review website TripAdvisor—from compelled disclosure of the identity of one of its users.[40] At the other end of the spectrum of anonymous speech protection, a federal court in Ohio unmasked an anonymous speaker on the ground that the person was likely to have discoverable information.[41]

Most other unmasking requests were analyzed under prevailing First Amendment-based standards. Where the anonymous speaker was engaged in expressive speech (i.e., the dispute was not regarding whether the anonymous speech infringed intellectual property rights), courts continued to place a high burden on plaintiffs wishing to unmask the speaker to demonstrate the merits of their cases. These decisions required plaintiffs to demonstrate either a prima facie case or that their claims could withstand a hypothetical summary judgment motion. Decisions issued from federal courts in California and Delaware[42] and from state courts

37. Phillips v. Consolidated Publ'g Co., No. CV213-069, 2015 WL 5821501 (S.D. Ga. Sept. 14, 2015).

38. *Id.* at *20.

39. Kapotas v. Better Gov't Ass'n, 30 N.E.3d 572, 597 (Ill. Ct. App. 2015).

40. Lincoln City Lodging Ltd. P'ship I v. Doe, No. 14CV4902 (Or. Cir. Ct. Oct. 1, 2014).

41. Ellora's Cave Publ'g, Inc. v. Dear Author Media Network, LLC, 308 F.R.D. 160, 162 (N.D. Ohio 2015).

42. Music Grp. Macao Commercial Offshore Ltd. v. Does, 82 F. Supp. 3d 979, 984 (N.D. Cal. 2015); Getaway.com LLC v. Does, No. CV 15-531-SLR, 2015 WL 5821501 (D. Del. July 30, 2015).

in Florida, New Jersey, and Washington.[43] Courts in Michigan and New York, however, reaffirmed their rejection of the majority view, holding that a motion to dismiss standard sufficiently protects anonymous speakers' First Amendment rights regardless of the speech or the claims asserted.[44] Similarly, the Illinois Supreme Court reaffirmed that state's prior rulings that because Illinois is a fact-pleading state (requiring a more rigorous showing of the merits of a claim at the outset than in notice-pleading states), speech protections are already built into the procedural rules such that subpoenaing a plaintiff's case need withstand only a motion to dismiss.[45] And courts in the Northern District of California issued inconsistent rulings: in two cases, judges rejected the majority view and applied motion to dismiss standards in defamation cases,[46] but in another such case, the court applied a prima facie case test.[47]

In *Thomson v. Doe*, an appellate court in Washington joined the small but growing band of courts that distinguish between different kinds of expressive speech in determining how rigorous a standard should be imposed on a subpoenaing plaintiff.[48] The plaintiff, an attorney who had been the subject of negative comments on the attorney review website Avvo, brought defamation and related claims against the reviewer and then issued a subpoena to Avvo seeking identifying information for the reviewer.[49] The court held that "when addressing a defamation plaintiff's motion to unmask an anonymous defendant, the court must consider the nature of the speech at issue when determining the evidentiary standard to apply" because "the evidentiary standard should match the First Amendment interest at play."[50] Upon considering the reviewer's speech,

43. Lee v. Morris Publ'g Grp., LLC, No. 16-2014-CA-005077, 2014 WL 7933985 (Fla. Cir. Ct. Aug. 5, 2014); Trawinski v. Doe, No. A-0312-14T1, 2015 WL 3476553 (N.J. Super. Ct. App. Div. June 3, 2015) (per curiam) (unpublished); Thomson v. Doe, 356 P.3d 727, 735 (Wash. Ct. App. 2015). The New Jersey decision reaffirms that court's seminal decision in this area of the law, *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001), which had been distinguished by the same court in a few cases over the past few years.

44. Sarkar v. Doe, No. 14-013099-CZ (Mich. Cir. Ct. Mar. 26, 2015), *appeal granted*, Nos. 326667 & 326691 (Mich. Ct. App. Aug. 27, 2015); Woodbridge Structured Funding, LLC v. Pissed Consumer, 6 N.Y.S.3d 2 (App. Div. 2015); Juice v. Twitter, Inc., 997 N.Y.S.2d 669 (Table) (N.Y. Sup. Ct. Aug. 29, 2014).

45. Hadley v. Doe, 34 N.E.3d 549, 557 (Ill. 2015).

46. Kechara House Buddhist Ass'n Malaysia v. Does 1–3, No. 15-cv-00332-DMR, 2015 U.S. Dist. LEXIS 66116, at *5–6 (N.D. Cal. May 19, 2015); Camargo v. Miltiadous, No. 3:14-cv-04490-JSC, 2015 U.S. Dist. LEXIS 56378, at *6–7 (N.D. Cal. Apr. 29, 2015).

47. *Music Grp. Macao Commercial Offshore Ltd.*, 82 F. Supp. 3d at 984.

48. *Thomson*, 356 P.3d at 730.

49. *Id.* at 728.

50. *Id.* at 734.

the court applied the high-burden prima facie case standard and denied the plaintiff's motion to compel compliance with the subpoena.[51]

In two cases involving subpoenas seeking to unmask anonymous speaker witnesses (as opposed to defendants), neither court adopted the standard applied in many such cases. In *Doe v. 2TheMart.com Inc.*,[52] the court crafted a test akin to the elements required to overcome the qualified reporter's privilege. This test requires the subpoenaing party to demonstrate that "information sufficient to establish or to disprove that claim or defense is unavailable from any other source."[53] Several other courts faced with requests to unmask third parties have adopted this test. But this year the Northern District of California applied a motion to dismiss standard in such a case,[54] and the Northern District of Ohio unmasked the witness upon a determination he appeared to have discoverable information.[55]

Several court decisions addressed procedural issues that arise in unmasking cases. New Jersey, for example, held that a newspaper has standing to assert the First Amendment rights of its anonymous commenters.[56] Two courts clarified that a subpoenaing party must seek to enforce the subpoena in the state in which the subpoenaed witness or documents are located, not where the underlying litigation is pending.[57] And federal courts in California and Delaware permitted efforts to unmask anonymous speakers to proceed, notwithstanding that they could not confirm their jurisdiction given the anonymity of the defendants.[58]

B. *Section 230 of the Communications Decency Act*

Courts across the nation have continued to apply Section 230 of the Communications Decency Act, 47 U.S. Code § 230 (CDA), to find online intermediaries immune from a variety of tort claims arising from online platform providers hosting third-party content. The Second Circuit affirmed the dismissal of a defamation claim against online website host

51. *Id.* at 734–36.

52. 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001).

53. *Id.*

54. *Kechara House*, 2015 U.S. Dist. LEXIS 66116, at *5–6.

55. *Ellora's Cave Publ'g*, 308 F.R.D. at 162.

56. Trawinski v. Doe, No. A-0312-14T1, 2015 WL 3476553 (N.J. Super. Ct. App. Div. June 3, 2015) (per curiam) (unpublished).

57. *Music Grp. Macao Commercial Offshore Ltd.*, 82 F. Supp. 3d at 984 (refusing to transfer petition to enforce subpoena against California-based Twitter to Washington where underlying litigation was pending); Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 770 S.E.2d 440, 445–46 (Va. 2015) (declining to enforce subpoena against California-based Yelp, rejecting argument that having agent for service of process in Virginia exposed Yelp to Virginia courts' subpoena powers).

58. Getaway.com LLC v. Does, No. CV 15-531-SLR, 2015 WL 4596413 (D. Del. July 30, 2015); Camargo v. Miltiadous, No. 3:14-cv-04490-JSC, 2015 U.S. Dist. LEXIS 56378, at *6–7 (N.D. Cal. Apr. 29, 2015).

GoDaddy, premised on a newsletter published on one of its websites.[59] Holding that "a plaintiff defamed on the Internet can sue the original speaker, but typically cannot sue the messenger," the Second Circuit surveyed and endorsed numerous cases from across the nation applying Section 230 to "a growing list of Internet-based service providers."[60] The Eleventh Circuit found that Google was immune from defamation claims based upon an allegation it had "manipulated its search results to prominently feature the article at issue."[61] And both the Third and Fourth Circuits affirmed district court rulings holding the operators of consumer review sites were entitled to immunity, similarly rejecting allegations those sites' filtering and highlighting certain consumer reviews vitiates Section 230 immunity.[62]

Section 230 has also been invoked as a defense against a variety of claims other than defamation. For example, a district court judge in New Jersey granted a motion to dismiss to the online dating app Grindr, rejecting the plaintiff's claim that the app was negligent in confirming its users' ages and was therefore responsible for the plaintiff's having been arrested for unlawful sex with a minor.[63]

Two courts reached opposite conclusions, however, about the availability of Section 230 immunity for a website that hosts advertisements alleged to facilitate prostitution involving minors. First, a district court in Massachusetts granted a motion to dismiss to Backpage.com in a suit brought by three women who alleged that "they were molested and repeatedly raped after being advertised as sexual wares on the defendant's website."[64] The court rejected the argument advanced by several *amici* that Backpage.com did not qualify for statutory immunity because it generates content by: "(1) posting illegal materials in sponsored ads; (2) stripping metadata from posted photos; (3) coaching the crafting of ads by allowing misspellings of suggestive terms; and (4) designing the escorts section of the website in such a way as to signal to readers that sex with children is sold here."[65] The district court concluded: "Backpage's passivity and imperfect filtering system may be appropriate targets for criticism, but they do not transform Backpage into an information content provider."[66] The court also rejected the argument that Backpage lost its immunity under Section 230 based upon the "design of its website" or

59. Ricci v. Teamsters Union Local 456, 781 F.3d 25, 29 (2d Cir. 2015).
60. *Id.* at 28.
61. Dowbenko v. Google, Inc., 582 F. App'x 801, 805 (11th Cir. 2014).
62. Westlake Legal Grp. v. Yelp!, Inc., 599 F. App'x 481, 485 (4th Cir. 2015); Obado v. Magedson, 612 F. App'x 90, 93 (3d Cir. 2015).
63. Saponaro v. Grindr, LLC, 93 F. Supp. 3d 319 (D.N.J. 2015).
64. Doe *ex rel.* Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149, 151 (D. Mass. 2015).
65. *Id.* at 154.
66. *Id.* at 157.

the allegation that Backpage either knew about or encouraged illegal conduct.[67]

In contrast, in September 2015, the Washington Supreme Court denied Section 230 immunity to Backpage, affirming the trial court's judgment that the complaint adequately alleged that the site's advertisement posting rules "were not simply neutral policies prohibiting or limiting certain content, but were instead 'specifically designed . . . so that pimps can continue to use Backpage.com to traffic in sex.'"[68] The allegations found sufficient to defeat Section 230 immunity included that (1) "the [Backpage.com] content requirements are nothing more than a method developed by Backpage.com to allow pimps, prostitutes, and Backpage.com to evade law enforcement for illegal sex trafficking, including the trafficking of minors for sex"; and (2) the "content requirements are specifically designed to control the nature and context of those advertisements so that pimps can continue to use Backpage.com to traffic in sex, including the trafficking of children, and so Backpage.com can continue to profit from those advertisements."[69] Noting these allegations were sufficient to survive a motion to dismiss, the court stated that "fact finding on [these] issue[s] is warranted,"[70] leaving open the possibility of a successful summary judgment motion on remand.

The Northern District of California refused to extend immunity under Section 230(c) to Google for having removed a YouTube video on grounds that the person who posted it had violated YouTube's terms of service by allegedly artificially inflating the number of views it received.[71] The court rejected Google's argument it had removed "otherwise objectionable" material, holding that statutory immunity applies only to "potentially offensive materials" of the same nature as those categories identified in the statute.[72]

The District of Connecticut found there was a close collaboration between Lean Spa, LLC, which sells purported weight-loss solutions, and various companies that marketed Lean Spa's products using "fake news sites" that published allegedly false reports of Lean Spa's products having been clinically tested and endorsed by customers and various organizations.[73] The court granted the FTC's motion for summary judgment

67. *Id.* at 158.
68. J.S. v. Vill. Voice Media Holdings, 359 P.3d 714, 717 (Wash. 2015).
69. *Id.* at 717–18.
70. *Id.* at 718.
71. Song Fi, Inc. v. Google, Inc., No. 14-5080 SC, 2015 U.S. Dist. LEXIS 75272, at *15 (N.D. Cal. June 10, 2015).
72. *Id.* at *12.
73. FTC v. Lean Spa, LLC, No. 3:11-CV-1715, 2015 WL 1004240 (D. Conn. Mar. 5, 2015), *appeal filed* (2d Cir. Apr. 2, 2015).

and denied Lean Spa's assertion of Section 230 immunity.[74] The court found that there was no factual dispute that Lean Spa knew its affiliates used fake news pages when it hired them, told the affiliates which products to advertise, and screened the affiliates' advertisements to ensure compliance with its preferences.[75]

Finally, some courts have taken a dim view of the popular consumer gripe site RipoffReport.com, which has previously succeeded, multiple times, in invoking Section 230 immunity. A federal district court in Utah denied a request for reconsideration of its earlier order denying RipoffReport.com's motion to dismiss.[76] Relying upon the leading Tenth Circuit case applying and interpreting Section 230,[77] the court found sufficient facts had been alleged that the website was "more than a neutral conduit" for offensive content.[78] Specifically, the complaint alleged that Ripoff Report encouraged negative content by including in its tagline "Don't let them get away with it. Let the truth be known" and stating on its homepage "complaints, reviews, scams, lawsuits, frauds reported, file your review. Consumers educating consumers."[79] In addition, the court noted that Ripoff Report has a "corporate advocacy program," which charges companies "a large fee" to help them "make your reports look like they should: positive."[80] Because of these allegations, the court held that the complaint "support[s] a reasonable inference that [Ripoff Report] was not a neutral publisher. It had an interest in, and encouraged, negative content."[81] The court held that Ripoff Report was responsible in whole or in part for developing or generating the offensive conduct and was therefore not entitled to Section 230 immunity.[82]

74. *Id.* at *14.
75. *Id.*
76. Vision Security, LLC v. Xcentric Ventures, LLC, No. 2:13-cv-00926-CW-BCW (D. Utah Aug. 27, 2015).
77. *See* FTC v. AccuSearch, Inc., 570 F.3d 1187 (10th Cir. 2009).
78. Professor Eric Goldman, a recognized authority and commentator on Section 230, has described this case as "additional evidence that perhaps the AccuSearch case has done more damage to Section 230 than the more publicized Roommates.com case." *Another Tough Section 230 Ruling for RipOff Report—Vision Security v. Xcentric*, TECH. & MKTG. L. BLOG (Sept. 20, 2015), http://blog.ericgoldman.org/archives/2105/09/another-tough-section-230-ruling-for-ripoff-report-vision-security-v-xcentric.htm. Professor Goldman predicts that the repercussions of the AccuSearch "neutral publisher" test will cause "Section 230 haters to forum-shop their cases into the Tenth Circuit." *Id.*; *see also* Gen. Steel Domestic Sales, LLC v. Chumley, No. 14-cv-01932, 2015 WL 4911585 (D. Colo. Aug. 18, 2015) (also applying the AccuSearch holding and finding that the defendant is not entitled to Section 230 immunity for selectively posting third-party content to create a negative impression of a competitor).
79. *Vision Security, LLC*, No. 2:13-cv-00926-CW-BCW.
80. *Id.*
81. *Id.*
82. *Id.*

C. *Personal Jurisdiction Based on Online Publication*

California has joined the ranks of states whose appellate courts hold that merely posting a statement online about a resident cannot confer personal jurisdiction in a lawsuit based on that post.[83] The Third Circuit rejected a Pennsylvania plaintiff's argument that personal jurisdiction existed over a Canadian citizen because there was no evidence the sender of the actual email was acting as the Canadian's agent.[84] Similarly, a Michigan federal court held that joining a Facebook group administered in Michigan was not enough to confer personal jurisdiction there over an out-of-state resident where the group was not aimed at a Michigan audience or focused on Michigan-centric topics.[85]

D. *Single Publication Rule*

In an unpublished decision, the Sixth Circuit held that the single publication rule applies to online publications; therefore, alleged defamation claims premised on statements first posted to the Internet more than one year prior to filing the complaint were time-barred by Tennessee's statute of limitations.[86] The Sixth Circuit held that

> statements that are posted to [an MTV News website] forum that is prominently accessible to the online public have a presumptively global audience, and subsequent alterations of format—such as shifting the statement between URLs or moving it from one portion of a webpage or server to another—are not likely to have a measurable effect on the statements' ability to be accessed by a new brand of viewers.[87]

This is because "the initial posting has already been directed at most of the universe of probable interlocutors, there is not likely to be any need for a digital equivalent of a rebroadcast or a second print run."[88] The court also rejected the plaintiffs' argument that new advertisements accompanying the articles on MTV's website constituted a new publication of those articles, re-triggering the statute of limitations, stating "simply alerting a new audience to the existence of a preexisting statement does not republish it."[89]

In contrast, the Delaware Court of Chancery, while recognizing that the single publication rule applies to online defamation, held that defendant Vox Media, Inc., had republished its 2012 articles concerning the

83. Burdick v. Super. Ct., 183 Cal. Rptr. 3d 1, 3 (Ct. App. 2015).
84. Scott v. Lackey, 587 F. App'x 712, 717–18 (3d Cir. 2014).
85. Steele v. Burek, No. 14-11969, 2014 WL 6612386, at *9–10 (E.D. Mich. Nov. 20, 2014).
86. *See* Clark v. Viacom Int'l, Inc., 617 F. App'x 495 (6th Cir. July 8, 2015).
87. *Id.* at 506.
88. *Id.*
89. *Id.* at 507.

plaintiffs' earlier business venture, OnLine.com (a video gaming platform), when it provided a hyperlink to those stories in a 2014 online story about the plaintiffs' new business venture, Pcell (a commercial wireless technology).[90] The court denied Vox Media's motion to dismiss on statute of limitations grounds, finding that the complaint had adequately alleged that the 2014 article both "enhanced or modified the defamatory allegations" in the 2012 articles to which it linked and also "was intended to and did actually reach a new audience."[91]

E. *"Twibel:" Defamation Via Social Media*

As lawsuits alleging defamation via Twitter, Facebook, and other social media continue to proliferate, a growing number of courts have treated the informal and hyperbolic nature of these media as indications that statements made on social media are less likely to be treated as statements of objective fact. The Northern District of California quashed a subpoena to Twitter for the identities of two users who had criticized a company that makes audio recording products, holding that the plaintiff could not demonstrate a "real evidentiary basis" for its defamation claims because most of the tweets were opinion.[92] Similarly, federal courts in Michigan[93] and Illinois[94] held that insulting or mocking posts on Instagram and Facebook, respectively, were not actionable in defamation.

The Southern District of New York, meanwhile, rejected an argument that tweets and Facebook posts that linked to longer articles or video were the functional equivalent of headlines "and thus not actionable [under New York law] if they represent a fair index of some other statement," holding that they contained sufficient content to be evaluated on their own.[95]

In an unusual twist, a Texas appellate court dismissed a defamation conspiracy claim and held that citizens have "a right to associate with each other on social media."[96] Texas's anti-SLAPP statute provides a mechanism for early dismissal of lawsuits that arise from the defendant's exercise of rights, including those of speech and association.[97] Therefore, the law applied to a claim of conspiracy to defame based on the defen-

90. Perlman v. Vox Media, Inc., No. 10046–VCP, 2015 WL 5724838 (Del. Ch. Ct. Sept. 30, 2015).
91. *Id.* at *19–20.
92. Music Grp. Macao Commercial Offshore Ltd. v. Does, 82 F. Supp. 3d 979, 982, 986 (N.D. Cal. 2015).
93. Binion v. O'Neal, No. 14-13454, 2015 WL 3544518, at *5–6 (E.D. Mich. Apr. 2, 2015).
94. Bittman v. Fox, 107 F. Supp. 3d 896, 902–03 (N.D. Ill. June 1, 2015).
95. Restis v. Am. Coal. Against Nuclear Iran, Inc., 53 F. Supp. 3d 705, 724–25 (S.D.N.Y. 2014).
96. Backes v. Misko, No. 05-14-00566-CV, 2015 WL 1138258, at *10 (Tex. App. Mar. 13, 2015).
97. *Id.* at *6.

dant's Facebook friendship with the person who posted allegedly defamatory remarks about the plaintiff to an online forum dedicated to show horse breeding.[98] Because the plaintiff provided no evidence that the conspiracy defendant had a "meeting of the minds" with the poster of the allegedly defamatory statement regarding that post, the claim against her was dismissed.[99]

IV. ACCESS

A. *Access Under FOIA Laws*

The Texas Supreme Court issued three opinions construing the Texas Public Information Act, two of which significantly restrict access, the other less so. In *Greater Houston Partnership v. Paxton*,[100] the court interpreted the definition of a "governmental body" under the Act to include "only those entities at least partially sustained by public funding."[101] The court effectively overturned the nearly thirty-year-old test articulated in the *Kneeland* case[102] and held that because the statutory language is unambiguous, it need not consider the accuracy or vitality of *Kneeland*. The court found Greater Houston Partnership, a chamber of commerce entity that received money from the City of Houston, was not a public entity.[103]

In another opinion regarding the interface of private enterprise and the government, the Texas Supreme Court ruled to keep certain details of Boeing's lease with a port authority from public release.[104] At issue in the case was an exception to the Public Information Act protecting information "that, if released, would give advantage to a competitor or bidder."[105] The court considered whether this exception was available to third parties like Boeing, and if so, what proof was necessary to protect information from release.[106] Boeing lost in the trial court and intermediate appellate court.[107] The Texas Supreme Court, however, agreed with Boeing that the Act's exception applies to both the government and private parties and may be invoked by either to protect the privacy and property interests of a private party in accordance with its terms.[108]

98. *Id.* at *9–10.
99. *Id.*
100. Greater Houston P'ship v. Paxton, 468 S.W.3d 51, 54 (Tex. 2015).
101. *Id.*
102. Kneeland v. Nat'l Collegiate Athletic Ass'n, 850 F.2d 224, 228–29 (5th Cir. 1988).
103. *Greater Houston P'ship*, 468 S.W.3d at 54.
104. Boeing Co. v. Paxton, 466 S.W.3d 831, 842 (Tex. 2015).
105. Tex. Gov't Code § 552.104.
106. *Paxton*, 466 S.W.3d at 837–38.
107. *Id.* at 835.
108. *Id.* at 839.

Finally, in a pro-open government ruling in *Kallinen v. City of Houston*,[109] the Texas Supreme Court reversed a court of appeals decision that required a requestor under the Act to wait until the attorney general issued an opinion on a governmental body's request to withhold information before bringing suit to compel its release.[110] The court, however, was unwilling to equate public information with information that the attorney general determines is subject to release.[111] The court refused to equate the attorney general ruling with an "administrative remedy" because requestors have no right to request or demand a ruling or disclosure from the attorney general and no right to an administrative appeal.[112] The requirement that a governmental body seek a ruling from the attorney general when withholding requested information is a check on the governmental body, not a remedy for the requestor to exhaust.[113]

The Indiana Supreme Court held that certificates of death that doctors, coroners, and funeral directors filed with county health departments are accessible public records under the Indiana Access to Public Records Act.[114] The court held that while the records are now kept electronically, the "change is one of form, not of substance."[115] The court further held that the Indiana General Assembly had drawn a distinction between a certificate of death, which is intended to record cause of death data for use by health officials, and a certification of death registration, which is intended to authenticate the death for the purpose of property disposition, the former being a public record while the latter is confidential.[116]

The Supreme Court of Ohio held that police records of private colleges were subject to the Public Records Act.[117] The case involved a request by a student-run media website to the Otterbein University police department for criminal reports of persons who had been referred to the Westerville Mayor's Court.[118] Under Ohio's Public Records Act, the term "public record" is defined as "records kept by any public office," and the term "public office" includes "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any func-

109. 462 S.W.3d 25, 29 (Tex. 2015).
110. *Id.*
111. *Id.* at 28.
112. *Id.*
113. *Id.*
114. Evansville Courier & Press v. Vanderburgh Cty. Health Dep't, 17 N.E.3d 922, 924 (Ind. 2014).
115. *Id.* at 928.
116. *Id.* at 929.
117. State *ex. rel* Schiffbauer v. Banaszak, 33 N.E.3d 52, 55 (Ohio 2015).
118. *Id.* at 53.

tion of government."[119] The court held that campus police officers are vested with the same powers and authority as police officers of a municipal corporation or a county sheriff.[120]

B. *Access to Court Proceedings and Records*

In *In re Wall Street Journal*,[121] the Fourth Circuit vacated a sealing and gag order issued *sua sponte* by the district court one day after a grand jury returned the indictment of coal magnate Donald Blankenship.[122] The order prohibited: (1) public access to most of the documents filed in the case; and (2) the parties, their counsel, potential trial participants, court personnel, and others from discussing the case with any member of the media.[123] The media entities moved to intervene to request the district court to reconsider, which was opposed by Blankenship and on which the government took no position.[124] The district court granted the motion to intervene and modified the order, but the media entities petitioned for mandamus relief from the order as modified.[125]

The Fourth Circuit also made important rulings affirming access to criminal trials, including that mandamus relief "is the preferred method for review of orders restricting press activity related to criminal proceedings."[126] It found that the media entities met the constitutional requirements for standing because their right under the First Amendment to gather news[127] and receive speech from willing speakers[128] had been directly impaired by the district court's order.[129] On the constitutional issues, the court noted that the public enjoys a qualified right of access to criminal trials;[130] pretrial proceedings;[131] and "documents submitted in the course of a trial," including documents filed in connection with a motion to dismiss an indictment and other pretrial filings.[132] Where the right of an accused to a fair trial is at stake, the court held, the public may not be denied access absent "specific findings . . . demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second,

119. *Id.*
120. *Id.*
121. 601 F. App'x 215, 219 (4th Cir. 2015).
122. *Id.*
123. *Id.*
124. *Id.* at 217.
125. *Id.* at 218.
126. *Id.* (citing *In re* State–Record Co., Inc., 917 F.2d 124, 126 (4th Cir.1990)).
127. *Id.* (citing Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).
128. *Id.* (citing Stephens v. Cty. of Albemarle, 524 F.3d 485, 492 (4th Cir. 2008)).
129. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).
130. *Id.* (citing Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980)).
131. *Id.* (citing Press–Enter. Co. v. Super. Ct., 478 U.S. 1, 14 (1986) (*Press–Enterprise II*)).
132. *Id.* (citing *In re* Time Inc., 182 F.3d 270, 271 (4th Cir.1999)).

reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[133]

In *KPNX Channel 12 v. Stephens*,[134] the Arizona Court of Appeals vacated a trial court's order closing to the press the penalty phase of a notorious capital murder trial.[135] Jodi Arias was convicted of first degree murder, but after the jury was unable to reach a verdict on the penalty, the superior court declared a mistrial of the penalty phase of the trial.[136] A new jury was to consider evidence in the retrial of the penalty phase.[137] Arias told the trial court she wanted to testify outside the presence of the press and public and asked the court to seal the transcript of the testimony.[138] The trial court agreed and closed the proceeding.[139] The court of appeals reversed, holding that despite Arias's belief that the public reaction to her testimony would inhibit her ability "to present a full and complete case for her life," her concerns did not demonstrate the existence of a clear and present danger that would impede her right to a fair trial with an impartial jury.[140]

C. *Access to Other Governmental Proceedings*

The case of *Brown v. Denton*[141] involved the intersection of court-related proceedings and the Florida Sunshine Law.[142] The court ruled that governmental officials may not end run their duties to conduct collective bargaining negotiations as open meetings by convening a confidential mediation in a federal lawsuit.[143] That the mediated settlement agreement was tentative and conditioned upon further approval did not cure any prior Sunshine Law violation because the purpose of the law is to "prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance."[144] As to the remedy, the circuit court took care in recognizing the federal court's supremacy and the limited scope of the Sunshine Law issue before it. The circuit court narrowly crafted its remedy to respect the interplay between Sunshine Law principals and federal mediation.[145] By holding closed-door negotiations that resulted in changes to public employees' pension benefits, the appellate

133. *Id.* (citing *Press–Enterprise II*, 478 U.S. at 14).
134. 340 P.3d 1075, 1079–80 (Ariz. Ct. App. 2014).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 1077.
139. *Id.*
140. *Id.* at 1079–80.
141. 152 So. 3d 8, 10 (Fla. Dist. Ct. App. 2014).
142. *Id.*
143. *Id.* at 9.
144. *Id.* at 11–12.
145. *Id.* at 12.

court concluded, the appellants ignored an important party who also had the right to be in the room—the public.[146]

V. NEWSGATHERING

A. *Drones*

Drones have continued to be a hot topic in newsgathering. Although the Federal Aviation Administration missed the congressional deadline for the safe integration of drones into the national airspace, the FAA has made some progress in enabling unmanned aircraft systems (UAS) operations, through (1) issuing a notice of proposed rulemaking, Operation and Certification of Small Unmanned Aircraft Systems; (2) issuing Section 333 exemptions to permit commercial operations; and (3) clarifying the applicability of the statutory requirements regarding aircraft registration to UAS, including those operating as model aircraft.

In February 2015, the FAA published its notice of proposed rulemaking, addressing regulations on the operation of small unmanned aircraft systems (sUAS).[147] These include drones that are less than fifty-five pounds and used for non-recreational purposes. Under the proposed rule, sUAS operators, who must be seventeen or older, would be required to pass an initial test, be vetted by the Transportation Security Administration, obtain an sUAS operator certificate, and pass a recurrent test every twenty-four months. The FAA also proposed that sUAS cannot fly at more than 500 feet above ground level; can fly only during daylight; cannot operate over people; and cannot be operated beyond the operator's visual-line-of-sight, unaided by anything except standard glasses and contact lenses. The News Media Coalition, which is composed of various organizations, such as publishing companies and media networks, filed comments on the proposed rule on April 24, 2015. The coalition was largely supportive of the proposed rule, but urged the FAA to relax certain restrictions.

In its proposed rule, the FAA also sought comment on the creation of a "micro UAS" category for UAS under 4.4 pounds. To qualify, the device, which would be limited to 400 feet above ground level, would have to be made of materials that break apart or yield in event of a collision. The DJI Phantom, which is a popular UAS among journalists, likely would qualify as a micro UAS. The coalition supported the creation of a micro UAS category.

146. *Id.*

147. Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (proposed Feb. 23, 2015) (to be codified at 14 C.F.R. pts. 21, 43, 45, 47, 61, 91, 101, 107 & 183).

Until the FAA issues a final rule, individuals or entities wanting to operate a drone for commercial purposes, which include newsgathering activities, must apply for a Section 333 exemption.[148] The FAA has recently begun issuing significantly more exemptions under its "summary grant" process.

In early 2015, the FAA also relaxed some of the conditions placed on Section 333 holders by loosening the certification requirements for UAS operators and creating a streamlined process for airspace authorizations. Section 333 exemption holders now only need to hold a sport or recreational pilot certificate, as opposed to previously being required to hold a commercial or private pilot certificate. Additionally, Section 333 exemption holders are now granted a blanket Certificate of Waiver or Authorization (COA), which allows them to operate within the parameters of the exemption as long as the UAS is flown at or below 200 feet and stays a certain distance from airports.

In May 2015, the FAA issued a memorandum titled "Media Use of UAS," which explains that citizen journalists can use drones to photograph newsworthy events and later sell these photographs to the media; however, professional news photographers cannot do so. According to the memorandum, a media entity may use drone footage in two ways: (1) apply for and receive FAA authorization for the operation of a drone for commercial purposes under the Section 333 exemption; or (2) obtain information captured by a drone that is operated by an unaffiliated third-party person or entity authorized by the FAA to operate the drone under the "hobby or recreation exemption."

The operator's intention ultimately defines whether flights fall under "hobby or recreation." If the operator has a history of frequently reselling material captured via drone, the FAA is not likely to deem the flights "recreational." A media entity that does not have operational control over a drone, and is otherwise not involved in its operation, falls outside of FAA oversight. FAA regulations define "operational control" as "the exercise of authority over initiating, conducting, or terminating a flight." The FAA's definition of "operational control" is open to interpretation by the courts and administrators.[149] The operator of the drone may be held responsible for not obtaining FAA approval for any use not considered part of "a hobby or recreational activity." Unauthorized operation of a drone may result in fines.

148. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 333, 126 Stat. 11 (codified as amended in scattered sections of 49 U.S.C.).

149. There are two distinct ways in which a court or federal agency might interpret a media entity as having operational control or being otherwise involved in operation: (1) the media agency physically operates the drone by holding and manipulating the remote control; or (2) the media agency directs or suggests to the freelance drone operator the time, place, or manner of the operation of the drone.

In October 2015, the FAA reconsidered its past practice of exercising discretion with respect to requiring UAS to be registered and announced that registration will be required for all UAS, including those used for recreation or hobby purposes.[150] Federal law requires that a person may operate an "aircraft" only when it is registered with the FAA.[151] Congress has confirmed that UAS, including those used for recreation or hobby purposes, are "aircraft" under federal law.[152] Because UAS are aircraft, they are subject to FAA regulation, including the statutory requirements regarding registration, set forth in 49 U.S.C. § 44101(a) and further prescribed in regulation at 44 C.F.R. § 47.

"Ag-gag" laws, which impose civil or criminal liability on violators, are designed to prohibit filming or photographing the operations of an agricultural facility without the effective consent of the owner. Several states have such laws on the books, but a recent federal court ruling may call into question the constitutionality of many of them. Some ag-gag laws directly prohibit unauthorized filming or photography at an animal facility.[153] Others, known as "quick-reporting" statutes, like the one enacted in Missouri in 2012, do not criminalize the activity itself, but do require that any video or photographic evidence of abuse or neglect be turned over to law enforcement immediately.[154] Animal groups oppose both types of ag-gag laws, claiming that quick-reporting statutes hamper their ability to compile enough evidence to mount effective civil or criminal cases against abusive agricultural operations.

Since the first ag-gag law was passed in Kansas in 1990, several other states have attempted to pass such legislation with varying degrees of success. In 2015, Wyoming and North Carolina successfully passed new ag-gag legislation,[155] while Montana, Colorado, and New Mexico saw ag-gag legislation efforts fail.[156]

150. Clarification of the Applicability of Aircraft Registration Requirements for Unmanned Aircraft Systems (UAS) and Request for Information Regarding Electronic Registration for UAS, 80 Fed. Reg. 63912 (Oct. 22, 2015).

151. 49 U.S.C. § 44101(a).

152. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 331(8), 336.

153. *E.g.*, UTAH CODE ANN. § 76-6-112.

154. MO. REV. STAT. § 578.013.

155. WYO. STAT. § 6-3-414 (2015); N.C. GEN. STAT. § 99A-2. North Carolina's law allows property owners to sue employees who record non-public areas without authorization. While not specific to agriculture, the law has been criticized as a new type of ag-gag law. The fact that it is not specific to agriculture also raises implications for whistleblowers in other industries and environments.

156. Montana already has an ag-gag law on the books prohibiting recording, but an attempt to pass a quick-reporting statute in 2015 failed. See Troy Carter, Bill Criminalizes Not Reporting Animal Cruelty, BOZEMAN DAILY CHRON., Feb. 17, 2015, *available at* http://www.bozemandailychronicle.com/news/mtleg/bill-criminalizes-not-reporting-animal-cruelty/article_8145f262-0129-5b02-bf44-509b00613594.html.

However, the ultimate fate of ag-gag laws remains to be seen following a federal court decision that struck down Idaho's ag-gag law as unconstitutional. In February 2014, the governor of Idaho signed into law Idaho Code § 18-7042, entitled "Interference with Agricultural Production," which penalized the surreptitious filming of "agricultural production" with up to a year in prison, up to a $5,000 fine, or both.[157] In August 2015, however, a federal court declared the law unconstitutional.[158] In granting summary judgment for the plaintiffs,[159] the court ruled that the law was a content and viewpoint-based restriction on speech in violation of the First Amendment. The law did not survive strict scrutiny review.[160] The court also pointed out that other laws, such as laws against trespass, defamation, fraud, and theft, exist to protect the interests the state purports to be protecting without violating free speech.[161] A similar challenge to Utah's ag-gag law is pending in federal court and is expected to go to trial in 2016.[162]

B. *Photojournalists and the Right to Record Police*

The past year saw a number of cases involving the hotly debated issue of journalists' and citizens' right to record police activity. In August 2014, Ferguson, Missouri, police officer Darren Wilson shot and killed Michael Brown, who was unarmed, resulting in a series of protests and demonstrations that involved violent clashes with police and garnered national attention. From these protests emerged numerous reports of police interfering with the media, including allegations of obstruction of access, arrests, threats, and even physical assaults.[163]

One incident that gained notoriety was the arrest of *Washington Post* reporter Wesley Lowery and *Huffington Post* reporter Ryan Reilly. The reporters had been working out of a McDonald's restaurant during the protests when officers ordered them to leave. Lowery recorded the interaction and refused to stop when instructed to do so by an officer. The two were arrested and processed, but after being identified as members of the media, they were released.

157. IDAHO CODE § 18-7042(3).

158. Animal Legal Defense Fund v. Otter, No. 1:14-cv-00104-BLW, 2015 WL 4623943, at *3 (D. Idaho Aug. 3, 2015).

159. The plaintiffs included the Animal Legal Defense Fund, PETA, the ACLU of Idaho, the Center for Food Safety, and several other organizations and individuals.

160. *Id.* at *3.

161. *Id.* at *4.

162. *See* 2015 WL 4623943, No. 2:13-cv-00679-RJS (D. Utah filed July 22, 2013).

163. *See* PEN America, *Press Freedom Under Fire in Ferguson: A PEN American Center Report* (Oct. 27, 2014), *available at* http://www.pen.org/sites/default/files/PEN_Press-Freedom-Under-Fire-In-Ferguson.pdf; Amnesty International, *On the Streets of America: Human Rights Abuses in Ferguson* (Oct. 2014), *available at* http://www.amnestyusa.org/sites/default/files/onthestreetsofamericaamnestyinternational.pdf.

In August 2015, almost a year later and just before the statute of limitations would expire, Lowery and Reilly were charged with trespassing and interfering with a police officer.[164] A trespassing conviction carries a sentence of up to a year in jail and a fine of up to $1,000. The reporters' respective news organizations have condemned the charges. Around the same time that Lowery and Reilly were charged, two other journalists, Bilgin Şaşmaz and Trey Yingst, were arrested while recording police in Ferguson. The charges against Şaşmaz and Yingst were dropped as part of a settlement in civil rights lawsuits filed on their behalf by the ACLU.[165]

Meanwhile, in Austin, Texas, another case involving the right to record police continues to make its way through the courts. In 2012, Antonio Buehler was arrested for resisting arrest after he filmed two police officers making a traffic stop.[166] Buehler claimed that he was assaulted for asserting his right to film. He was later arrested twice more for filming police stops. Buehler filed suit in federal court, alleging under 42 U.S.C. § 1983, that five officers and unnamed John Does violated his First and Fourteenth Amendment rights when they interfered with his efforts to film and publish their public conduct.[167] He also alleged additional Constitutional violations and various state law claims.

In 2014, in an order largely denying the defendants' motion to dismiss, a federal magistrate judge upheld Buehler's right to photograph and film police officers carrying out their official duties in public.[168] The magistrate judge further held that this right was clearly established at the time of Buehler's arrests based on widespread recognition of the right by federal appellate courts, including the Fifth Circuit, and many federal district courts.[169]

However, Buehler's victory was short-lived. After he was indicted by a grand jury on several misdemeanor counts of disobeying lawful orders, the magistrate judge granted summary judgment for the defendants, holding that the grand jury indictments established probable cause for each of Buehler's arrests and precluded his constitutional claims.[170] In making

164. Ravi Somaiya & Ashley Southall, *Arrested in Ferguson Last Year, 2 Reporters Are Charged*, N.Y. TIMES, Aug. 10, 2015, http://www.nytimes.com/2015/08/11/us/arrested-in-ferguson-2014-washington-post-reporter-wesley-lowery-is-charged.html?_r=0.

165. *See* Press Release, American Civil Liberties Union of Missouri, Two Journalists Recording Ferguson Protests Will Not Face Charges (Aug. 3, 2015), *available at* http://www.aclu-mo.org/newsviews/2015/08/03/two-journalists-recording-ferguson-protests-will-not-face-ch.

166. Buehler v. City of Austin/Austin Police Dep't, A-13-CV-1100 ML (W.D. Tex. July 24, 2014).

167. *Id.*

168. Memorandum Opinion and Order, *Buehler*, A-13-CV-1100 ML, at *11–12 (W.D. Tex. July 24, 2014).

169. *Id.*

170. Buehler v. City of Austin/Austin Police Dep't, No. 1:13-CV-1100-ML, 2015 U.S. Dist. LEXIS 20878, at *38 (W.D. Tex. Feb. 20, 2015).

his ruling, the magistrate judge relied on Fifth Circuit precedent, which holds that "[i]f [probable cause for arrest] exists, any argument that the arrestee's speech as opposed to [his] criminal conduct was the motivation for [his] arrest must fail, no matter how clearly that speech may be protected by the First Amendment."[171] Thus, there was no Constitutional violation and the officers were entitled to qualified immunity. Buehler appealed his case to the Fifth Circuit, where as of late 2015, it was still awaiting review.[172]

Finally, a few states attempted this year to limit the right to record through legislation. A bill in Arkansas that would have required photographers to obtain explicit written consent from subjects for most purposes, was passed by the legislature, but vetoed by Governor Asa Hutchinson.[173] And in Texas, a bill attempting to establish a minimum twenty-five-foot distance between the photographer and the police was withdrawn by its proponent after receiving widespread criticism from citizens' groups and law enforcement.[174]

C. *Liability Under the Federal Driver's Privacy Protection Act*

The Seventh Circuit issued an opinion interpreting the Federal Driver's Privacy Protection Act (DPPA), 18 U.S.C. § 2721, in a way that may potentially subject journalists to civil penalties for unlawfully acquiring and publishing "personal information" obtained from driving records.[175] The DPPA prohibits individuals from knowingly obtaining or disclosing "personal information" from a motor vehicle record. "[P]ersonal information" is defined as "information that identifies an individual, including an individual's photograph, Social Security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information."[176]

Five police officers sued *Sun-Times Media LLC*, alleging the publishing company violated the DPPA by obtaining and publishing each officer's "personal information" in a *Chicago Sun-Times* article that criticized the police for selecting officers that bore an unusually close physical resemblance to the suspect during a lineup.[177] The article published the officers' lineup

171. Mesa v. Prejean, 543 F.3d 264, 273 (5th Cir. 2008).

172. Buehler v. City of Austin/Austin Police Dep't, No. 15-50155 (5th Cir. filed Feb. 24, 2015).

173. Press Release, Office of the Governor, Governor Hutchinson's Veto Letter to Senate Concerning SB79 (Mar. 31, 2015), *available at* http://governor.arkansas.gov/press-releases/detail/governor-hutchinsons-veto-letter-to-senate-concerning-sb79.

174. Annabelle Bamforth, *TX Rep. Jason Villalba Scraps Bill That Would Limit Filming of Police*, TRUTH IN MEDIA, Apr. 13, 2013, http://truthinmedia.com/tx-rep-jason-villalba-scraps-bill-that-would-limit-filming-of-police/.

175. Dahlstrom v. Sun-Times Media, LLC, 777 F.3d 937, 954 (7th Cir. 2015), *petition for cert. filed* (U.S. July 30, 2015) (No. 15-158).

176. *Id.* at 941 (quoting 18 U.S.C. § 2725(3)).

177. *Id.* at 940.

photographs, full names, months and years of their birth, heights, weights, hair colors, and eye colors.[178] The *Sun-Times* obtained the names and photographs of the officers from the Chicago Police Department and the additional identifying information from motor vehicle records.[179]

The *Sun-Times* moved to dismiss the complaint, arguing that the published information was not "personal information" under the statute and that the statute's prohibition on obtaining and publishing this information violated the First Amendment.[180] The district court held the challenged information was within the scope of "personal information" and that the DPPA's prohibition did not violate the First Amendment.[181] On interlocutory appeal, the Seventh Circuit affirmed and remanded for further proceedings.[182]

In addressing whether the published information constituted the officers' "personal information," the Seventh Circuit adopted a broad definition—emphasizing the fact that certain categories were enumerated (e.g., Social Security number, address, et alia) did not mean that other categories were implicitly excluded from the definition.[183] The court also emphasized that a broad definition promoted the underlying purposes of the statute, which are to prevent stalkers from obtaining information regarding their victims and to protect against the state's practice of selling personal information to businesses.[184]

Regarding the First Amendment challenge, the court emphasized that the Supreme Court has "repeatedly declined to confer on the media an expansive right to gather information."[185] The Seventh Circuit distinguished its opinion in *American Civil Liberties Union v. Alvarez*,[186] which held that an Illinois statute prohibiting individuals from making audio recordings of police officers performing their duties violated the First Amendment under either intermediate or strict scrutiny. While *Alvarez* banned all audio recordings of any oral communication, the DPPA prohibited only acquisition from an isolated source.[187] Additionally, the court pointed out that "peering into an individual's personal government records" implicates privacy concerns that are not present with information that can be observed during a routine traffic stop.[188] The court con-

178. *Id.*
179. *Id.* at 941.
180. *Id.* 941–42.
181. *Id.*
182. *Id.* at 954–55.
183. *Id.* at 943–44.
184. *Id.* at 944.
185. *Id.* at 946 (quoting Branzburg v. Hayes, 408 U.S. 665, 707 (1972)).
186. 679 F.3d 583, 586–87 (7th Cir. 2012).
187. *Dahlstrom*, 777 F.3d at 948.
188. *Id.*

cluded that rational basis was the correct standard and that limiting public access to driving records was reasonably related to the government's legitimate interest in preventing stalkers from acquiring personal information from state records.[189] Because the challenge here was as applied, the holding was limited to the facts and circumstances of the case.[190] The *Sun-Times* filed a petition for writ of certiorari on July 30, 2015.[191]

VI. REPORTER'S PRIVILEGE

A. *Federal Legislative Efforts*

The Free Flow of Information Act, introduced as two companion bills, Senate Bill 987 and House Bill 1962,[192] continues to stay on the shelf. In November 2013, the Senate Judiciary Committee issued its report and the bill was placed on the Senate legislative calendar with no action to date.[193]

B. *Federal Cases*

Non-confidential source information received mixed protection in federal courts this year. In a securities fraud action filed by investors against a pharmaceutical company in the District of Columbia, the plaintiffs claimed they suffered losses when the truth about the safety of one of the defendant's drugs was revealed in an article about the early termination of that drug's clinical trial due to safety concerns.[194] The defendant sought the reporter's testimony to prove that market actors already knew of the study's termination before the article's publication and claimed the reporter was "uniquely positioned" to provide testimony regarding the disclosure of the study's termination to market participants.[195]

The court agreed with the reporter that the non-confidential information sought by the defendant—such as confirmation of the quotes in the article and information as to how and when he learned about the study—was still protected by the privilege.[196] However, relying on prior district precedent, the court found that a "less demanding" showing is required to defeat the privilege for non-confidential information.[197] Nonetheless, the

189. *Id.* at 949.
190. *Id.* at 954.
191. Sun-Times Media, LLC v. Dahlstrom, No. 15-158 (U.S. filed July 30, 2015).
192. S. 987, a*vailable at* https://www.congress.gov/bill/113th-congress/senate-bill/987/all-actions (last accessed Nov. 1, 2015); H.R. 1962, *available at* https://www.congress.gov/bill/113th-congress/house-bill/1962/all-actions.
193. S. 987, *available at* https://www.congress.gov/bill/113th-congress/senate-bill/987/all-actions (last accessed Nov. 1, 2015).
194. Goldberg v. Amgen, Inc., No. 15-mc-00825 (APM), 2015 WL 4999856 (D.D.C. Aug. 21, 2015).
195. *Id.* at *2.
196. *Id.* at *4.
197. *Id.*

court granted the reporter's motion to quash, even though it agreed that at least some of the information sought would go to the "heart" of the defendant's defenses.[198] The court found the defendant had failed to "demonstrate the requisite diligence in seeking evidence from alternative sources," which was required even under the more relaxed standard for obtaining non-confidential information.[199] The court also found that it was not unreasonable to require the defendant to attempt to depose a foreign party who might be in possession of relevant information because there "is no foreign evidence exception to the exhaustion requirement."[200]

Yet, in another case involving non-confidential information, the Southern District of Florida compelled an NBC reporter to testify regarding statements made by the plaintiff in a § 1983 action against a police officer.[201] The plaintiff–arrestee claimed the officer had no justification for shooting him multiple times while he lay on the ground during an arrest.[202] The officer claimed that the arrestee appeared to be reaching for a gun.[203] An NBC news story reported that the arrestee said that he reached to adjust an aluminum bat concealed in his waistband so he could comply with the officer's orders,[204] but the arrestee subsequently denied making that admission.[205] Accordingly, the officer sought the reporter's testimony to confirm that the arrestee made that statement to the reporter so as to bolster his defense that the arrestee's own admitted actions justified the shooting.[206]

The court reviewed the cases in the Eleventh Circuit and concluded that, in contrast with the First and Second Circuits, the Eleventh Circuit does not apply a less demanding standard when non-confidential information is involved.[207] The court further concluded that the Eleventh Circuit's standard

> does not require the party seeking disclosure to demonstrate that it cannot prove its case without the requested information, only that it has a compelling need for the information where the court determines that the information is both highly relevant and where other sources for the information are not available.[208]

198. *Id.* at *5.
199. *Id.* at *7.
200. *Id.*
201. Gregory v. Miami-Dade Cty., No. 13-21350-CIV, 2015 WL 3442008 (S.D. Fla. May 28, 2015).
202. *Id.* at *1.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at *5.
208. *Id.* at *9.

Ultimately, the court deemed the "unique circumstances" of this "rare" case to be sufficient to require testimony from the NBC reporter because otherwise "the trier of fact may be deprived of the opportunity to consider an admission by the Plaintiff" regarding the central issue in the case.[209]

C. *State Cases*

Two cases from Illinois courts were of note this year. In a sexual assault case brought by a student against his former teacher, the Northern District of Illinois, applying Illinois law and addressing a question that has yet to be addressed by the Illinois Supreme Court, concluded that video outtakes were source material protected by the Illinois Reporter's Privilege Act.[210] The court ruled that although the privileged outtakes could convey information regarding the defendant's alleged predatory behavior toward boys and that such information was relevant to the parties' claims and/or defenses,[211] the defendant had not met the remaining requirements to divest the privilege under the Act.[212]

Additionally, the Illinois Appellate Court reversed a trial court decision's finding a reporter in contempt for refusing to disclose the identity of his confidential sources.[213] The reporter had published a series of stories about a grisly double murder based on information received from an unnamed source.[214] Finding that all other means of identifying the source had been exhausted and that disclosure of the source was essential to determining whether the secrecy of the grand jury proceedings or discovery rules had been violated, the trial judge ordered the reporter to identify his source.[215] The appellate court reversed, finding that "the identity of [the reporter's] source cannot be said to be relevant to a fact of consequence to the first degree murder allegations,"[216] emphasizing that the purpose of the privilege "is to assure reporters access to information, thereby encouraging a free press and a well-informed citizenry."[217]

VII. INSURANCE

A. *Privacy*

In the context of liability policies providing personal and advertising injury coverage for "oral or written publication of material that violates a

209. *Id.* at *10.
210. Kelley v. Lempesis, No. 13-cv-4922, 2015 WL 4910952 (N.D. Ill. Aug. 17, 2015).
211. *Id.* at *4.
212. *Id.* at *4–5.
213. People v. McKee, 24 N.E.3d 75 (Ill. Ct. App. 2014).
214. *Id.* at 76.
215. *Id.* at 77.
216. *Id.* at 79.
217. *Id.* at 78.

person's right of privacy," courts across the nation continued to construe the undefined policy term "publication" as requiring publication to a third party. Opinions were issued in various contexts, including cases involving illegally recorded customer calls,[218] spyware,[219] and zip code collection.[220] Where there was no evidence of publication to a third party, these courts reaffirmed that insurance carriers had no duty to defend or indemnify.[221]

In the context of a putative class action lawsuit for "willful" violations of the Fair and Accurate Credit Transaction Act (FACTA),[222] the Eleventh Circuit construed "knowing conduct" exclusions applicable to coverage for personal injury, advertising injury, and website injury liability.[223] Because the Supreme Court has held that "willfulness," as defined in FACTA, encompasses both "knowing" violations and those committed in "reckless disregard" of the statute's requirements, the knowing conduct exclusions did not preclude a duty to defend.[224]

218. Defender Sec. Co. v. First Mercury Ins. Co., 803 F.3d 327, 333 (7th Cir. 2015) (applying Indiana law) (upholding order granting the defendant's motion to dismiss). In *Defender*, the Seventh Circuit upheld an Indiana federal court ruling to hold 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 333 (rejecting Encore Receivable Mgmt., Inc. v. Ace Prop. & Cas. Ins., No. 1:12-cv-297, 2013 WL 3354571 (S.D. Ohio July 3, 2013) (*vacated* May 19, 2014)). *Defender* held the underlying plaintiffs' alleged sharing of personal information during recorded calls at most establishes that the plaintiffs published information about themselves, not that the insured published information about the plaintiffs to third parties, as required by Indiana law. *Defender*, 2015 WL 5692516, at 333.

219. Am. Econ. Ins. Co. v. Aspen Way Enter., Inc., No., CV 14-09-BLG-SPW, 2015 WL 5680134 (Sept. 25, 2015) (applying Montana law). "Publication" occurs when information is transmitted to a third party. *Id.* at *8. The court found an underlying claim for violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2511, related to the insured's installation of spyware on rental computers could allege "personal and advertising injury" as defined by the policy; however, the "Recording and Distribution Exclusion" applied to bar any duty to defend. *Id.* at *14.

220. OneBeacon Am. Ins. Co. v. Urban Outfitters, Inc., 625 Fed.App'x 177 (3d Cir. Sept. 15, 2015) (applying Pennsylvania law) ("publication" requires dissemination to the public) (affirming OneBeacon Am. Ins. Co. v. Urban Outfitters, Inc., 21 F. Supp. 3d 426 (E.D. Penn. 2014)).

221. *Defender*, 2015 WL 5692516, at *5; *Aspen*, 2015 WL 5680134, at *14; *Urban Outfitters*, 2015 WL 5333845, at *2; *but compare* Travelers Indem. Co. of Am. v. Portal Healthcare Solutions, LLC, 35 F. Supp. 3d 765, 771 (E.D. Va. 2014) (making confidential medical records publicly accessible through online search were "published the moment they became accessible to the public via an online search" regardless of whether the public read the information under policy providing coverage for publication of electronic material).

222. 15 U.S.C. § 1681c(g)(1) (prohibiting "print[ing] more than the last five digits of the [credit] card number or the expiration date upon any receipt provided to the cardholder. . . .").

223. Travelers Prop. Cas. Co. of Am. v. Kansas City Landsmen, LLC, 592 F. App'x 876, 879 (11th Cir. Jan. 12, 2015).

224. *Id.* at 882 (construing definition in FACTA § 1681n).

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)[225] and related state laws. Most courts continue to hold policy exclusions for TCPA claims or for communications in violation of statutes apply to bar coverage—to the extent the underlying action alleges a potentially covered privacy violation under the applicable law.[226] In the context of different types of policies, other exclusions have also been enforced to preclude coverage for TCPA claims.[227] Limiting a carrier's indemnity obligation, the Eighth Circuit upheld a federal court ruling under Missouri law, which held that the policy's annual, per-claim deductible of $1000 applied to bar an insurer's indemnity obligation for a TCPA class action, despite having a duty to defend.[228]

B. *Defamation*

Where,[229] when,[230] and why[231] allegedly defamatory comments were made proved critical for multiple courts examining the potential for coverage. In a case arising from a confrontation between a loss prevention officer and a customer at a home improvement store, the Indiana Court of Appeals found an exclusion for assault and battery based claims did not bar a duty to defend a slander claim because it was based on a separate act occurring inside the store after the initial physical confrontation outside the store.[232] Similarly, the Florida District Court of Appeal found an

225. 47 U.S.C. § 227.

226. *See*, *e.g.*, Emcasco Ins. Co. v. CE Design, LTD, 784 F.3d 1371, 1383–85 (10th Cir. 2015) (applying Oklahoma law) (exclusion serves as additional grounds for no coverage for fax blasting claim under TCPA); Am. Cas. Co. of Reading, PA v. Superior Pharm., LLC, 86 F. Supp. 3d 1307, 1315 (M.D. Fla. 2015); *but see* Addison Automatics, Inc. v. Netherlands Ins. Co., No. 11-4042, 2015 WL 4979021 (Mass. Super. Ct. Aug. 17, 2015) (applying New Jersey law) (not included in official reporter) (TCPA exclusion unenforceable where added to renewal policy and notice of changes not given to the insured in writing as required by N.J. ADMIN. CODE § 11:1-20.2(c)).

227. L.A. Lakers, Inc. v. Fed. Ins. Co., No. CV 14-7743 DMG(SHx), 2015 WL 2088865 (C.D. Cal. Apr. 17, 2015), *appeal filed* May 21, 2015 (applying California law) (exclusion for claims "based upon, arising from, or in consequence of . . . invasion of privacy" in D&O policy precluded duty to defend insured against TCPA lawsuit relating to allegedly unsolicited text messages).

228. W. Heritage Ins. Co. v. Asphalt Wizards, 795 F.3d 832, 840 (8th Cir. 2015) (applying Missouri law) (upholding W. Heritage Ins. Co. v. Love, 24 F. Supp. 3d 866 (W.D. Mo. 2014).

229. Bernard v. Menard, Inc., 25 N.E.3d 750 (Ind. App. Ct. 2015).

230. Khatib v. Old Dominion Ins. Co., 153 So. 3d 943 (Fla. Dist. App. Ct. 2014).

231. Sletten & Brettin Orthodontics, LLC v. Cont'l Cas. Co., 782 F.3d. 931 (8th Cir. 2015).

232. *Bernard*, 25 N.E.3d at 760. After Bernard and his fiancée purchased certain items at a Menard's in Indianapolis, the loss prevention officer confronted him in the parking lot, grabbed him by the arm, slammed him into his van, and threw him to the ground. The insurance policy had an endorsement excluding claims for assault and battery from coverage.

employment-related practices exclusion inapplicable in a case arising from allegedly defamatory accusations made at a shareholders meeting.[233] Finally, the Eighth Circuit held an intentional acts exclusion precluded coverage for defamation claims requiring proof of actual malice arising from comments made on the Internet by an orthodontist about a competitor.[234] In each instance, the orthodontist posed as a patient of his competitor and posted fake, negative reviews.[235]

C. *Advertising Injury*

Cases analyzing coverage for advertising injury necessarily begin with consideration of what constitutes advertisement. The Fifth Circuit found that a home builder's model homes were "advertisements" for the purpose of coverage.[236] The insurer had argued that houses could never be advertisements because a house could not be a "notice" that was "broadcast or published."[237] The court, however, concluded that the model homes as well as yard signs were the builder's primary means of marketing its construction business.[238] Meanwhile, the U.S. District Court for the Southern District of Texas held that misrepresenting the scope of the insured's own patent in targeted communications to specific contracting authorities was not an advertisement.[239] In a case involving two competing test preparation companies, the Fifth Circuit found that

Bernard, however, was forced to return to the store and claimed he was detained for an unreasonable amount of time and slandered by the shoplifting accusations. The insurance carrier, Capitol Specialty Insurance Corp., argued that all of Bernard's claims arose out of or were related to the battery. The court found that "[w]hat occurred inside the store was separate from and unrelated to what occurred outside in the parking lot" and not "one continuous, ongoing incident." As such, the slander and false imprisonment claims were subject to the duty to defend.

233. *Khatib*, 153 So. 3d at 947. This case arose out of dispute between Dr. Majdi Ashchi, the founder of First Coast Cardiovascular Institute (FCCI), and three other doctors who were serving as officers or directors of FCCI. After a dispute over control of FCCI, Dr. Aschi filed a third-party defamation complaint against his former colleagues. The court found the employment-related practices exclusion inapplicable because not all business-related activities are necessarily employment related. Here, the allegedly defamatory comments about Dr. Aschi were possibly made in the context of business-related conferences or business-related social events, making the employment-related practices exclusion inapplicable.

234. *Sletten & Brettin Orthodontics*, 782 F.3d at 935.

235. The insured orthodontics practice argued that applying the intentional acts exclusion would make coverage for defamation illusory because of the actual malice standard in cases against public figures. The court rejected this argument because intent is not an element for defamation claims against private individuals—leaving coverage for many claims of defamation committed against private individuals.

236. Mid-Continent Cas. Co. v. Kipp Flores Architects, LLC, 602 F. App'x 985, 994 (5th Cir. 2015).

237. *Id.* at 993.

238. *Id.* at 994.

239. Uretek (USA), Inc. v. Cont'l Cas. Co., No. 4:13-cv-3746, 2015 WL 667880 (S.D. Tex. Feb. 17, 2015).

allegations that a website was "confusingly similar" did not trigger coverage as a potential trade dress infringement claim.[240] Finally, the Sixth Circuit concluded that promotional gift cards were not coupons and thus not subject to an exclusion to coverage.[241]

The scope of coverage for advertisement and advertising coverage, of course, is often limited by exclusions such as a breach of contract exclusion,[242] broadcasting exclusion,[243] and intellectual property exclusion.[244]

VIII. ADVERTISING LAW

A. *Sweepstakes and Contests*

On September 17, 2015, the Federal Communications Commission (FCC) released the long-awaited revision to the Contest Rule.[245] The salient point is that material terms no longer need to be broadcast on air.

240. Test Masters Educ. Servs., Inc. v. State Farm Lloyds, 791 F.3d 561 (5th Cir. 2015). The insurance policy at issue provided coverage for trade dress claims, but not trademark claims. In the original counterclaim, it was alleged that Test Master's website used a map that "mimicked" the map on the competitor's website. The amended counterclaim removed all references to the map, and the insurer withdrew coverage. *Id.* at 564. The court found the allegations that the website was "confusingly similar" due to use of a similar service mark and false representations regarding the services offered. Any allegations of confusion did not relate to the competitor's trade dress. *Id.* at 567.

241. ACE European Grp., Ltd. v. Abercrombie & Fitch Co., Nos. 14-4073, 14-4074, 621 Fed. App'x 338 (6th Cir. Aug. 13 2015). In 2009, Abercrombie had given $25 promotion gift cards to customers who purchased a certain amount of goods. Some of the gift cards contained the phrase "no expiration date." When Abercrombie refused to honor the cards, it was sued by customers in three class action lawsuits. The insurer disclaimed coverage on two grounds, breach of contract and over-redemption of coupons. The court found that the gift cards were neither contracts, *id.* at 342, nor coupons, *id.*, because the cards were not limited to any particular product and could, in theory, offer more than a discount because the card could be used to obtain an item for free.

242. AXIS Ins. Co. v. Inter/Media Time Buying Corp., No. CV 15-01380-DMG(AJWx), 2015 WL 3609300 (C.D. Cal. June 8, 2015). The court found that all of the allegations in the underlying complaint "flow from" the insured's contractual obligations to purchase advertising time slots for its client and make full disclosures of the costs. Therefore, the breach of contract exclusion precluded coverage for the entire underlying complaint. *Id.* at *8.

243. Dish Network Corp. v. Arrowood Indem. Co., 772 F.3d 856 (10th Cir. 2014). The court rejected the argument that satellite television programming should not be considered "broadcasting." Therefore, the exclusion for "any advertising injury arising out of an offense committed by an insured whose business is advertising, broadcasting, publishing or telecasting" was applicable and precluded coverage.

244. Alterra Excess and Surplus Ins. Co. v. Snyder, 234 Cal. App. 4th 1390 (2015). In a case involving the Estate of R. Buckminster "Bucky" Fuller and its claims for misappropriation of name and likeness, the court found the insurer's exclusion entitled "Infringement of Copyright, Patent, Trademark or Trade Secret" could reasonably be understood to apply to the claims asserted by the estate. *Id.* at 1408–09. The exclusion in question was commonly referred to as the "Intellectual Property" exclusion and included the phrase "or other intellectual property rights" that the court found broad enough to include the claims for misappropriation of name and likeness.

245. Broadcast Licensee-Conducted Contests, 80 Fed. Reg. 64354 (Oct. 23, 2015) (to be codified at 73 C.F.R. pt. 73).

The station can now direct the viewer to a "readily accessible" station website for the material terms.[246]

The station can disclose the URL where the material terms reside "with information sufficient for a consumer to find those terms easily" (e.g., stationname.com).[247] The station does not need to give the "complete, direct website address" where material terms are posted (e.g., stationname.com/contests/jonesfurnituresweepstakesrules).[248] The website name must be broadcast "periodically."[249] According to the FCC's Report and Order, the link to the material terms must be "conspicuously located on the website home page and must be labeled in a way that makes clear its relation to contest information," such as a "contests" tab.[250] The material terms must remain on the website for at least thirty days after the promotion has concluded (i.e., after a winner has been selected), and expired material terms should be clearly labeled.[251]

One interesting element of the new rule is that the FCC will now allow alterations to the material terms while the promotion is live. According to the Report and Order, "[t]he Contest Rule prohibits false, misleading or deceptive contest descriptions and requires broadcasters to conduct their contests substantially as announced. Accordingly, we do not expect broadcasters to regularly change the material terms of a contest after the contest has commenced."[252] The FCC nonetheless recognized that "on rare occasions, limited changes to a contest's terms may be necessary to address changes in circumstances beyond the anticipation or control of the broadcaster."[253]

Notwithstanding the FCC's allowance of some changes, there are still good reasons not to change material terms, and the station does not have the unfettered ability to change material terms midstream. As the Report and Order states:

> We emphasize that a broadcaster that effectuates a change in terms that unfairly or deceptively alters the operation of the contest or the nature or value of the prize or materially disadvantages existing contestants will be deemed to have rendered prior descriptions false, misleading, and deceptive and, thus, would violate the Contest Rule, regardless of whether such alterations are announced on air or posted to a website.[254]

246. *Id.* at 64355, 64356.
247. *Id.* at 64356.
248. *Id.*
249. *Id.*
250. *Id.* at 64357.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 64357, 64358.

If there is a change, it must be disclosed on air within twenty-four hours of the change on the website and announced periodically on air thereafter.[255] Finally, the definition of "material terms" has not changed, and a station can (if it so desires) still disclose material terms on air and thereby comply with the rule.[256]

The new rules were announced in the *Federal Register* on October 23, 2015, and were to become effective upon Office of Management and Budget approval and announcement of an effective date.

B. *Endorsements and Testimonials*

In June 2015, the FTC issued revised FAQs for the Endorsement Guides.[257] The new FAQs replaced FAQs originally released in 2010; the Endorsement Guides[258] themselves had been updated in 2009.

Not surprisingly, the revised FAQs focus on social media. The general theme of the revised FAQs is disclosure of material connections where the consumer would not reasonably expect there to be a connection. Specifically, in terms of social media the revised FAQs note, among other things, that even the posting of a picture on social media without comment could convey a message that the poster likes and approves the product and could therefore be an endorsement. It "would be even better" to have multiple disclosures of a material connection in a YouTube video (as opposed to a single disclosure at the beginning of the video). "Sweepstakes" should be used in a hashtag instead of "sweeps" because many people likely would not understand what "sweeps" means and the failure of people to disclose that they were incentivized for giving "likes" "might not be a problem."

The FAQs also set forth clear guidelines for companies to train and monitor members of their network of bloggers and social media influencers. The FTC noted that the required level of oversight varies based on the risk that the product being marketed could cause consumer harm, but all advertisers should (1) tell members of its network what they can and cannot say about the products, (2) instruct members of its network on their responsibilities for disclosing their connection to the advertiser, (3) periodically search what members of its network are saying about its products, and (4) follow up if it discovers questionable practices.

The FTC noted that it is impossible for an advertiser to know every single statement made by members of its network but that the advertiser should make a "reasonable effort" to know what the network members are saying.

255. *Id.* at 64357.
256. *Id.* at 64355.
257. Fed. Trade Comm'n, *FTC Endorsement Guides: What People Are Asking*, https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.
258. 16 C.F.R. § 255.0.

C. *FCC Telephone Consumer Protection Act (TCPA)*

On July 10, 2015, the Federal Communications Commission (FCC) released a Declaratory Ruling and Order resolving several petitions filed by businesses and industry groups seeking clarification of various issues relating to the Telephone Consumer Protection Act.[259] Congress enacted the Act in 1991 to address certain practices thought to be an invasion of consumer privacy and a risk to public safety.[260] Under the Act and the FCC implementing regulations, rules, and orders (collectively, the TCPA), if a caller uses an automated telephone dialing system (ATDS or autodialer) or prerecorded message to make a non-emergency call to a wireless phone, the caller must have obtained the consumer's prior express consent or face liability for violating the TCPA. Prior express consent for these calls must be in writing if the message is telemarketing, but can be either oral or written if the call is informational.[261] If the call includes or introduces an advertisement or constitutes telemarketing, consent must be in writing.[262] The TCPA implementing regulations provide specific requirements for obtaining written consent.[263]

The July 2015 Order expands consumer protections and rejects exemptions and safe harbors requested by the petitioners. It likely will fuel a continued rise in TCPA-related class action lawsuits.

The Order reiterates that the TCPA's consent requirement applies to short message service text messages (SMS or text message) in addition to voice calls.[264] The Order also confirms that consumer consent is required for Internet-to-phone SMS text messages.[265] Internet-to-phone SMS

259. *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, FCC 15-72, 30 F.C.C.R. 7961, 7966 (July 10, 2015).

260. Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991).

261. 47 C.F.R. § 64.1200(a)(1)(iii); *2015 Declaratory Ruling and Order*, 30 F.C.C.R at 7971. "Persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 92-443, 7 F.C.C.R. 8752, 8767 (Oct. 16, 1992).

262. 47 C.F.R. § 64.1200(a)(2); *2015 Declaratory Ruling and Order*, 30 F.C.C.R at 7971. The TCPA implementing regulations define "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. § 64.1200(f)(1). The regulations define "telemarketing" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(12).

263. Express written consent requires agreement in writing that includes (1) the signature of the person called (valid E-SIGN acceptable); (2) clear authorization for the caller to deliver (or cause to be delivered) to the person telemarketing messages using an ATDS or artificial or prerecorded voice; (3) the phone number to which the signatory authorizes the advertisements or telemarketing messages to be delivered; and (4) a statement that the person is not required to give consent as a condition of purchasing any property, goods, or services. 47 C.F.R. § 64.1200(f)(8).

264. *2015 Declaratory Ruling and Order*, 30 F.C.C.R at 7979–80.

265. *Id.* at 8017.

refers to messages converted to SMS messages from messages sent or directed to an address with an Internet domain reference, including both those sent as e-mail and those entered at a wireless service provider's website interface (*e.g.*, 5551212@txt.carrier.net).[266]

The Order reaffirms dialing equipment that generally has the *capacity* to store or produce and dial random or sequential numbers meets the TCPA's definition of "autodialer" even if it is not presently used for that purpose, including when the caller is calling a set list of consumers. The TCPA does not exempt equipment that lacks the "present ability" to dial randomly or sequentially.[267] Under the TCPA, dialers that require "human intervention" are not considered ATDS. However, the application of the "human intervention element" must be made on a "case-by-case determination."[268] While at least one court recently dismissed a TCPA claim based on a finding that the dialing system required human intervention, the Order suggests that most dialing systems with the capacity to dial randomly or sequentially are covered by the TCPA.[269]

The Order clarifies that a user who sends text messages using a mobile application, and not the app provider, is the caller for TCPA purposes where the app provider "merely ha[s] some role, however minor, in the causal chain that results in the making of a telephone call."[270] Where the app user determines (1) whether to send a message, (2) to whom to send a message, and (3) when the message is sent, the app user is the "caller" for TCPA purposes.[271]

The Order states that a caller cannot "designate the exclusive means by which consumers must revoke consent."[272] Under the TCPA,

> consumers have a right to revoke consent, using any reasonable method including orally or in writing. Consumers generally may revoke, for example, by way of a consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location, among other possibilities.[273]

The onus is on callers to confirm that called parties have not revoked prior consent by *any* of these reasonable means.

266. *Id.* at 8017 n.374.
267. *Id.* at 7975.
268. *Id.*
269. Luna v. Shac, LLC, No. 14-cv-00607-HRL, 2015 U.S. Dist. LEXIS 109841, at *14 (N.D. Cal. Aug. 19, 2015) (granting summary judgment for the defendant on TCPA claim because subject text messages were sent due to human intervention).
270. *2015 Declaratory Ruling and Order*, 30 F.C.C.R at 7979.
271. *Id.* at 7981.
272. *Id.* at 7996.
273. *Id.*

The Order clarifies that "a caller making a call subject to the TCPA to a number reassigned from [a] consumer who gave consent for the call to a new consumer is liable for violating the TCPA"—subject to a limited one-call "safe harbor" exception where the caller does not know of the reassignment.[274] The Order further clarifies that the "TCPA requires the consent not of the intended recipient of a call, but of the current subscriber (or non-subscriber customary user of the phone) and that caller best practices can facilitate detection of reassignments before calls."[275] It may be difficult for callers to determine if they have exhausted the safe harbor when they are operating under the reasonable assumption that they obtained consent for the call from the original subscriber.

The TCPA rule, effective October 16, 2013, expanded the requirements for obtaining prior express written consent for telemarketing calls.[276] Under the new rule, telemarketers must tell consumers the telemarketing will be done with autodialer equipment and that consent is not a condition of purchase.[277] The July 2015 Order clarifies that consumer's written consent obtained before the current rule took effect does not satisfy the current rule.[278] The Order granted a waiver from October 16, 2013, until October 7, 2015, for callers relying on the "old" prior express written consent to come into compliance.[279]

The Order clarifies that a one-time text message sent immediately after a consumer's request for the text does not violate the TCPA or FCC rules.[280] For example, a consumer might respond to an advertisement or other retailer call-to-action by texting a keyword to the retailer, which replies by texting a coupon to the consumer. The Order finds that the retailer's text "is not telemarketing, but instead fulfillment of the consumer's request to receive the text" and "the consumer's initiating text clearly constitutes consent to an informational reply in fulfillment of the consumer request."[281]

Immediately following the Order's release, several petitioners filed petitions for review with the U.S. Court of Appeals for the District of Columbia. The court consolidated the petitions for review, and final briefing is due in early 2016 with oral argument to follow.[282]

274. *Id.* at 7999.
275. *Id.* at 7999–8000.
276. 47 C.F.R. § 64.1200(f)(8).
277. *2015 Declaratory Ruling and Order*, 30 F.C.C.R at 8012–13.
278. *Id.* at 8014.
279. *Id.* at 8014–15.
280. *Id.* at 8015.
281. *Id.* at 8015–16.
282. ACA Int'l v. FCC et al., Case No. 15-1211 (D.C. Cir. Oct. 13, 2015).