

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

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This article addresses a range of significant legal developments relating to publishing from October 1, 2015, to September 30, 2016. The first two parts address torts involving defamation and privacy. The third part recaps changes in Internet law concerning anonymous speech, personal jurisdiction, application of the single publication rule, immunity to interactive computer service providers under Section 230 of the Communications Decency Act, and defamation on social media. Parts IV, V, and VI address emerging topics on the collection and publication of news, including access, newsgathering using drones, the right to record, and protecting a reporter’s confidential and non-confidential sources. Part VII covers emerging trends

in insurance coverage for content-based torts. Part VIII sets forth developments in advertising law relating to social media influencers and the injury-in-fact requirement in Telephone Consumer Protection Act claims.

I. DEFAMATION

Although courts decided a number of interesting defamation cases over the past year—and dealt with topics ranging from the contours of libel by implication in Texas¹ to the ability of Bill Cosby to publicly defend himself against rape allegations²—four federal circuit decisions stand out. In these decisions, the courts grappled with actual malice pleading standards, the propriety of injunctions against defamatory speech, a novel claim for unjust enrichment, and the “of and concerning” element.

A. Second Circuit Finds Actual Malice Not Plausibly Pled

In December 2015, the Second Circuit concluded that Rule 8 of the Federal Rules of Civil Procedure requires a limited-purpose public figure to plead in a plausible way that defendants acted with actual malice.³ It then affirmed dismissal of the plaintiff’s complaint on the ground that he failed to satisfy the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*⁴ and *Ashcroft v. Iqbal*.⁵

In *Biro v. Condé Nast*, a plaintiff in the business of authenticating art sued *The New Yorker* and several republishers over an article about the legitimacy of his authentication methods. A limited-purpose public figure required to prove actual malice, the plaintiff alleged that the *New Yorker* defendants “either knew or believed or had reason to believe that many of the statements of fact in the Article were false or inaccurate, and nonetheless published them” and that they “acted with actual malice, or in reckless disregard of the truth, or both.”⁶ The plaintiff further alleged that the *New Yorker* defendants (1) failed to “investigate and determine the validity” of the allegedly defamatory statements; (2) relied on anonymous and biased sources; and (3) “ignore[d] the many other works of art which plaintiff has worked with over the years, as well as his many satisfied clients.”⁷ With regard to the republishers, the plaintiff alleged that they acted with actual malice “in

1. See *KBMT Operating Co. v. Toledo*, 492 S.W.3d 710, 715 (Tex. 2016); *Tatum v. Dallas Morning News*, 493 S.W.3d 646, 664 (Tex. App. 2015).

2. Compare *Hill v. Cosby*, No. 15-cv-1658, 2016 U.S. Dist. LEXIS 15795, at *26–27 (W.D. Pa. Feb. 9, 2016) (granting Cosby’s motion to dismiss), with *Ruehli v. Cosby*, No. 3:15-cv-13796, slip op. (D. Mass. June 23, 2016) (denying Cosby’s motion to dismiss).

3. *Biro v. Condé Nast*, 807 F.3d 541, 545 (2d Cir. 2015).

4. 550 U.S. 544 (2007).

5. 556 U.S. 662 (2009).

6. *Biro*, 807 F.3d at 543.

7. *Id.*

that [they] knew or should have known” that many of the statements of fact in the Article “were false” and that they “published [the statements] . . . notwithstanding that knowledge.” In addition, he alleged that certain republishers either failed to remove or retract the article or published it notwithstanding pending litigation.⁸

Affirming the district court, the Second Circuit held such allegations were insufficient under the pleading standard set forth in Rule 8, which requires a complaint to contain “enough facts to state a claim to relief that is plausible on its face.”⁹ In so holding, the Second Circuit fell in line with decisions from the First,¹⁰ Fourth,¹¹ and Seventh Circuits¹² and rejected the plaintiff’s argument that Fed. R. Civ. P. 9(b) allows malice “to be alleged generally,” holding that whatever the language of Rule 9(b), Rule 8’s plausibility standard applies to pleading intent.¹³ The Second Circuit also disagreed with the plaintiff’s argument that it is “impossible” without discovery to plead facts demonstrating that a claim of actual malice is plausible.¹⁴

B. Seventh Circuit Holds Injunction Against Speech Overbroad

In a non-media libel case, the Seventh Circuit considered the propriety of an injunction against a former nun and her advocate/spokesman.¹⁵ In *McCarthy v. Fuller*, the plaintiffs secured a verdict of \$350,000 in damages (plus attorney fees, sanctions and costs) and also obtained a permanent injunction that enjoined the defendants from publishing a discrete set of statements “as well as any similar statements that contain the same sorts of allegations or inferences.”¹⁶

In reviewing the decision, the Seventh Circuit declined to consider the question “whether it is ever proper to enjoin speech”¹⁷ and instead focused on the particular language of the injunction. It held that because the jury did not indicate which specific statements it found to be defamatory (it simply entered a general verdict), the judge had no basis for enjoining those statements. It also held that the judge had no authority “to enjoin defamatory statements that the jury had not been asked to con-

8. *Id.*

9. *Id.* at 544 (quoting *Twombly*, 550 U.S. at 570). “A claim is plausible ‘when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’ But ‘naked assertions’ or ‘conclusory statements’ are not enough.” *Id.* (quoting *Iqbal*, 556 U.S. at 678, 684).

10. See *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012).

11. See *Mayfield v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012).

12. See *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013).

13. *Biro v. Condé Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015).

14. *Id.* at 545.

15. *McCarthy v. Fuller*, 810 F.3d 456, 459 (7th Cir. 2015).

16. *Id.* at 460.

17. *Id.*

sider in deciding on its verdict” and the “similar statements” language in the injunction was improper because “[a]n injunction must be specific about the acts that it prohibits.”¹⁸

Having concluded that the injunction could not be sustained, the court then turned to the “belief in some quarters” that defamation can never be enjoined, given First Amendment prohibitions on prior restraints. Although it found no reason to answer this question definitively, it expressed sympathy for plaintiffs who sue judgment-proof defendants, stating that “such a rule . . . would make an impecunious defamer undeterrable,” and it stated its view that, although the Supreme Court has not yet addressed the issue, “[m]ost courts would agree . . . that defamatory statements can be enjoined.”¹⁹

The court affirmed the judgment except the injunction, which it vacated, and remanded to the district court to determine whether to issue a new injunction, based on judicial findings regarding which statements were actually defamatory.²⁰

C. Eighth Circuit Remands American Sniper Defamation Claim

In June 2016, the Eighth Circuit vacated a \$1.8 million jury verdict against the estate of U.S. Navy SEAL Chris Kyle, concluding that plaintiff Jesse Ventura’s claim for unjust enrichment “enjoys no legal support under Minnesota law” and remanding Ventura’s defamation claim for a new trial.²¹

Ventura v. Kyle arose out of Kyle’s bestselling book *American Sniper*, in which he briefly described a 2006 altercation with Ventura (although he named Ventura only in post-publication interviews, and not in the book itself). According to Kyle, he punched Ventura after Ventura refused to stop disparaging America, President Bush, and the SEALs themselves, culminating with the statement, “You deserve to lose a few.”²² Ventura denied that any incident whatsoever took place and that he made such statements.

In a trial that took place after Kyle’s untimely death in an unrelated incident, the jury awarded Ventura \$500,000 for defamation and \$1.3 million for unjust enrichment; it rejected his claim for misappropriation of name and likeness. The Eighth Circuit, however, reversed. On the defamation claim, which it remanded for a new trial, it concluded that the verdict was tainted by references in cross-examination and in closing argument to the existence of insurance coverage and that “the district court

18. *Id.* at 460–61.

19. *Id.* at 462.

20. *Id.* at 463.

21. *Ventura v. Kyle*, 825 F.3d 876, 878 (8th Cir. 2016).

22. *See id.* at 879.

clearly abused its discretion in denying a new trial.”²³ On the unjust enrichment claim, the court rejected it outright for two reasons. First, Ventura “had no pre-existing contractual or quasi-contractual relationship with Kyle,” a requirement for unjust enrichment claims under Minnesota law.²⁴ Second, even if Ventura had established this essential element, the “equitable remedy” provided by an unjust enrichment claim would still not be available to him because he had an adequate remedy at law—i.e., money damages for defamation.²⁵ Ventura filed a petition for certiorari to the Supreme Court on October 31, 2016.

D. *Third Circuit Evaluates “Of and Concerning” Requirement*

In a case demonstrating the danger of juxtaposing file photos with breaking news, the Third Circuit re-instated the libel claim of a Philadelphia firefighter who claimed he was defamed when his photograph (taken in 2006) was used next to a 2015 article about a sex scandal within the city’s fire department.²⁶ The plaintiff firefighter had no part in the scandal described in the article.

On re-hearing in *Cheney v. Daily News*, the Third Circuit considered the district court’s decision to dismiss on the ground that the defamatory material was not of and concerning the plaintiff. Although the caption on the plaintiff’s photograph made clear it was a stock photo and nothing in the article itself suggested that plaintiff was involved in the scandal, the court held that the district court erred. It stated, “The photograph was placed directly next to the text of the article and underneath the headline introducing the scandal. Considering that many firefighters were implicated and Cheney’s was the only name in the publication, a reasonable reader could conclude that the inclusion of his photograph and name meant to suggest that the text of the article concerned him.”²⁷

II. PRIVACY

A. *Misappropriation*

California’s anti-strategic lawsuit against public participation (anti-SLAPP) statute required dismissal of a misappropriation claim brought by an army sergeant who claimed the main character in the Oscar-winning film *The Hurt Locker* was based on his life and experiences in Iraq.²⁸ The Ninth Circuit held that the film “is speech that is fully protected by the

23. *Id.* at 886.

24. *Id.* at 887.

25. *Id.*

26. *Cheney v. Daily News L.P.*, 654 F. App’x 578 580 (3d Cir. 2016).

27. *Id.* at 582.

28. *Sarver v. Chartier*, 813 F.3d 891, 906 (9th Cir. 2016).

First Amendment” and the sergeant did not “invest time or money to build up economic value in a marketable performance or identity.”²⁹ Rather, the court concluded, the sergeant was “a private person who lived his life and worked his job.”³⁰

An attorney’s putative class action right of publicity claim against the online attorney directory Avvo failed when a federal district court concluded that the directory is “non-commercial and fully protected by the First Amendment,” comparing the directory to a traditional yellow pages telephone directory.³¹

A New York appellate court rejected misappropriation claims brought under New York Civil Rights Law § 51 by reality TV star Karen Gravano and actress Lindsey Lohan, who claimed that the video game *Grand Theft Auto V* used characters that are depictions of them.³² Despite the plaintiffs’ claims of similarities between themselves and the video game characters, the court held that “defendants did not use [plaintiffs’] name, portrait or picture” in the video game, and in any event the video game does not fall under the New York statute’s definitions of “advertising” or “trade.”³³ The court concluded that the video game is “a work of fiction and satire.”³⁴

The Eleventh Circuit rejected a right of publicity claim brought by the Rosa and Raymond Parks Institute for Self Development, a non-profit corporation that owns rights to the name and likeness of the late Rosa Parks, against Target Corporation arising out of Target’s sale of seven books, a movie, and a plaque about Parks.³⁵ Applying Michigan law, the court held that individual privacy rights “must yield to the qualified privilege to communicate on matters of public interest” and that the use of Rosa Parks’ name and likeness is “necessary to chronicling and discussing the history of the Civil Rights Movement.”³⁶

The long-running and previously reported dispute arising from 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 settled in 2015, pursuant to a confidential settlement agreement which included the dismissal of all of Jordan’s claims.³⁷

29. *Id.* at 905.

30. *Id.*

31. *Vrdolyak v. Avvo, Inc.*, 2016 U.S. Dist. LEXIS 123578, at *10 (N.D. Ill. Sept. 12, 2016).

32. *Gravano v. Take-Two Interactive Software*, 142 A.D.3d 776 (N.Y. 2016).

33. *Id.*

34. *Id.*

35. *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824, 832 (11th Cir. 2016).

36. *Id.* at 830, 832.

37. *Jordan v. Jewel Food Stores, Inc.*, No. 10-cv-00340 (N.D. Ill. Dec. 14, 2015).

B. *False Light*

As discussed in Part I on defamation, the Third Circuit held that a Philadelphia firefighter stated a claim for false light invasion of privacy when his unrelated photograph accompanied a story concerning a sex scandal in the fire department.³⁸

C. *Intrusion*

The Third Circuit held that allegations that Google placed tracking cookies on web browsers by exploiting loopholes in the cookie blockers while at the same time holding “itself out as respecting the cookie blockers” created a triable intrusion claim under California law.³⁹ A “reasonable factfinder could indeed deem Google’s conduct ‘highly offensive’ or ‘an egregious breach of social norms.’”⁴⁰

Allegations that Viacom collected and tracked the browsing history of children who visited Nickelodeon’s website despite promises not to do so could form the basis of an intrusion claim, the Third Circuit held, partially vacating a New Jersey federal district court’s dismissal of the claims.⁴¹

D. *Publication of Private Facts*

In March 2016, a Florida jury returned a verdict for \$115 million in compensatory damages and \$25 million in exemplary damages in the invasion of privacy suit brought by Terry Gene Bollea, known as Hulk Hogan, against Gawker Media arising from Gawker’s posting of a secretly taped video showing Bollea “naked and engaged in private consensual relations.”⁴² After Gawker’s unsuccessful efforts in post-trial motions to have the verdict set aside, the company sought Chapter 11 bankruptcy protection⁴³ and ultimately agreed to pay a \$31 million settlement to end this litigation.⁴⁴

38. See *Cheney v. Daily News L.P.*, 654 F. App’x 578 580 (3d Cir. 2016).

39. *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 151 (3d Cir. 2015), cert. denied sub nom. *Gourley v. Google, Inc.*, 2016 U.S. LEXIS 4597, at *1 (U.S. Oct. 3, 2016).

40. *Id.*

41. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 295 (3d Cir. 2016).

42. *Bollea v. Clem*, No. 12012447-CI-011 (Fla. Cir. Ct. 2016).

43. *In re Gawker Media, LLC*, No. 16-bk-11700 (Bankr. S.D.N.Y. filed June 10, 2016). In its bankruptcy petition, Gawker listed Bollea as an unsecured creditor holding a disputed claim of \$130 million.

44. Brandon Lowrey, *Gawker Founder Pay \$31M To Settle Hulk Hogan Litigation*, LAW360 (Nov. 2, 2016), <http://www.law360.com/articles/858723/gawker-founder-pay-31m-to-settle-hulk-hogan-litigation>.

III. INTERNET LAWA. *Unmasking Anonymous Speakers*

Courts ruling on efforts to unmask anonymous online speakers in the past year issued decisions that were largely protective of anonymous speech rights. Two courts followed the precedent-setting approach established by the Ninth Circuit in *In re Anonymous Online Speakers*,⁴⁵ determining what level of First Amendment scrutiny should apply to such a request by first assessing the nature of the expressive speech at issue (e.g., political, religious, consumer related, social commentary, etc.). In *John Doe 2 v. Superior Court*, a California appellate court, upon finding that emails sent to Hollywood executives that were allegedly defamatory of a visual effects studio were not “commercial speech” worthy of lesser First Amendment protection, denied a discovery request for the emails’ author, holding that the statements at issue were either statements of opinion or not defamatory as a matter of law.⁴⁶ And in *Smythe v. Does*, the Northern District of California quashed a subpoena seeking the identity of one who tweeted what the court described as “social or commercial criticism” about the plaintiff; the plaintiff failed to persuade the court that she had a “real evidentiary basis” for her complaint because she did not explain how the tweets referred to her.⁴⁷

Twitter users maintained their anonymity in two additional cases this year as well, as did a user who posted a review on the job hunting website Glassdoor.com. In *Herbalife International of America, Inc. v. Twitter, Inc.*, a trial court in Illinois denied pre-suit discovery to a company seeking to unmask a Twitter user because the challenged tweets were nondefamatory statements of opinion.⁴⁸ In *SunEnergy1, LLC v. Brown*, a trial court in Delaware quashed a subpoena seeking to identify the author of a post on Glassdoor.com, holding that the nature of online reviews generally, and the specific language of the post, meant that the post was nonactionable opinion.⁴⁹ And in *Woods v. Doe*, a trial court in California denied a plaintiff actor’s request for discovery, under the state’s anti-SLAPP statute, for identifying information concerning two Twitter users who had re-

45. 661 F.3d 1168, 1176–77 (9th Cir. 2011), *replacing previous opinion at* 611 F.3d 653 (9th Cir. 2010).

46. 206 Cal. Rptr. 3d 60, 75 (Ct. App. 2016). The court also declined the plaintiff’s invitation to grant the requested discovery, notwithstanding these defects, on the ground that the anonymous speaker might be a studio employee subject to a mandatory arbitration provision in an employment contract. *Id.* at 76.

47. No. 15-mc-80292-LB, 2016 U.S. Dist. LEXIS 1348, at *6, *11 (N.D. Cal. Jan. 5, 2016).

48. No. 2015-L-007373 (Ill. Cir. Ct. Cook Cty. Nov. 20, 2015).

49. No. N14M-12-028, 2015 WL 7776625, 2015 Del. Super. LEXIS 982, at *12–14 (Del. Super. Ct. Nov. 30, 2015).

ferred to the plaintiff as a “cocaine addict.” The court held that because the plaintiff had not yet established a prima facie case that the statement was an actionable statement of fact, and not rhetorical hyperbole, he had not established good cause to pierce the users’ anonymity.⁵⁰

Finally, fee shifting statutes and state shield laws worked in favor of those who sought to protect their anonymity this year. In *Doe No. 1 v. Burke*, the District of Columbia’s highest court held that an anonymous Wikipedia contributor who prevailed in his effort to quash a subpoena issued to Wikipedia was “presumptively” entitled to his attorney fees under D.C.’s anti-SLAPP statute, even though the attorney fee provision in the statute uses the term “may” instead of “shall.”⁵¹ And in *Republic of Kazakhstan v. Does 1-100*, the Washington Court of Appeals applied the state’s shield law in quashing a subpoena by the government of Kazakhstan that sought to identify those who registered the domain of an online opposition newspaper.⁵²

B. *Personal Jurisdiction*

The South Carolina Court of Appeals joined the ranks of state appellate courts holding that merely posting an article online that mentions a resident of the jurisdiction is insufficient to confer personal jurisdiction in a defamation action based on that article.⁵³

The Wisconsin Court of Appeals held that the state’s courts did not have personal jurisdiction over an Australian newspaper even though its website used third-party targeted advertising services that provided advertisements for Wisconsin businesses to viewers in Wisconsin.⁵⁴ According to the court, the Wisconsin-focused advertisements resulted from the choices of website users and the site’s advertising providers, not the newspaper, and therefore did not constitute a direct targeting of Wisconsin by the *Sydney Morning Herald*.⁵⁵ Similarly, a federal judge in St. Louis held that Gawker’s use of similar third-party targeted advertising providers was insufficient to confer jurisdiction over the New York-based website in Missouri.⁵⁶

Posting a hyperlink to an allegedly defamatory video in the comments sections of local news websites did not confer personal jurisdiction over an

50. No. BC589746 (Cal. Super. Ct. Oct. 26, 2015). The court went on to deny the defendant’s anti-SLAPP motion, however; the case is on appeal.

51. 91 A.3d 1031 (D.C. 2014), *appeal after remand*, 133 A.3d 569, 576–78 (D.C. 2016).

52. 368 P.3d 524, 530 (Wash. Ct. App. 2016).

53. *Hidria, USA, Inc. v. Delo*, 783 S.E.2d 839, 848 (S.C. Ct. App. 2016).

54. *Salfinger v. Fairfax Media Ltd.*, 876 N.W.2d 160, 176–77 (Wis. Ct. App. 2016).

55. *Id.*

56. *Johnson v. Gawker Media, LLC*, 2016 U.S. Dist. LEXIS 5088, at *31–32 (E.D. Mo. Jan. 15, 2016).

out-of-state blogger, a federal judge in Chicago ruled.⁵⁷ Because merely posting a hyperlink is not a republication of the material for purposes of the defamation tort, the plaintiff could not rely on the defendant's postings as the activity targeting the forum state necessary for jurisdiction to attach.⁵⁸

In another rejection of a plaintiff's attempts to create a new jurisdictional hook, a federal judge in Washington, D.C., ruled that the court did not have personal jurisdiction over the authors of allegedly defamatory postings on websites hosted on a server in the District of Columbia when the authors had no other relevant contacts with the nation's capital.⁵⁹

C. Single Publication Rule and Linking Liability

Two state courts held that providing a hyperlink to another person's online content does not republish the linked information. A Pennsylvania court held that a defendant who linked to and "liked" an allegedly defamatory political story on Facebook, with a brief reference to the website and an "exhortation" to readers to go vote, "did not initiate a republication" of the story.⁶⁰ The court reasoned that a link "is akin to the release of an additional copy of the same edition of a publication" and "liking" another person's post "is not equivalent to a reiteration."⁶¹ Similarly, the Washington Court of Appeals held that a hyperlink is not a publication of the underlying comments. It "is more like a reference than a separate publication" because it provides access to the original statements without communicating the contents of those original statements.⁶²

The federal district court in Utah held that an amended version of the defendant's comments—an "overview" section about the plaintiff's treatment facility on the defendant's website—which added 700 words and changed "significant words" about the facility, "placed the information in a new form" and therefore constituted a new publication.⁶³

The Wisconsin Court of Appeals held that because a defendant "actively updated" its webpage "by adding additional derogatory posts" about the plaintiff, the defendant "actively sought new audiences" through "a continuing course of conduct" that continued within the statute of limitations; thus the earlier publications were not time-barred.⁶⁴

57. *Bittman v. Fox*, 2016 U.S. Dist. LEXIS 63948, at *20–22 (N.D. Ill. May 16, 2016).

58. *Id.*

59. *Hourani v. Psybersolutions LLC*, 164 F. Supp. 3d 128, 138–39 (D.D.C. 2016). The court also rejected the plaintiff's theory that personal jurisdiction existed because the authors were acting as agents of the D.C.-based website host. *Id.* at 138.

60. *Slozer v. Slattery*, Pa. Super. Unpub. LEXIS 4259 (Pa. Super. Ct. 2015).

61. *Id.* at *17.

62. *Life Designs Ranch, Inc. v. Sommer*, 364 P.3d 129, 138 (Wash. Ct. App. 2015).

63. *Diamond Ranch Acad., Inc. v. Filer*, No. 2:14-CV-751-TC, 2016 U.S. LEXIS 19210, at *34–35 (D. Utah Feb. 17, 2016), *appeal filed*, No. 16-4034 (10th Cir. Mar. 18, 2016).

64. *Laughland v. Beckett*, 870 N.W.2d 466, 472–73 (Wis. Ct. App. 2015).

D. Section 230 of the Communications Decency Act

This past year brought tumultuous changes in the case law applying the federal statutory immunity to ISPs and other “Internet intermediaries” from claims premised on content provided by others. While numerous courts have continued to apply Section 230 of the Communications Decency Act (CDA) broadly to extend immunity in a wide variety of contexts and claims,⁶⁵ a growing number of judges have recently read Section 230 narrowly and declined to dismiss claims premised on third-party provided content—prompting leading academic commentator Eric Goldman to openly ask “WTF?”⁶⁶

On the positive side, the First Circuit affirmed the trial court’s ruling that Backpage.com was immune from claims by three young women, victims of human trafficking, who claimed the website had violated the Trafficking Victims Protection Reauthorization Act of 2008 by supplying a platform for ads that facilitated prostitution.⁶⁷ The court rejected the plaintiffs’ argument that their civil claim was exempt from Section 230 because the federal statute also provided for criminal penalties.

The string of cases that have chipped away at Section 230’s protective shield⁶⁸ began in May 2016 with the Ninth Circuit’s revised opinion in *Jane Doe 14 v. Internet Brands, Inc.*, in which that court held (for the second time) that a state law claim for “negligent failure to warn” against a website for the modeling industry did not seek to hold the website operator as the “publisher or speaker of any information provided by another

65. See, e.g., *O’Kroy v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016) (holding that Google was protected by Section 230, notwithstanding facts that it “performed some automated editorial acts on the content, such as removing spaces and altering font, and it kept the search result up even after O’Kroy complained about it.”); *Kimzey v. Yelp!, Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016) (granting motion to dismiss in favor of Yelp!: “threadbare allegations of fabrication of statements are implausible on their face and are insufficient to avoid immunity under the CDA”); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 234 (7th Cir. 2015) (while granting injunction against sheriff’s efforts to pressure credit card companies to prohibit the use of their credit cards to purchase ads on Backpage.com, noting that the credit card companies likely would have been immune under Section 230 for any advertisements its card users purchased); *Fields v. Twitter, Inc.*, 2016 U.S. Dist. LEXIS 105768 (N.D. Cal. Aug. 10, 2016) (extending immunity under Section 230 to Twitter against plaintiff’s claim that Twitter had facilitated terrorist attacks by ISIS operatives who had communicated via that platform).

66. Eric Goldman, *WTF Is Going On With Section 230?*—Cross v. Facebook, TECH. & MKTG. L. BLOG (June 7, 2016) (collecting thirteen cases in which Section 230 immunity was denied to defendants), <http://blog.ericgoldman.org/archives/2016/06/wtf-is-going-on-with-section-230-cross-v-facebook.htm>.

67. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016), *aff’d* 104 F. Supp. 3d 149 (D. Mass. 2015).

68. See *Judges Are No Longer Giving Tech Companies an Automatic Pass on Civil Liability*, FORTUNE (Aug. 18, 2016) (noting Professor Goldman’s assessment that “[s]ince June 2015, judges have rejected Section 230 defenses in at least 17 cases”), <http://fortune.com/2016/08/18/judges-tech-companies/?iid=leftail>.

information content provider” and therefore was not barred by Section 230.⁶⁹

In a bizarre decision, the U.S. District Court for the Middle District of Florida denied Section 230 immunity, raised on a motion to dismiss, to Google because the complaint had sufficiently alleged that Google *failed to act in good faith* by removing the plaintiff’s websites from its search results without a reason that fell within Google’s own policies, and “the plain language of the CDA only provides immunity for actions voluntarily taken in good faith.”⁷⁰

In June 2016, California’s Court of Appeal ruled that the consumer review website Yelp! must comply with a trial court’s order to remove a negative consumer review, which was entered following a default judgment in a defamation case an attorney brought against the person who had posted the negative review.⁷¹ Yelp!’s petition for review was supported by forty media and online organizations.⁷² The California Supreme Court granted Yelp!’s petition in September 2016.⁷³

E. Defamation on Social Media (“Twibel”)

Courts have continued to show an inclination to consider posts on social media platforms as more likely to be non-defamatory hyperbole or opinion, but as with all defamation cases, context is key. Several recent cases with the potential to influence the development of social media defamation law are unpublished and non-precedential in their jurisdictions, however.

A federal court for the Southern District of New York found that the fact that allegedly defamatory statements were posted on social media was a key indication that they were not verifiable as true or false.⁷⁴ The court held that “the media vehicles used to disseminate the Publications—a Wordpress blog, social media posts, and an unsigned press release complaining about litigation tactics—suggest to readers that they contain

69. Doe No. 14 v. Internet Brands, Inc., 824 F.3d 846, 854 (9th Cir. 2016) (relying on Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009)). The Ninth Circuit subsequently applied this same “failure to warn” exemption to another website, Match.com. Beckman v. Match.com, 2016 U.S. App. LEXIS 16218, at *2–4 (9th Cir. Sept. 1, 2016).

70. E-ventures Worldwide, LLC v. Google, Inc., 2016 U.S. Dist. LEXIS, at *14 (M.D. Fla. May 12, 2016).

71. Hassell v. Bird, 203 Cal. Rptr. 3d 203, 227 (Ct. App. 2016), *review granted*, 208 Cal. Rptr. 3d 284 (Cal. 2016).

72. Eric Goldman, *The Internet Rallies Against a Terrible Section 230 Ruling*—Hassell v. Bird, TECH. & MKTG. L. BLOG (Aug. 22, 2016) (“In support of Yelp’s request, amici submitted 14 letters representing over 40 organizations and over a dozen law professors. Basically, the entire Internet community has rallied around Yelp on this matter.”), <http://blog.ericgoldman.org/archives/2016/08/hassell-v-bird.htm>.

73. Hassell v. Bird, 208 Cal. Rptr. 3d 284 (Cal. Sept. 21, 2016).

74. Live Face on Web, LLC v. Five Boro Mold Specialist Inc., 2016 U.S. Dist. LEXIS 56601, at *7–8 (S.D.N.Y. Apr. 28, 2016).

opinions, not facts, and they are written in an amateurish fashion.”⁷⁵ Similarly, in an unpublished opinion, a New York state trial court held that a reasonable reader would interpret statements on Facebook as “merely rhetorical hyperbole, and not statements of fact that the plaintiff was an actual vampire or criminal,” in part because they “were posted[] on a popular social media website[] during an impassioned reaction to the loss of a landmarked building in the community.”⁷⁶

An intermediate Texas appellate court affirmed a trial court’s denial of a motion to dismiss a defamation claim based on a father’s Facebook post that angrily asserted his wife had been seduced by a coach of his son’s youth baseball team.⁷⁷ The post could be construed as defamatory to the youth league and its president because the statement, “I guess that’s the kind of lessons [sic] they plan on teaching the kids,” could be interpreted as a statement of fact that the league condones adultery.⁷⁸ Another Texas appeals court treated a news organization’s Facebook post as a “news bulletin” but nevertheless affirmed the dismissal of a defamation claim by the mayor of a Mexican city because the posting was about the mayor’s father and did not imply he was involved in his father’s alleged illegal activities.⁷⁹

In Florida, a federal judge dismissed defamation and invasion of privacy claims against Shaquille O’Neal by a man disfigured by a genetic condition whose picture the retired NBA star mocked on his Instagram feed.⁸⁰ However, the judge allowed the plaintiff’s claim of intentional infliction of emotional distress to proceed, holding that O’Neal’s mocking the man on a social media feed with millions of followers could be considered extreme and outrageous conduct.⁸¹

In an unpublished opinion, the Michigan Court of Appeals tackled the issue of “parody” Twitter accounts, those that use an iteration of a person’s name to lampoon that person’s actual statements or actions. The plaintiff, who had described himself on his own Twitter account as a “badass lawyer” and made references to alcohol and drug use, complained that the parody account defamed him by implying he had authored tweets such as “4/20 = Pot smoking holiday[.] Possession of marijuana = Client[.] Client = Income[.] In the words of Snoop Dogg: smoke weed every day.”⁸² The court held that no

75. *Id.*

76. *Stolatis v. Hernandez*, 2016 N.Y. Misc. LEXIS 943, at *12–13 (N.Y. Sup. Ct. Mar. 25, 2016).

77. *Bedford v. Spasoff*, 485 S.W.3d 641, 648–49 (Tex. App. 2016).

78. *Id.*

79. *Entravision Commc’ns Corp. v. Salinas*, 487 S.W.3d 276, 284–85 (Tex. App. 2016), *reconsideration en banc denied* (Mar. 8, 2016), *review denied* (Sept. 23, 2016).

80. *Binion v. O’Neal*, 2016 U.S. Dist. LEXIS, at *18 (S.D. Fla. Jan. 11, 2016).

81. *Id.* at *10.

82. *Levitt v. Felton*, 2016 Mich. App. LEXIS 1006, at *3 (Mich. Ct. App. May 19, 2016).

reasonable reader would mistake the account as the real thing, given that the author had posted several disclaimers and the satirical tweets were too hyperbolic to be taken seriously.⁸³

Finally, in a coda to one of the first social media defamation trials, a California appellate court (again in an unpublished opinion) affirmed a jury verdict in favor of Courtney Love, whose tweets drew a lawsuit from her former attorney.⁸⁴

IV. ACCESS

A. Access Under FOIA Laws

The all-important issue of attorney fees in public records cases was addressed by the Florida Supreme Court in *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, which found that the Public Records Act (PRA) does not require a showing that a public agency acted unreasonably or in bad faith before attorney fees can be awarded to a prevailing party and that the Board's actions imposing conditions that violated the PRA were an "unlawful refusal."⁸⁵ The court held that a 1984 amendment to the fee statute changing "unreasonably refused" to "unlawfully refused" eliminated the potential that an award of attorney fees would be denied just because the public agency acted reasonably in violating the Public Records Act. The public agency's failure to comply, rather than its good or bad faith in doing so, therefore became the relevant inquiry.⁸⁶ The court held that failing to "respond in good faith" may in itself warrant an award of attorney fees, but the legislature did not intend to limit fee awards to such cases.⁸⁷ The unlawful acts at issue in this case, i.e., excessive charges to view or copy the materials, required the requestor "to turn to the courts to vindicate that right," and reasonable attorney fees should have been awarded.⁸⁸

Contrast this to the standard for fees at issue in the Kentucky appellate court in *Cabinet for Health and Family Services v. Courier-Journal, Inc.*⁸⁹ The newspaper had sought records regarding child fatalities or near fatalities, which the Cabinet denied, based in part on "emergency" amendments to its regulations regarding disclosure of child abuse and neglect records that had been adopted following the newspaper's request.⁹⁰

83. *Id.* at *8–9.

84. *Gordon & Holmes v. Love*, 2016 Cal. App. Unpub. LEXIS 755 (Cal. Ct. App. Feb. 1, 2016).

85. 189 So. 3d 120, 129–30 (Fla. 2016).

86. *Id.* at 126.

87. *Id.* at 128.

88. *Id.* at 129.

89. 493 S.W.3d 375, 384 (Ky. Ct. App. 2016).

90. *Id.* at 378–79.

Under the Kentucky Open Records Act (ORA), to be entitled to attorney fees, costs, and penalties, the circuit court must find that the public agency acted “willfully,” “cannot[ing] that the agency withheld records without plausible justification and with conscious disregard of the requester’s rights.”⁹¹ Nevertheless, under this high standard, the court found that the Cabinet had continued to resist “its most basic obligations” under the ORA without any balancing of competing interests of privacy and the public’s need to know how its government works; the court imposed attorney fees and a penalty.⁹²

The D.C. Circuit Court of Appeals issued an opinion regarding access to private email accounts of public officials in the case of *Competitive Enterprise Institute v. Office of Science & Technology Policy*.⁹³ The court held, as matter of first impression, that OSTP’s refusal to undertake a search of agency records that its director allegedly maintained on private email account amounted to an improper “withholding” of alleged agency records.⁹⁴ The requestor had sought “all policy/OSTP-related email sent to or from jholdren@whrc.org.”⁹⁵ OSTP refused to provide records from the address, stating they were “beyond the reach of FOIA” because they were in an “account” that “is under the control of the Woods Hole Research Center, a private organization.”⁹⁶ The court disagreed, stating that if the agency head controls what would otherwise be an agency record, it is still an agency record and must be searched or produced. The purpose of FOIA would not be served if “a department head could deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain.”⁹⁷

The Sixth Circuit held in *Detroit Free Press, Inc. v. U.S. Department of Justice (Free Press II)* that mug shots are subject to a “non-trivial” right of privacy,⁹⁸ overruling *Detroit Free Press, Inc. v. U.S. Department of Justice (Free Press I)*, which held that criminal defendants who have appeared in court during ongoing proceedings lack any privacy interest in their booking photos.⁹⁹ The Tenth and Eleventh Circuits issued rulings rejecting

91. *Id.* at 395 (citing *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013) (interpreting KY. REV. STAT. § 61.882(5))).

92. *Id.* at 386.

93. 827 F.3d 145, 146 (D.C. Cir. 2016).

94. *Id.*

95. *Id.*

96. *Id.* at 146–47.

97. *Id.* at 150.

98. 829 F.3d 478, 484 (6th Cir. 2016).

99. 73 F.3d 93, 97 (6th Cir. 1996).

Free Press I's analysis.¹⁰⁰ At issue is FOIA Exemption 7(C), which prevents disclosure of law enforcement records when the disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹⁰¹ The court noted that booking photos are snapped in a "vulnerable and embarrassing moment" and that mug shots are not even shown to juries because they replace the presumption of innocence with "an unmistakable badge of criminality."¹⁰² The court further noted that while, in 1996, when it decided *Free Press I*, booking photos for all practical purposes disappeared, today "an idle Internet search reveals the same booking photo that once would have required a trip to the local library's microfiche collection."¹⁰³ The court therefore overruled *Free Press I* as "an impermissibly cramped notion of personal privacy that is out of step with the broad privacy interests recognized by our sister circuits."¹⁰⁴

A Florida court of appeals remanded a trial court finding that an economic development commission was a governmental agency for purposes of the Public Records Act.¹⁰⁵ The requestor was a county clerk seeking information regarding potential criminal activity by a company.¹⁰⁶ The commission was a non-profit private corporation that coordinated with county and regional agencies to expand the business and industrial base of the county,¹⁰⁷ and the county paid roughly one-half of the commission's budget.¹⁰⁸ The Florida Supreme Court had developed nine factors to examine in determining whether a private entity is a governmental agency for public records purposes.¹⁰⁹ Because subsequent cases had concluded that "the factor by factor analysis . . . is not necessary when the delegation of governmental responsibility is clear and compelling," the trial court held the commission was a governmental agency on that basis alone.¹¹⁰ The appellate court held, however, that the commission did not completely assume the county's provision of economic development services and remanded for application of the full totality of the factors test.¹¹¹

100. See *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825 (10th Cir. 2012); *Karantalis v. U.S. Dep't of Justice*, 635 F.3d 497 (11th Cir. 2011) (*per curiam*) (adopting district court opinion).

101. 5 U.S.C. § 552(b)(7)(C).

102. *Free Press II*, 892 F.3d at 482.

103. *Id.*

104. *Id.* at 484.

105. *Econ. Dev. Comm'n v. Ellis*, 178 So. 3d 118, 123 (Fla. Dist. Ct. App. 2015).

106. *Id.* at 120.

107. *Id.* at 120–21.

108. *Id.* at 121.

109. *Id.* (citing *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., Inc.*, 596 So. 2d 1029, 1031 (Fla.1992)).

110. *Id.* at 121–22.

111. *Id.* at 123.

B. *Access to Court Proceedings and Records*

The case of *Constand v. Cosby*,¹¹² involving an order to unseal in a years-old Bill Cosby case, is notable as an illustration of how quickly things happen in today's media as well as for its legal issues. Constand filed the lawsuit in 2005 claiming Cosby had drugged and sexually assaulted her. The district court entered an interim order requiring the parties to file discovery motions under seal until the parties had conducted all necessary depositions in the case, whereupon the court would determine which documents should remain sealed.¹¹³ However, the parties settled the case confidentially, and the interim order lay undisturbed until 2014 when AP sought to unseal the documents.¹¹⁴ Notably, in ordering that the documents be immediately unsealed, the district court held that Cosby had reduced privacy interests because he had "donned the mantle of public moralist and mounted the proverbial electronic or print soap box to volunteer his views on, among other things, childrearing, family life, education, and crime."¹¹⁵ Also notably, counsel for Cosby did not, prior to the hearing, request a stay in the event that the court ruled against him and unsealed the documents.¹¹⁶ With no stay and the district court's instruction that the clerk unseal the documents "forthwith," an AP reporter discovered that the documents were publicly available and downloaded them within minutes of the online posting although Cosby's counsel emailed a stay request to the court less than twenty minutes later. Cosby still pursued an appeal to have the documents resealed, arguing that an order re-sealing the documents would leave him "better positioned" to persuade "the various courts in which he finds himself a party" to limit the use of the documents in the proceedings before them.¹¹⁷ The Third Circuit dismissed the appeal as moot, but vacated the unsealing order "out of concern for procedural fairness," namely that parties should not remain bound by a decision that the court of appeals cannot review because it has become moot.¹¹⁸

V. NEWSGATHERING

A. *Drones*

In December 2015, the Federal Aviation Administration (FAA) promulgated regulations requiring anyone who uses a small unmanned aircraft

112. 833 F.3d 405 (3d Cir. 2016).

113. *Id.* at 407.

114. *Id.* at 408.

115. *Id.*

116. *Id.*

117. *Id.* at 411.

118. *Id.* at 412.

to register it.¹¹⁹ Drone owners can register by filling out an online form and paying a \$5 registration fee. After receiving a unique registration number, drone owners must put the registration number on the drone for identification.

In August 2016, FAA regulations that impose less burdensome requirements on drone flights for commercial purposes than the previous scheme became effective.¹²⁰ Under the new regulations, referred to as Part 107, the FAA requires drone operators to have only a “remote pilot certificate,” rather than a pilot’s license, and anyone sixteen-years-old or older may sit for an aeronautical knowledge test regarding drone use to receive the certificate.¹²¹ Part 107 includes a number of restrictions on drone operations. Drones are usually limited to a maximum height of 400 feet in the air, but may fly up to 400 feet above a building within a 400-foot radius of the building.¹²² Even below the 400-foot altitude limit, drones may not operate in certain classes of airspace without prior authorization from the Air Traffic Control responsible for the airspace.¹²³ The most restrictive regulation states that a drone may not be flown “over a human being.”¹²⁴ The regulation commentary makes clear this means over “any part of any person, regardless of the dwell time.”¹²⁵ Other restrictions discuss how, when, and where drones may be operated.¹²⁶

Some commentary has questioned whether the FAA overstepped its regulatory authority with its classification of almost all drones as “aircraft” and its assertion that it can regulate conduct down to just above the surface level. In *Huerta v. Haughwout*, the FAA issued a subpoena to the Haughwouts to investigate YouTube videos they posted showing drones equipped with a pistol and a flamethrower.¹²⁷ The Haughwouts refused to comply, asserting that the FAA had exceeded its authority in defining “aircraft” to include drones such as theirs; thus, they argued, the subpoena was not a valid exercise of administrative subpoena power. The district court concluded that the FAA did not need to resolve the scope of its authority prior to pursuing a subpoena, but simultaneously cautioned that

119. See FAA Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. 78593 (Dec. 16, 2015).

120. Compare 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.), with FAA Operation and Certification of Small Unmanned Aircraft Systems (August Drone Regulations), 81 Fed. Reg. 42063 (June 28, 2016).

121. 14 C.F.R. § 107.61 (2016).

122. 14 C.F.R. § 107.51.

123. 14 C.F.R. § 107.41.

124. 14 C.F.R. § 107.39.

125. See August Drone Regulations, 81 Fed. Reg. at 42129.

126. See, e.g., 14 C.F.R. §§ 107.17, 21, 23, 25, 29.

127. 2016 U.S. Dist. LEXIS 92866, at *3–4 (D. Conn. July 18, 2016).

the FAA may have overreached in asserting authority to regulate drones that are flown just above the surface.

Another important issue is to what extent federal law preempts state law. The FAA stated in a fact sheet that federal law regarding the “operation or flight of aircraft” preempts all state laws on the subject.¹²⁸ Preemption extends to “restrictions on flight altitude[;] flight paths; operations bans; [and] any regulation of the navigable airspace.”¹²⁹ Additionally, the FAA stated that “[m]andating equipment or training for UAS related to aviation safety such as geo-fencing would likely be preempted.”¹³⁰ However, the FAA has qualified its position to affirm that not all state laws regarding drones are preempted. Whether a state law is preempted may turn on whether it prohibits flight completely or instead prohibits a manner of use.

In *Boggs v. Merideth*, the plaintiff brought a declaratory judgment claim, asking the “[c]ourt to resolve th[e] tension and define clearly the rights of aircraft operators and property owners.”¹³¹ The plaintiff alleged that his neighbor shot down his drone when he flew it over the neighbor’s property. The neighbor was criminally charged, but a Kentucky state court judge dismissed the charges, holding that the neighbor had a right to shoot down the drone over his own property. The plaintiff has asked the federal court to conclude that FAA regulations preempt any state law right to shoot down a drone and to find the defendant liable. A motion to dismiss based on lack of a federal question is pending.¹³²

B. Ag-Gag Laws

“Ag-gag” laws are designed to prohibit filming or photographing the operations of an agricultural facility without the consent of the owner, imposing civil and/or criminal liability on violators. Two states that passed ag-gag legislation last year faced challenges to those laws.

Wyoming’s laws imposed criminal and civil penalties on individuals who unlawfully enter private or open lands and gather information related to the land with the intent of delivering this “resource data” to governmental agencies.¹³³ After a lawsuit was filed lodging Free Speech and Petition claims¹³⁴ and the court expressed concern that the law could be read to criminalize activity on public lands, the law was amended to eliminate the reference to “open lands.” The plaintiffs maintained their lawsuit, ar-

128. See FAA State and Local Regulation of Unmanned Aircraft Systems (Dec. 17, 2015), https://www.faa.gov/uas/resources/uas_regulations_policy/media/UAS_Fact_Sheet_Final.pdf.

129. *Id.* at 3.

130. *Id.*

131. No. 3:16-cv-6-DJH (W.D. Ky. filed Jan. 4, 2016).

132. *Boggs v. Merideth*, No. 3:16-cv-6-DJH (W.D. Ky. Mar. 3, 2016).

133. WYO. STAT. §§ 6-3-414, 40-27-101 (2015).

134. *W. Watersheds Project v. Michael*, 2016 U.S. Dist. LEXIS 88843 (D. Wyo. July 6, 2016), *appeal docketed*, No. 16-8083 (10th Cir. Aug. 3, 2016).

guing that the amended law still violated the Free Speech and Equal Protection Clauses. The court disagreed, dismissing their claims as “erroneously premised upon their perceived First Amendment right to trespass upon private property to collect resource data.”¹³⁵ The court also found that the amended statute furthered a legitimate governmental interest in protecting private property rights without targeting a specific group or burdening a fundamental right. The case is on appeal.

North Carolina’s law allows property owners to sue employees who record non-public areas without authorization.¹³⁶ Shortly after the law was enacted, several groups sued for declaratory and injunctive relief regarding the statute’s constitutionality.¹³⁷ The defendants’ motion to dismiss—which alleges lack of subject matter jurisdiction and immunity under the Eleventh Amendment—is pending.

Meanwhile, on October 25, 2016, oral argument was held on the plaintiff’s motion for summary judgment in the nation’s first ag-gag challenge, which involves Utah’s statute.¹³⁸

C. *Photojournalists and the Right to Record*

The right of journalists and citizens to record police activity continues to be a hotly debated topic as images and videos of police interactions continue to proliferate. In Arizona, Senate Bill 1054, which would have prohibited the recording of officers from within twenty feet of law enforcement action, was introduced this year and then killed by its author following public concerns over free speech. A similar bill was scrapped in Texas last year for the same reasons.

In Pennsylvania, two individuals were detained in separate incidents involving their recording of police officers. They sued in federal court, alleging First and Fourth Amendment violations; their cases were consolidated.¹³⁹ The court granted summary judgment for the defendants on the First Amendment claims, finding that the plaintiffs failed to submit evidence that their actions constituted “expressive conduct,” holding that “observing and recording” police conduct was not enough.¹⁴⁰ The plaintiffs’ appeal is pending.

135. *Id.* at *21–22.

136. N.C. GEN. STAT. § 99A-2. 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.

137. *People for the Ethical Treatment of Animals, Inc. v. Cooper*, No. 1:16-cv-00025-TDS-JEP (M.D.N.C. filed Jan. 13, 2016).

138. *See Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS (D. Utah filed July 22, 2013).

139. *Fields v. City of Philadelphia*, 166 F. Supp. 3d 528, 531 (E.D. Pa. 2016), *appeal docketed*, No. 16-1650 (3d Cir. Mar. 24, 2016).

140. *Id.* at 533–39.

And a freelance photojournalist sued the City of New York and individual officers, claiming that his press credentials were removed in retaliation for his criticism of the New York Police Department (NYPD) and in violation of his First and Fourteenth Amendment rights.¹⁴¹ The court denied the photojournalist's request for a preliminary injunction requiring the return of his press credentials, noting that "press access may be curtailed where there is a compelling reason—or perhaps simply a rational basis—for the restriction."¹⁴² Because the plaintiff was taking photographs in a prohibited area designated by the NYPD during an ongoing emergency, the court found such a compelling reason existed. The defendants' motion to dismiss for lack of subject matter jurisdiction is pending.

D. *Invasion of Privacy*

The highly publicized case of *Pierre-Paul v. ESPN* addresses the interaction between privacy of patient medical records and First Amendment protections for newsgathering activities.¹⁴³ In *Pierre-Paul*, New York Giants' defensive end Jason Pierre-Paul sued ESPN and reporter Adam Schefter after Schefter tweeted a copy of the NFL star's medical chart following a fireworks accident that destroyed part of his right hand. On August 29, 2016, the court granted in part and denied in part the defendants' motion to dismiss, holding that Florida's medical privacy law¹⁴⁴ did not apply to the actions of reporters such as Schefter. However, the court refused to dismiss Pierre-Paul's claim for publication of private facts, holding that his medical records may not be a matter of public concern. The court further stated that "the circumstances surrounding the obtainment of these medical records are in dispute. If Schefter secured [Pierre-Paul]'s records unlawfully, Defendants may not be afforded First Amendment protections that could otherwise apply in publishing these records."¹⁴⁵ The court, however, did not explain what "circumstances" might have made Schefter's receipt of these records "unlawful."

VI. REPORTER'S PRIVILEGE

Reporters faced difficulty in protecting non-confidential newsgathering materials in state courts this year, with many courts concluding that parties had overcome the state's qualified privilege. Protecting confidential sources also proved difficult in the context of defamation suits. In the sole federal reporter's privilege case of note, discussed in Part VI.B.

141. *Nicholas v. Bratton*, 2016 U.S. Dist. LEXIS 71665 (S.D.N.Y. June 1, 2016).

142. *Id.* at *7–8.

143. 2016 U.S. Dist. LEXIS 119597 (S.D. Fla. Aug. 29, 2016).

144. FLA. STAT. ANN. § 456.057.

145. *Pierre-Paul*, 2016 U.S. Dist. LEXIS 119597, at *3–4.

below, a district court applied the Seventh Circuit's prior ruling in *McKevitt v. Pallasch* to find that the First Amendment does not provide protection against the disclosure of confidential sources in civil proceedings.

A. *Non-Confidential Newsgathering Materials*

In one of the many cases demonstrating hostility to the protection of non-confidential newsgathering materials, a Pennsylvania appellate court affirmed the trial court's decision to compel disclosure of reporters' resource materials that were used in preparing articles containing allegedly defamatory statements about a sitting judge.¹⁴⁶ The court ruled that the information "goes to [the reporters'] states of mind," which was "material, relevant, and crucial" to the judge's ability to prove actual malice in his defamation case.¹⁴⁷ The court further ruled that the information could not be obtained by alternative means and would not result in a chilling effect because "it would have no impact on any future confidential source's decision to provide information to a reporter."¹⁴⁸ One judge dissented, arguing that information at issue was not relevant to the articles claimed to be defamatory and therefore not crucial to the judge's case.¹⁴⁹ The dissenting judge also argued that the information could in fact be obtained from other sources and that its relevance to the claim had not been proven by the plaintiff judge.¹⁵⁰

In Delaware, a trial court judge compelled the *News Journal* to produce the entire unedited video of an interview conducted with a murder suspect and his attorney, concluding that the public interest in disclosing the full interview outweighed the public interest in non-disclosure.¹⁵¹ The court found it was significant that, among other factors, the videotape was sought in a criminal, murder-for-hire case and that the aired portions of the videotape were selected "presumably on reasons of journalistic style," such that compliance with the subpoena would be unlikely to "chill" the willingness of sources.¹⁵² The court made this ruling despite the fact that the *News Journal* "is in many respects the only source available for statewide news" in Delaware.¹⁵³ This was the second case to apply the Delaware shield law; in the first case, the court also denied a motion to quash a subpoena seeking notes of an interview with a murder suspect.¹⁵⁴

146. *DiPaolo v. Times Publ'g Co.*, 142 A.3d 837 (Pa. Super. Ct. 2016).

147. *Id.* at 845.

148. *Id.*

149. *Id.* at 846–48.

150. *Id.*

151. *State v. Benson*, 2016 WL 3660525 (Del. Super. Ct. Apr. 27, 2016).

152. *Id.* at *5.

153. *Id.* at *7.

154. *Id.* at *1 (citing *State v. Rogers*, 820 A.2d 1171 (Del. 2003)).

In New York, a pair of decisions reached opposite conclusions regarding non-confidential material. In *People v. Bonie*, the Appellate Division affirmed a trial court's decision compelling unpublished video footage of an interview with a murder suspect.¹⁵⁵ The court found that the defendant's statements during the interview about his relationship with the victim were "highly material and relevant" on issues of "motive intent, and consciousness of guilt" because they were inconsistent with other statements he had given to the police.¹⁵⁶ Moreover, the court rejected the reporter's argument that the prosecutor should have tried to locate the Department of Corrections employees who were present at the interview, reasoning that "their recollections, if any, of defendant's statements do not have the same evidentiary effect as would the video recording."¹⁵⁷

Later in the year, *New York Times* reporter Frances Robles prevailed before the same court in her effort to fight a subpoena to testify about a jailhouse interview and turn over her notes.¹⁵⁸ The defendant in the underlying criminal case had provided a videotaped confession that was deemed admissible at trial. During his interview with Robles, the defendant repeated many of the same details he provided to police, but claimed that the confession had been coerced. The appellate court found that the prosecution had "not made a 'clear and specific showing' that Robles's testimony and interview notes were "'critical or necessary' to the People's proof of a material issue so as to overcome the qualified protection for the journalist's nonconfidential material."¹⁵⁹ The court distinguished *Bonie* on the grounds that the prosecution here had an admissible videotaped confession by the defendant that contained statements consistent with other evidence in the case¹⁶⁰ and found that under the circumstances, its ruling was consistent with the "tradition in this State of providing the broadest possible protection to the sensitive role of gathering and disseminating news of public events."¹⁶¹ Robles's appeal drew support from fifty-eight entities that filed a joint amicus brief on her behalf.

In other positive news for the press, the Arizona Court of Appeals reversed a trial court's refusal to quash a subpoena to a newspaper reporter for notes of interviews with the victim of a murder.¹⁶² Although the court rejected the reporter's contention that the state's shield law covered non-confidential newsgathering materials, the court went on to hold that the

155. 35 N.Y.S.3d 53 (N.Y. App. Div. 2016).

156. *Id.* at 56.

157. *Id.*

158. *People v. Juarez*, 2016 WL 6106676 (N.Y. App. Div. 2016).

159. *Id.* at *1.

160. *Id.*

161. *Id.* (quoting *O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 527 ((N.Y. App. Div. 1988)).

162. *Phoenix Newspapers v. Reinstein*, 381 P.3d 236 (Ariz. Ct. App. 2016).

First Amendment provided a qualified privilege that protected the interview notes, and the defendant had failed to overcome that privilege.¹⁶³

B. Confidential Source Information

In the high-profile prosecution of former Pennsylvania Attorney General Kathleen Kane, a trial court quashed a subpoena seeking the physical documents leaked to a newspaper reporter.¹⁶⁴ The reporter argued that permitting access to the original documents to conduct forensic testing for purposes of determining the identity of the leaker would be incompatible with the protection for confidential sources provided by the state shield law.¹⁶⁵

But confidential sources received mixed protection this year when requested in discovery for defamation cases. In *Range Development Co. of Chisholm v. Star Tribune*, the Minnesota Court of Appeals reversed a district court's order compelling a journalist to reveal the identity of the source who provided him with a report that was critical of the plaintiff company.¹⁶⁶ Applying the state shield law's requirement that there must be "probable cause" to believe the information is "clearly relevant to the issue of defamation" and the information cannot be sought by another means, the court held the plaintiff had failed to demonstrate that the identity of the source would lead to persuasive evidence on the issues of falsity and malice because the reporter claimed he relied solely on the report itself and had not spoken to the source about the contents of the report.¹⁶⁷

In contrast, a District of Massachusetts judge ordered Glenn Beck and the owners and producers of *The Glenn Beck Show* to reveal their sources in connection with their reporting on the Boston Marathon bombing.¹⁶⁸ Beck identified Abdulrahman Alharbi as a financier of the bombing and continued to name him even after authorities had publicly exonerated Alharbi.¹⁶⁹ Beck and the other defendants claimed that the authorities were wrong and that the statements were truthful based on information they received from confidential sources.¹⁷⁰ Applying Massachusetts law, the court weighed the "public interest in having every person's evidence available against the public interest in the free flow of information."¹⁷¹

163. *Id.*

164. See *Pennsylvania v. Kane*, CP-46-CR-0006239-2015 (Mar. 8, 2016), <http://www.montcopa.org/ArchiveCenter/ViewFile/Item/2895> (last accessed Nov. 14, 2016).

165. Motion to Quash, *Pennsylvania v. Kane*, <http://www.montcopa.org/ArchiveCenter/ViewFile/Item/2763> (last accessed Nov. 14, 2016).

166. 885 N.W.2d 500, 512 (Minn. Ct. App. 2016).

167. *Id.* at 510–11.

168. *Alharbi v. TheBlaze, Inc.*, No. 14-11550, 2016 WL 4203402 (D. Mass. Oct. 20, 2016).

169. *Id.* at *1.

170. See *id.* at *9.

171. *Id.* at *8.

Although the court recognized that the “defendants’ promise of confidentiality to the sources weighs against compelled disclosure,” the court found that plaintiff had satisfied his burden, given the lack of clarity from the defendants’ depositions, and the lack of alternative means for the plaintiff to verify what the confidential sources allegedly told the producers.¹⁷²

The sole federal decision of note this year came from the Northern District of Illinois.¹⁷³ The plaintiffs asserted a qualified constitutional privilege to protect the identities of sources and blog contributors in a retaliation case brought by Chicago State University professors against the university administration.¹⁷⁴ Relying on the Seventh Circuit’s ruling in *McKevitt v. Pallasch*,¹⁷⁵ which found no First Amendment privilege for protecting reporters’ sources, the district court rejected the professors’ argument, finding *McKevitt*’s reasoning was equally applicable to the civil proceeding, even though it involved a request for non-confidential source information in a criminal case.¹⁷⁶

VII. INSURANCE

A. *Privacy*

1. Data Breaches and Hacking

In the context of liability policies providing personal and advertising injury coverage, courts looked at the potential for coverage for hacking and data breach claims. The Supreme Court of New Hampshire examined coverage for a stalking petition, including allegations of computer hacking.¹⁷⁷ The court concluded that hacking did not involve “other invasion of right of privacy” within the scope of coverage for “personal injury” under the applicable nonprofit directors, officers, and organization’s liability policy.¹⁷⁸ However, the Fourth Circuit held that an insured’s alleged data breach resulting in exposure of client medical records on the Internet for more than four months were covered personal injury offenses under two differently worded policies.¹⁷⁹

172. *Id.* at *10.

173. *Beverly v. Watson*, 2016 U.S. Dist. LEXIS 87725 (N.D. Ill. July 7, 2016).

174. *Id.* at *1.

175. 339 F.3d 530, 531–32 (7th Cir. 2003).

176. *Beverly*, 2016 U.S. Dist. LEXIS 87725, at *20–21.

177. *Todd v. Vt. Mut. Ins. Co.*, 137 A.3d 1115, 1119 (N.H. 2016).

178. *Id.* at 1128.

179. *Travelers Indem. Co. of Am. v. Portal Healthcare Sols., LLC*, 644 F. App’x 245, 248 (4th Cir. 2016) (applying Va. law). One policy defined “personal injury” to include, among other things, “[o]ral, written or electronic publication of material that . . . gives unreasonable publicity to a person’s private life.” The other policy defined “personal injury” to include

2. Impermissible Use of Zip Code Information

The Ninth Circuit upheld the Central District of California's ruling that variations of the statutory violation exclusion in general liability policies barred "personal and advertising injury" coverage for a violation of California's Song-Beverly Act,¹⁸⁰ which prohibits retailers from requesting, recording, and publishing personal identification information, such as customer zip codes, during credit card transactions.¹⁸¹ Significantly, the court held that common law privacy claims based on the alleged improper requesting of zip codes "do not exist" separate from the Song-Beverly Act.¹⁸²

3. Unsolicited Telephone Calls, Text Messages, and Faxes

Courts continue to parse whether, and to what extent, insurance coverage exists for unsolicited telephone calls, text messages, and faxes that allegedly violate the Telephone Consumer Protection Act (TCPA)¹⁸³ 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 for TCPA and related claims (to the extent the underlying action alleges a privacy violation under the applicable law).¹⁸⁴ Whether similar exclusions also apply to communications in violation of statutes that govern other types of conduct is also being examined by courts—with differing results.¹⁸⁵ Courts also continued to limit carrier indemnity obligations,

"[o]ral or written publication, including publication by electronic means, of material that . . . [d]iscloses information about a person's private life."

180. CAL. CIV. CODE § 1747.08.

181. *Big 5 Sporting Goods Corp. v. Zurich Am. Ins. Co.*, 635 F. App'x 351, 353 (9th Cir. 2015) (applying California law), *aff'g* 957 F. Supp. 2d 1135 (C.D. Cal. 2013).

182. *Id.* at 354.

183. 47 U.S.C. § 227.

184. *See, e.g., Ill. Cas. Co. v. W. Dundee China Palace Rest., Inc.*, 49 N.E.3d 420, 427 (Ill. Ct. App. 2015) (exclusion for laws similar to the TCPA barred coverage for claims for conversion and violation of Illinois Consumer Fraud and Deceptive Business Practices Act); *Fayezi v. Ill. Cas. Co.*, 58 N.E.3d 830, 845 (Ill. Ct. App. 2016) (exclusion for "[a]ny liability or legal obligation of any insured with respect to" injuries "arising out of" the TCPA barred coverage for class action for violation of the TCPA, conversion, and violation of the Consumer Fraud and Deceptive Business Practices Act); *Regent Ins. Co. v. Integrated Pain Mgmt.*, 2016 U.S. Dist. LEXIS 130291 (E.D. Mo. Sept. 23, 2016) (applying Illinois law) (various violations of statute exclusions precluded duty to defend suit for violation of TCPA and conversion even though not all claims alleged were pursuant to TCPA).

185. *Compare* *Evanston Ins. Co. v. Gene by Gene, Ltd.*, 155 F. Supp. 3d 706, 713 (S.D. Tex. 2016) (alleged publication of DNA results on insured's website in violation of Alaska's Genetic Privacy Act was not excluded as a claim based on "any other statute, law, rule, ordinance, or regulation that prohibits or limits the sending, transmitting, communication or distribution of information or other material" because Privacy Act did not concern an unsolicited communication to consumers) *with* *Big 5 Sporting Goods Corp.*, 635 F. App'x 351, 354 (9th Cir. 2015) (statutory exclusion applies to alleged impermissible use of zip code information under California's Song-Beverly Act) *and* *Steadfast Ins. Co. v. Tomei*, 2016 Pa. Super. Unpub. LEXIS 1864, at *18 (Pa. Super. Ct. May 24, 2016) (applying Pennsylvania law)

for example, by applying per claim deductibles¹⁸⁶ and ruling that amounts sought under TCPA are financial penalties.¹⁸⁷

B. *Defamation*

The bases for damages sought proved pivotal where courts addressed the potential for coverage. Absence of a pled underlying cause of action for defamation proved fatal to claims for coverage in several cases.¹⁸⁸ Another court applied the acts of malice exclusion to bar coverage for disparaging statements allegedly motivated by actual malice.¹⁸⁹ However, the sexual misconduct exclusion did not bar the duty to defend a suit for defamation, false light, and intentional infliction of emotional distress based on defendant's denials of rape because the underlying action also involved claims independent of sexual misconduct.¹⁹⁰

C. *Advertising*

Cases analyzing coverage for advertising injury frequently begin with consideration of what constitutes advertisement. The Central District of California found trademark infringement did not fall within the scope of the undefined term "advertising idea," a construction supported by the ex-

(including alternative ruling that violation of statute exclusion was not overly broad and would bar coverage for alleged surreptitious videotaping of tanning salon patrons in the nude and posting on the Internet in violation of a number of state and federal criminal statutes).

186. *First Mercury Ins. Co. v. Nationwide Sec. Servs., Inc.*, 54 N.E.3d 323, 334 (Ill. Ct. App. 2016) (citing *W. Heritage Ins. Co. v. Asphalt Wizards*, 795 F.3d 832 (8th Cir. 2015) (applying Missouri law) (holding the policy's \$500 per-claim deductible for advertising injury barred any indemnity obligation for a TCPA class action settlement)).

187. *Ace Am. Ins. Co. v. Dish Network, LLC*, 173 F. Supp. 3d 1128, 1136 (D. Colo. 2016) (statutory damages sought by the plaintiffs in the underlying suit are actually financial penalties not covered under Colorado law). Dish Network also applied the policy's exclusion for personal and advertising injury if the insured is in a media and Internet-type business to bar coverage because "the commonly understood definitions of the terms 'broadcasting' and 'telecasting' undoubtedly encompass Dish's transmissions." *Id.* at 1138.

188. *E.g.*, *Nat'l Fire Ins. Co. of Hartford v. Kosair Charities Comm., Inc.*, 2016 U.S. Dist. LEXIS 59614 (W.D. Ky. May 4, 2016) (applying Kentucky law) (no duty to defend or indemnify because underlying action does not plead causes of action seeking damages for "personal and advertising injury"; references to alleged defamatory statements by insured do not form basis of claims); *Desabato v. Assurance Co. of Am.*, 2016 U.S. Dist. LEXIS 135389 (W.D. Pa. Sept. 30, 2016) (applying Pennsylvania law) (no personal and advertising coverage because allegations in complaint did not raise potential defamation claim or misappropriation of advertising ideas; letter from insured to plaintiff not alleged to be "published" to third party; elements of misappropriation under Pennsylvania law not alleged in complaint).

189. *OneBeacon Am. Ins. Co. v. Hanover Ins. Co.*, 2016 Conn. Super. LEXIS 1940, at *27-28, *62 (Conn. Super. Ct. July 5, 2016).

190. *AIG Prop. Cas. Co. v. Cosby*, 2015 U.S. Dist. LEXIS 174858 (C.D. Cal. Nov. 13, 2015) (defense for claims by Janice Dickson for defamation, false light, and intentional infliction of emotional distress not barred by sexual misconduct exclusion because some claims independent of sexual misconduct).

press exclusion for trademark infringement.¹⁹¹ Various exclusions, including the prior publication,¹⁹² failure-to-conform,¹⁹³ and known falsity¹⁹⁴ exclusions were also upheld to bar coverage for “personal and advertising injury” claims. However, some courts were reluctant to apply blanket “personal and advertising injury” exclusions to limit coverage.¹⁹⁵ False advertising claims were examined, with courts reaching opposite conclusions with respect to coverage.¹⁹⁶

VIII. ADVERTISING LAW

A. *FTC Enforces Endorsement Guidelines Against Social Media “Influencers”*

The Ides of March were upon online marketers when the Federal Trade Commission announced on March 15, 2016, that it had settled with a major retailer in an enforcement action arising from the use of so-called social media “influencers.”¹⁹⁷ Lest there be any doubt about the FTC’s intention in this regard, it announced another settlement regarding an in-

191. *Infinity Micro Computer, Inc. v. Cont’l Cas. Co.*, 2016 U.S. Dist. LEXIS 134957 (C.D. Cal. Sept. 29, 2016) (pending appeal) (also no coverage for infringement of slogan or trade dress).

192. *Boehm v. Scheels All Sports, Inc.*, 2016 U.S. Dist. LEXIS 108994 (W.D. Wis. Aug. 17, 2016) (prior publication exclusion applied to bar coverage for action by sports photographers against sports memorabilia dealers or unauthorized reproductions and sales of copyrighted work because the alleged infringement began before the policy period).

193. *Selective Way Ins. Co. v. Crawl Space Door Sys., Inc.*, 162 F. Supp. 3d 547, 555, 557 (E.D. Va. 2016) (holding failure-to-conform exclusion and intellectual property exclusions barred coverage for underlying action for false and misleading advertising and trademark infringement).

194. *U.S. Fid. & Guar. Co. v. Fendi Adele S.R.L.*, 823 F.3d 146, 152–53 (2d Cir. 2016) (applying New York law) (no duty to indemnify trademark infringement claims; even if sale was advertising, the known falsity exclusion applied because insured knew it was selling goods bearing a false designation of origin).

195. *See, e.g., Princeton Express & Surplus Ins. Co. v. DM Ventures USA LLC*, 2016 U.S. Dist. LEXIS 98740 (S.D. Fla. July 19, 2016) (advertising injury exclusion held ambiguous; insurer had duty to defend lawsuit by eight models alleging their photographs were used in bar websites, social media, flyers, posters and other advertisements to promote bar); *Cachet Fin. Sols., Inc. v. Hartford Fin. Servs. Grp., Inc.*, 162 F. Supp. 3d 858, 868 (D. Minn. 2016) (duty to defend trademark infringement and unfair completion claims because “personal and advertising injury exclusion” deemed ambiguous).

196. *Compare* *Evanston Ins. Co. v. Clartre, Inc.*, 158 F. Supp. 3d 1110, 1123 (W.D. Wash. 2016) (no duty to defend or indemnify insured’s alleged misappropriation of wood-treated chemical technology; no misappropriation of advertising idea, trade dress, or style of doing business triggered by insured’s alleged false and misleading statements regarding its products and known falsity exclusion would apply to bar coverage) *with* *Hanover Ins. Co. v. Anova Food, LLC*, 173 F. Supp. 3d 1008, 1021–22 (D. Haw. 2016) (applying Florida law) (duty to defend patent infringement and false advertising lawsuit because allegations also referenced disparagement of plaintiffs, their products, and their businesses).

197. Press Release, FTC, *Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 “Fashion Influencers”* (Mar. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through>.

fluencer campaign two days later¹⁹⁸ and a third within four months.¹⁹⁹ With this uptick in enforcement actions, the FTC has shown it is more than willing to exert its influence over the influencers.

The FTC's enforcement activity with regard to influencers in general and social media in particular is not surprising because the FTC telegraphed this new emphasis in June 2015 when it issued the revised FAQs for the *Endorsement Guides*.²⁰⁰ The revised FAQs focused on social media and provided lengthy and explicit guidance on how brands should make disclosure in the context of endorsements on social media.

An "influencer" is an individual with a following on social media who posts content about products and services, typically at the behest of the marketer. Influencers are viewed as having greater credibility because people tend to place more credence in recommendations from people they know or trust. Of course, influencers are not posting simply because they like the brand or its products. They typically receive free products and services and sometimes payments of hundreds, thousands, or even tens of thousands of dollars. The social marketing agency Captiv8 estimates that companies spend nearly \$3 million per year on sponsored posts on Instagram and that an Instagram influencer with millions of followers can receive more than \$100,000 per sponsored post. Needless to say, the provision of free goods and services and the payments constitute a material connection between the brand and the endorser, and the FTC's recent enforcement actions reflect the FTC's long-standing position mandating the disclosure of such material connections.

The March 15 FTC announcement concerned Lord & Taylor. The FTC alleged that Lord & Taylor had provided a dress to each of fifty online influencers and paid those individuals between \$1,000 and \$4,000 to post photos on Instagram and other social media sites of themselves wearing the dress. According to the FTC, Lord & Taylor pre-approved each proposed post, and the influencers were contractually obligated to use the "@lordandtaylor" Instagram user designation and include "#DesignLab" in each post. The FTC claimed that Lord & Taylor had not required that the influencers disclose the connection (for example, with a "#ad" dis-

198. Press Release, FTC, FTC Approves Final Order Prohibiting Machinima, Inc. from Misrepresenting That Paid Endorsers in Influencer Campaigns Are Independent Reviewers (Mar. 17, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-approves-final-order-prohibiting-machinima-inc>.

199. Press Release, FTC, Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos (July 11, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it>.

200. FED. TRADE COMM'N ENDORSEMENT GUIDE: WHAT PEOPLE ARE ASKING (May 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

closure), and none of the influencers did in fact reveal the connection. The FTC also alleged that the Lord & Taylor campaign included a paid article in *Nylon* without any indication that the article was paid advertising. The FTC, which approved the final consent order in May,²⁰¹ prohibited Lord & Taylor from misrepresenting that paid advertising is from an independent user or ordinary consumer.²⁰² The FTC also directed the company to disclose unexpected material connections.²⁰³

The other two enforcement actions followed a similar pattern. On March 17, 2016, the FTC announced that it had approved a final consent order against Machinima,²⁰⁴ which was paying users to post YouTube videos about Microsoft's Xbox One system and video games. In a July 2016 announcement, the FTC revealed that it had settled with Warner Bros. over allegations that the company failed adequately to disclose a material connection with influencers who were paid to post positive gameplay videos on YouTube.²⁰⁵ According to the FTC, the influencers were given free, advance copies of the game and paid up to tens of thousands of dollars to post videos extolling the game. Although Warner Bros. instructed users to disclose the sponsorship connection, it allegedly directed them to make the disclosures in a box appearing below the video, and the disclosures would be visible only if the user clicked the "Show More" button in the box. Moreover, when the YouTube videos were posted on Facebook or Twitter, the disclosure box was not visible.

In the Machinima and Lord & Taylor final orders, the FTC required the marketers to implement systems to control and monitor their influencers' endorsements.²⁰⁶ In both matters, the FTC directed the marketer to provide each influencer with a clear statement regarding the influencer's obligation to disclose material connections and to implement a system to monitor the influencers' statements. Moreover, the FTC required Lord & Taylor to terminate influencers who misrepresented or failed to disclose their connection and directed Machinima to withhold pay from influencers who failed to disclose a material connection. Notably, although the FTC sought to change the company's behavior in all three of the cases, it did not seek a financial penalty from any of the three companies.

201. Lord & Taylor Press Release, *supra* note 196.

202. *In re* Lord & Taylor, LLC, No. C-4576 (FTC May 20, 2016), <https://www.ftc.gov/system/files/documents/cases/160523lordtaylordo.pdf>.

203. *Id.*

204. *In re* Machinima, Inc., No. 1423090 (FTC Mar. 16, 2016), <https://www.ftc.gov/system/files/documents/cases/150902machinimaorder.pdf>.

205. *In re* Warner Bros. Home Ent'mt, No. 1523034 (FTC Nov. 17, 2016), https://www.ftc.gov/system/files/documents/cases/161811_c-4595_warner_bros_do.pdf.

206. *Machinima*, No. C-4569; *Lord & Taylor*, No. 1423090.

B. Mixed Results for TCPA Claims in Wake of Spokeo

The Supreme Court's recent decision in *Spokeo, Inc. v. Robins*²⁰⁷ has proven to be a Rorschach test for courts and commentators. Both sides declared victory when the opinion was released, numerous scholars have written articles on the case, and dozens of lower courts have since weighed in on the implications of the decision. Courts have found plaintiffs have Article III standing in some circumstances but not in others, and courts have come out on both sides on claims under the Telephone Consumer Protection Act.²⁰⁸

In *Spokeo*, the Supreme Court determined that a plaintiff does not “automatically satisfy the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.”²⁰⁹ Although a risk of real harm may be sufficient to establish standing, it must be a “material risk of harm.”²¹⁰ A “bare procedural violation” is not enough.²¹¹

Courts have not hesitated to determine that TCPA plaintiffs fail to meet Article III standing requirements post *Spokeo*.²¹² In *Romero*, for example, the court divided the calls into three categories: calls the plaintiff did not hear ring, calls the plaintiff heard ring but did not answer, and calls the plaintiff answered.²¹³ The court found no injury in fact for the unanswered calls because the plaintiff could not show she had suffered any lost time, aggravation, or distress.²¹⁴ With regard to the two calls the plaintiff did answer, the court noted that the “[p]laintiff does not offer any evidence demonstrating that Defendants’ use of an ATDS [automatic telephone dialing system] to call her number caused her greater lost time, aggravation, and distress than she would have suffered had the calls she answered been dialed manually, which would not have violated the TCPA.”²¹⁵ Accordingly, the court determined that the plaintiff had not suffered an injury in fact.

207. 136 S. Ct. 1540 (2016).

208. 47 U.S.C. § 227 (TCPA).

209. *Spokeo*, 136 S. Ct. at 1549.

210. *Id.* at 1549–50.

211. *Id.* at 1549.

212. See, e.g., *Ewing v. SQM US, Inc.*, 2016 U.S. Dist. LEXIS 143272 (S.D. Cal. Sept. 29, 2016); *Romero v. Dep’t Stores Nat’l Bank*, 2016 U.S. Dist. LEXIS 110889 (S.D. Cal. Aug. 5, 2016); *Susinno v. Work Out World, Inc.*, 2016 U.S. Dist. LEXIS 113664 (D.N.J. Aug. 1, 2016); *Smith v. Aitima Med. Equip., Inc.*, 2016 U.S. Dist. LEXIS 113671 (C.D. Cal. July 29, 2016).

213. *Romero*, 2016 U.S. Dist. LEXIS 110889, at *12–15.

214. *Id.*

215. *Id.* at *15. See also *Ewing*, 2016 U.S. Dist. LEXIS 143272, at *6 (finding no injury in fact when “Plaintiff does not, and cannot, allege that Defendants’ use of an ATDS to dial his

In *Caudill v. Wells Fargo Home Mortgage, Inc.*,²¹⁶ the defendant argued that the harm would have been the same had the calls been dialed manually, as opposed to using an ATDS, but the court reached a different conclusion. According to the court, “[t]he fact remains, however, that the calls *are* alleged to have been robo-calls, which do implicate the TCPA. . . . Accordingly, Caudill has sufficiently demonstrated that his alleged harm is fairly traceable to the challenged conduct and, thus, he has established standing.”²¹⁷ Other courts have found concrete harm arising from the time spent answering calls, the charges incurred from unwanted calls, and the intrusion on privacy.²¹⁸ In *Rogers v. Capital One Bank (USA), N.A.*, the court simply stated that the Eleventh Circuit had determined that a violation of the TCPA was a concrete injury, and therefore the plaintiff had standing.²¹⁹

One other case bears mention. In *Stoops v. Wells Fargo Bank, N.A.*, the plaintiff created a “honey pot” for unwitting debt collectors.²²⁰ The plaintiff bought and activated prepaid cell phones with area codes originating from certain locations in Florida “‘because there is a depression in Florida’ where ‘people would be usually defaulting on their loans or their credit cards.’”²²¹ Among the numbers plaintiff collected were two for delinquent customers who had previously owned the phones and had consented to receive auto-dialed calls or calls with a pre-recorded voice.²²² When Wells Fargo called the numbers in an attempt to collect on its loans, the plaintiff, who had filed at least eleven TCPA cases, sued.²²³ Lawsuit No. 11 was a wrong number for plaintiff, however, “[b]ecause

number caused him to incur a charge that he would not have incurred had Defendants manually dialed his number”).

216. 2016 U.S. Dist. LEXIS 89136 (E.D. Ky. July 11, 2016).

217. *Id.* at *5–6.

218. See *Booth v. Appstack, Inc.*, 2016 U.S. Dist. LEXIS 68886, at *17 (W.D. Wash. May 24, 2016) (noting that TCPA violation alleged “required Plaintiffs to waste time answering or otherwise addressing widespread robocalls”); *Mey v. Got Warranty, Inc.*, 2016 U.S. Dist. LEXIS 84972, at *7–8 (N.D. W. Va. June 30, 2016) (finding concrete harm from use of cellular minutes, depletion of battery life, cost of electricity, invasion of privacy, intrusion upon cell phone, and wasting of time).

219. 2016 U.S. Dist. LEXIS 73605, at *4–5 (N.D. Ga. June 7, 2016). *But see* *Romero v. Dep’t Stores Nat’l Bank*, 2016 U.S. Dist. LEXIS 110889, at *19 (S.D. Cal. Aug. 5, 2016) (calling *Rogers* court reasoning “circular”).

220. 2016 U.S. Dist. LEXIS 82380, at *2–6 (W.D. Pa. June 24, 2016).

221. *Id.* at *2.

222. *Id.* at *4.

223. *Id.* at *3–6.

Plaintiff has admitted that her only purpose in purchasing her cell phones and minutes is to receive more calls, thus enabling her to file TCPA lawsuits, she has not suffered an economic injury.”²²⁴ Accordingly, the court found “that Plaintiff has not suffered injury-in-fact and therefore lacks constitutional standing to assert her injury against Defendant.”²²⁵

224. *Id.* at *38; *see also* Smith v. Aitima Med. Equip., Inc., 2016 U.S. Dist. LEXIS 113671, at *13 (C.D. Cal. July 29, 2016) (finding no standing where plaintiff alleged receiving only one call because “[a]ny depletion of Plaintiff’s battery, or aggravation and nuisance, resulting from only one call, is a de minimis injury”).

225. *Stoops*, 2016 U.S. Dist. LEXIS 82380, at *42.