Flowerpot to SecureDrop: Promoting Anonymity While Preserving the Bartnicki Principle

MATTHEW L. SCHAFER AND KATHERINE M. BOLGER

Introduction

Leaking is a risky business. It is risky for the reporter who faces contempt of court for refusing to identify her source. And it is risky for the source who faces criminal prosecution if the Government unmasks her identity.

SecureDrop, an open-source software platform, diminishes these risks by giving a source the means to leak sensitive information to a reporter and communicate with the reporter via the "anonymous web" without leaving digital footprints—without even the reporter knowing the source's identity. Using it, a source can anonymously upload sensitive documents, which are then encrypted, to a news organization's server and securely communicate with the organization. In this way, it is more difficult for the Government to discover a source's identity by exploiting traditional vulnerabilities that would normally allow it to track a source's online activity.

SecureDrop's increasing popularity comes at a time when the pitfalls of leaking online without taking precautions have solidified. In May of 2015, Judge Leonie Brinkema sentenced Jeffrey Sterling, a former CIA employee whose email exchanges with reporter James Risen were uncovered by the Government, to more than three years in prison for violating the Espionage Act. Days later, the Government released from custody Stephen Kim, a former State Department official whose online contact with reporter James Rosen was uncovered by the Government in a search warrant application, after he served ten months in prison for also violating the Espionage Act. The revolving door at the federal penitentiary of once-confidential sources betrayed by their own online conduct would give any would-be leaker pause.

But does use of SecureDrop, while addressing these risks, put news organizations at legal risk in other ways? Do the legal protections developed over the last forty years, namely the Bartnicki principle that "if a newspaper lawfully obtains truthful information about a matter of public significance then [] officials may not (Continued on page 28)
A Few Constants in a Changing World

BY DAVID J. BODNEY

Communications lawyers are a privileged lot. Thanks to our media clients, we get a front-row seat to breaking news and entertaining events.

Every day, however, we work for clients whose worlds are changing dramatically. Disruptive innovation has reconfigured the media landscape, creating new, powerful companies and voices, leaving old business models and institutions behind.

By now, this “new normal” is surely old news to communications lawyers. We have watched the rise and fall, the merger and disintegration, of media empires for the past decade or so. Still, it is useful to pause, if only for a moment, and consider a trio of persistent transformations that define daily life for many of our clients, and to think about how we, as their lawyers, can be of greatest service.

First, content is created, distributed and consumed in ways that did not pervade our culture a decade ago. Disruptive innovations in the news and entertainment industries—book publishing and music, newspapers and television—have fundamentally altered user habits and revenue streams in recent years. At the same time, digital content hubs and social media sites, accessed largely on smartphones, are attracting viewers as never before. Second, these profound changes in the creation, distribution and consumption of content have coincided with the worst recession in living memory. Economic uncertainty and market volatility have altered outlooks not only inside boardrooms but newsrooms, too. Third, especially for the press, whose role in our democracy is inked into the parchment of our Constitution, these changes take on special significance, arriving as they did in the wake of September 11—an attack that brought war to our shores and changed the balance of ordered liberty in this country, probably forever.

So, there we have it: industry upheaval, economic collapse (and nervous recovery) and perpetual war with stateless actors. And the changes and challenges don’t stop there. Consider the instantaneous aspect of it all. Images from across the globe can spread as quickly as a dirty bomb, and our clients must decide difficult questions about whether, when and how much to publish with little time for reflection. Journalists get caught in the crossfire around the globe. People lose jobs, privacy, reputation, lives. Little wonder Pope Francis has called the modern world “a field hospital after battle.”

This is where we media lawyers find ourselves—and must do our part. And yet we are rooted in a profession that is less about change than constancy. We rely on precedent to justify conduct—past, present and future. Our laws lag far behind technology and evolving concepts of liberty, but they are buttressed by centuries of hard-fought truths. In our profession, change comes slowly, incrementally, from the inside of our legal structures, and even then only upon assurance that any change is consistent with eternal verities.

We fight for change—to advance and protect the rights of our media clients—but we hold fast to the Constitution and work with a healthy respect for the law when we counsel our clients.

As well we should. For this is why our clients call upon us for advice. They seek our judgment. They assume we know the law, but it is our judgment, based on an understanding of a system that is characterized more by stasis than change, that they value. We are not called, weekends or late at night, because they lack business savvy or editorial direction. Rather, we are engaged because we understand a system of laws that often depends more on 17th Century common-law principles than cutting-edge advances in technology—like fighting cybercrime or finding alternative ways of receiving high-speed Internet. In a world of change, we know certain legal truths, only some of which are self-evident.

To be sure, we must learn the client’s businesses and embrace the technology that supports them. But perhaps the ultimate paradox for communications lawyers these days is the recognition that our highest value to clients whose worlds are rocked by change lies in our grasp of legal constancies. When it comes to leading-edge issues, we are valued for our knowledge of the law, to be sure, but also for our grasp of certain immutable truths.

To that end, it is fitting that we media attorneys take seriously a few bedrock principles that may need some dusting off. As members of a “learned profession,” we are called upon by the ethical rules to step outside the comfort zone of our daily practice and engage in pro bono services. Lawyers in my state, for
example, must adhere to a “creed” that identifies certain desirable goals, including “devotion to public service, improvement or administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance.” Similarly, the preamble to my state’s Ethical Rules provides: “A lawyer should be mindful of the deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.”

If Oliver Wendell Holmes, Jr. was right in observing that “[t]he life of the law has been experience,” then it is only fitting that we make time for a few fresh legal experiences. By taking on pro bono work—say, handling an access matter for a student newspaper or a media organization that could not fight for public records but for our uncompensated help—we gain insight and improve judgment. If we devote some measure of our practice to public service, administration of justice or civic influence on behalf of the needy, we enhance our understanding of the world. By striving to achieve these “desirable goals,” we work through a system of laws that improves our value to clients who seek our judgment. Public service, administration of justice, civic engagement: to one degree or another, these are, or should be, constants for media lawyers in a rapidly-changing world.

We are indeed a privileged lot. And we owe it to our clients, if not ourselves, to recognize the benefits of the lawyer’s role in society, bound by order and tradition, to guide clients through times of unprecedented change. An important part of that tradition includes adherence to a lawyer’s creed and ethical responsibilities in ways that help inform the judgment for which so many attorneys are so handsomely paid. By immersing ourselves, from time to time, in civic, pro bono and public service, we develop a greater awareness of the world around us. And that awareness makes us of greater value to our clients—who struggle to get it right, dealing with difficult, emerging issues at breakneck speed—when we find ourselves sitting beside them in our ringside seats.}

This one-day workshop held in conjunction with the Forum’s Annual Meeting, provides an excellent opportunity for you to “get on your feet” through individual training and feedback from deans of the media bar. As in past years, this Workshop will combine hands-on advocacy training with substantive areas of media law.

This training session is based on hypotheticals that you will receive in the weeks prior to the Workshop, along with all necessary background materials.

During the workshop, you will break into small group sessions to focus on three different media-law problems.

- **Mock Oral Argument:** Argue a motion to intervene seeking to unseal a civil complaint filed against the doctor who allegedly botched an execution by lethal injection.
- **Mock Mediation:** A freelance video-journalist recorded a controversial traffic stop during nationally-televised riots, was unlawfully detained, and her footage confiscated. A mediation will be held to resolve the rising tensions among the media and local authorities.
- **Pre-Broadcast Review:** Practice vetting a script and video rough cut of a month-long investigation into hacked documents with twists and turns along the way.

Register for the conference at [http://ambar.org/go-media-advocacy](http://ambar.org/go-media-advocacy)
Right To Be Forgotten, Expungement Laws Raise New Challenges on the 40th Anniversary of Cox Broadcasting v. Cohn

CHARLES D. TOBIN AND CHRISTINE N. WALZ

Forty years ago, in Cox Broadcasting Corp. v. Cohn, the U.S. Supreme Court firmly established the First Amendment right to accurately report facts and allegations contained in public court records. With its clear, bright-line rule, the Court extended important protections to journalists and guaranteed to the public greater transparency for the administration of justice.

The Supreme Court, for the very most part, has adhered to the strength of its pronouncement in the Cox Broadcasting case. Today, however, developing legal trends in other forums—including the “right to be forgotten” rulings in Europe, California’s “online eraser” law for minors, and the growing expungement movement in United States legislatures—pose serious threats to the black-and-white protection that the Justices extended decades ago.

Cox Broadcasting v. Cohn and Its United States Progeny

In Cox Broadcasting v. Cohn,1 the Supreme Court clearly recognized that journalists should not be placed in peril for publishing information given to them by the custodians of government records. The specific issue: whether a reporter could be held liable for invasion of privacy for publishing the name of a rape victim, when it was a matter of public record contained in court files provided to him by a court clerk.

The journalist involved in the case, Tom Wassell from WSB-TV, was reporting on the rape of a Georgia college student found dead after a party in suburban Atlanta.2 Initially, before prosecutors began exploring rape charges, the name of the girl—Cynthia Leslie Cohn—was published in at least one newspaper, under the headline: “Tests Seek Death Cause of Girl, 17.”3 Six teens were eventually charged with raping the highly intoxicated young woman and leaving her on the ground near her home. The case received intense media coverage.4 Five of the defendants pled guilty to rape or attempted rape.

Wassell, in covering the trial of the last defendant, asked the court’s clerk and received a copy of the indictment, which included the name of the victim.5 Upon receipt of this information, Wassell identified the victim in his reporting. The victim’s father, Martin Cohn, filed a lawsuit against Cox Broadcasting, claiming money damages for invasion of privacy. The lawsuit was based, in part, on a Georgia statute that flatly prohibited identifying rape victims in broadcast or print reports.6

Cox Broadcasting argued that the broadcast was privileged under both state law and the First and Fourteenth Amendments to the U.S. Constitution. The trial court rejected the claims, held that the Georgia statute gave a civil remedy to those injured by its violation, and granted summary judgment to Cohn on the issue of liability.7 On appeal, the Georgia Supreme Court initially held that Georgia’s statute prohibiting publication of rape victims’ names did not itself extend to a civil cause of action for invasion of privacy, but nonetheless found a cause of action under the common law privacy tort of public disclosure.8 The deceased victim’s privacy, according to the court, could not be invaded, but her father had stated a valid cause of action for invasion to his own privacy by the publication of his daughter’s name.9

The Georgia Supreme Court then found that there were issues of fact as to whether WSB-TV and Cox Broadcasting were liable, and it agreed with the trial court that the First Amendment did not bar liability under the circumstances.10 Relying on a California Supreme Court decision Briscoe v. Reader’s Digest Assn., Inc. from a few years earlier, the Georgia Supreme Court said: “The rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other.”11

On rehearing, the Georgia Supreme Court rejected the station’s arguments that the publication was a matter of public concern. Instead, it held that the state statute prohibiting publication of rape victim’s names was an authoritative declaration of state policy that the name of a rape victim was not a matter of public concern.12 The statute, the court held, was a “legitimate limitation on the right of freedom of expression contained in the First Amendment,” and the court said it could discern “no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection.”13

Cox Broadcasting appealed to the U.S. Supreme Court, challenging the constitutionality of Georgia’s statute.
In an 8-1 decision, the Supreme Court reversed the judgment of the Georgia Supreme Court, specifically addressing the tort of public disclosure where the disclosure was based on public records in a public prosecution that were open to public inspection. In writing for the majority, Justice Byron White noted that liability for invasion of privacy torts, like defamation, was limited by a fair report privilege, but further recognized the constitutional dimension to the common law and statutory fair report privilege. He wrote:

"[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations."

The Court said that public court records are inherently matters of public concern, and "a public benefit is performed by the reporting of the true contents of the records by the media." Accordingly, the Court established the First Amendment right to accurately report facts and allegations in the public record, reasoning:

We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.

To the extent it is necessary to protect information like the names of victims, the Court said the onus was on public officials to undertake efforts to avoid disclosure of the information. "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." Although the Cox Broadcasting v. Cohn decision concerned liability for publishing information contained in a public court file, over the last 40 years it has been applied very broadly, shielding journalists from liability for publishing truthful facts obtained through a variety of means inside and outside of the court setting.

Other Courts Catch Up to the Cox Broadcasting Decision

Despite Cox Broadcasting v. Cohn's clear constitutional holding, some courts initially were reluctant to accept a bright-line approach protecting accurately reporting facts and allegations in the public record. For example, California courts continued to rely on Briscoe v. Reader's Digest Assn., Inc., which allowed for a balancing test that took into account whether the public interest in the publication of certain accurate facts fades over time. Courts struggled to apply this balancing test, leading to very mixed results and uncertainty for journalists. For example, in Wasser v. San Diego Union, the California Court of Appeal held that a teacher who had been acquitted of a murder charge could not maintain an invasion of privacy suit against a newspaper for publishing information about that charge, even though it had occurred more than 10 years earlier. The court reasoned that the plaintiff had remained in or near the public eye, and therefore, information about his murder charge remained newsworthy as a matter of law. In contrast, in Conklin v. Sloss, the court found that the plaintiff, a rehabilitated felon, could state a cause of action for invasion of privacy for publishing information about his criminal conviction 20 years later. The Conklin court was persuaded that plaintiff's actions since then, which included remarrying, fathering two children, and generally rehabilitating himself, raised issues of fact as to whether his conviction remained newsworthy, such that the newspaper would or would not be protected for publishing the information anew.

It was not until 2004 that the California Supreme Court finally caught up to Cox Broadcasting's bright line by overruling its earlier decision in Briscoe. In Gates v. Discovery Communications, Inc., the California Supreme Court clearly stated that Cox Broadcasting v. Cohn's holding was unqualified: "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." Accordingly, "the fact the public record of a criminal proceeding may have come into existence years previously" did not "affect[] the absolute right of the press to report its contents." Based on this reasoning, the California Supreme Court held that a television company that aired a show about a 13-year-old murder case in which the plaintiff was implicated was not liable for invasion of privacy, where the broadcast was based on facts obtained from public official court records.

Today, regardless of how remote in time, the legal protections for accurate reporting on court records is well established under United States law. Elsewhere, a number of legal trends pose new challenges for the right to accurately report the contents of public records. And even here, the long-protected right established by Cox Broadcasting v. Cohn and its progeny comes under periodic attack.

The European Union's “Right to Be Forgotten”

The first disturbing trend arises from a European Court of Justice decision announced in May 2014, which concerns the scope of protections under the EU-recognized “right to be forgotten.” The case, Google Spain SL v. Agencia Española de Protección de

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Although the underlying publication had been long resolved, and the plaintiff sought, through the Spanish data protection agency, to have the notice removed from Google search results as outdated. The agency ruled against Google Spain, and Google appealed to Spain’s National High Court. The court certified questions to the European Court of Justice, which is tasked with issuing preliminary rulings on points of EU law arising in domestic proceedings to ensure uniform application throughout the EU.

Ruling en banc, the European Court of Justice found that Google, as a data processor and controller, was subject to the European Union’s 1995 Data Protection Directive, a regulation that provides individuals a right to seek erasure of incomplete or inaccurate data. The European Court of Justice took the statutory interpretation even further, holding that the directive applied not just to incomplete or inaccurate data, but also to data that was outdated or no longer needed for its original purpose.

In its decision, the European Court of Justice balanced Mr. González’s right to privacy and right to be forgotten against Google’s arguments that it had a right to include the information in its search results. Although the underlying publication was protected under the law because it had been made upon an order from a Spanish government agency, the court rejected Google’s argument that it should not be required to remove search results because the underlying publication was both legally published and still publicly available.

Instead, the court said that:

'[I]f it is found, following a request by the data subject [under the Directive], that the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally at this point in time, is incompatible with [the Directive] because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased.'

In the European court’s view, easily accessible private information on the Internet seriously interfered with individuals’ privacy interests and focused on the negative impact of retrieval of outdated information.

It must be pointed out at the outset that... processing of personal data, such as that at issue in the main proceedings, carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual’s name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet - information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty - and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous.

In sum, the European Court of Justice concluded that the right to be forgotten outweighs both the economic interest of the search engine operator and the interest of the general public in searching for and locating the information. The court also noted, without much discussion or guidance, that its balancing test might produce different outcomes if the subject of the data had a role in public life.

The court’s decision establishes a precedent that will require search engines, Internet publishers, and website operators to engage in a complicated analysis to assess whether information complained about is “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue” and “whether the data subject has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name.”

Indeed, the United Kingdom’s Information Commissioner recently issued an order that demonstrates the troubling reach of the Google Spain decision. After Google responded to an individual’s request and removed links pertaining to a 10-year-old criminal offense, news organizations, as part of their coverage of the Google Spain decision, wrote stories detailing some of Google’s actions in response to removal requests. Those articles, which were indexed by Google and searchable, contained details of the individual’s original crime. Google refused to remove these later posts, finding that they were part of a recent news story and in the public interest.

The U.K. Information Commissioner ordered Google to remove these new posts from their search results, even though they are current journalistic content which may both newsworthy and in the public interest. It reasoned, “that interest can be adequately and properly met without a search made on the basis of the complainant’s name providing links to articles which reveal information about the complainant’s spent conviction.”

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Data, involved a government debt-collection notice about the plaintiff, Mario Costeja Gonzales, published in 1998, which remained on the Internet in 2010. The debt collection issue was subject to the European Union’s 1995 Data Protection Directive, a regulation that provides individuals right to seek erasure of incomplete or inaccurate data. The European Court of Justice took the statutory interpretation even further, holding that the directive applied not just to incomplete or inaccurate data, but also to data that was outdated or no longer needed for its original purpose.

In its decision, the European Court of Justice balanced Mr. González’s right to privacy and right to be forgotten against Google’s arguments that it had a right to include the information in its search results. Although the underlying publication was protected under the law because it had been made upon an order from a Spanish government agency, the court rejected Google’s argument that it should not be required to remove search results because the underlying publication was both legally published and still publicly available.

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In the European court’s view, easily accessible private information on the Internet seriously interfered with individuals’ privacy interests and focused on the negative impact of retrieval of outdated information.

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In sum, the European Court of Justice concluded that the right to be forgotten outweighs both the economic interest of the search engine operator and the interest of the general public in searching for and locating the information. The court also noted, without much discussion or guidance, that its balancing test might produce different outcomes if the subject of the data had a role in public life.

The court’s decision establishes a precedent that will require search engines, Internet publishers, and website operators to engage in a complicated analysis to assess whether information complained about is “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue” and “whether the data subject has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name.”

Remarkably, the Court specifically noted that the required analysis should not take into account whether the publication or retrieval of the information at issue would cause prejudice to the individual.

Indeed, the United Kingdom’s Information Commissioner recently issued an order that demonstrates the troubling reach of the Google Spain decision. After Google responded to an individual’s request and removed links pertaining to a 10-year-old criminal offense, news organizations, as part of their coverage of the Google Spain decision, wrote stories detailing some of Google’s actions in response to removal requests. Those articles, which were indexed by Google and searchable, contained details of the individual’s original crime. Google refused to remove these later posts, finding that they were part of a recent news story and in the public interest.

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There is no question that the lawsuit is having a significant impact on Google and other search engines. Since the decision, Google has received more than 324,094 takedown demands (concerning more than one million URLs) and faces a number of lawsuits from requesters who are unhappy with their digital profile. It was required to create a technical infrastructure and administrative process to handle takedown demands in the EU. More specifically, it created a form for accepting takedown demands, which is available through the Google search pages for the countries covered by the European Court of Justice’s decision. To submit a takedown demand, petitioners are required to provide their names, links to the offending material, and an explanation of why the inclusion of a search result is irrelevant, outdated, or otherwise objectionable. If a request is granted, the underlying website publishing the content is sent a notice so that it may argue for keeping the link active as a search result. A team at Google then makes case by case determinations as to what material should be removed. Google’s removal request form describes the analysis its team engages in:

When you make such a request, we will balance the privacy rights of the individual with the public’s interest to know and the right to distribute information. When evaluating your request, we will look at whether the results include outdated information about you, as well as whether there’s a public interest in the information—for example, we may decline to remove certain information about financial scams, professional malpractice, criminal convictions, or public conduct of government officials.

This analysis—now required, at the very least, for search engines operating in EU countries—represents a significant departure from the bright-line protections for accurate reporting based on public records established in the United States by Cox Broadcasting v. Cohn and its progeny.

RTBF and Renewed Tension with Domestic Law
The “right to be forgotten” may be, for the moment, a creature of European law only. But one troubling decision a few decades ago in U.S. access law—recently mirrored in a European case—demonstrate that virtual privacy arguments risk erosion of the clear protections of Cox Broadcasting v. Cohn may also be at risk here. Further risk to established protections may also be approaching from new sets of statutory laws.

The court’s decision establishes a precedent that will require complicated analysis to assess . . .

Reporters Committee v. DOJ and New ECHR Aggregation Ruling
Although the case predates the Internet, the Supreme Court’s 1989 decision in the Freedom of Information Act (FOIA) case U.S. Department of Justice v. Reporters Committee for Freedom of the Press presaged much of the current virtual privacy debate. In this case, the Reporters Committee challenged the Federal Bureau of Investigation’s denial of a FOIA request for the “rap-sheet”—the criminal history aggregated from various law enforcement agencies—of a mob figure who had been involved in dealings with a corrupt Congressman. The FBI had denied the request under FOIA Exemption 7(c), which exempts from disclosure information that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

The Supreme Court unanimously ruled for the FBI. In the controlling decision by Justice John Paul Stevens, the Court noted that most of the information in rap sheets is freely available to the public. “Arrests, indictments, convictions, and sentences are public events that are usually documented in court records.

In addition, if a person’s entire criminal history transpired in a single jurisdiction, all of the contents of his or her rap-sheet may be available upon request in that jurisdiction.”

The Reporters Committee Court, however, rejected the argument that the public nature of these records meant the subject had no privacy interest at all, saying that it reflected a “cramped notion of personal privacy.” Further, the Court in a footnote waived away its holding in Cox Broadcasting, regarding privacy and public records, by noting the different legal contexts of the two cases: “The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual’s interest in privacy is protected by the Constitution.”

The core issue in any FOIA case, the Court noted, is the statute’s purpose in providing citizens information about “what their government is up to.” The Reporters Committee Court concluded that the aggregated criminal records compiled by the FBI tell citizens little about what their government is up to, and that the subject’s “privacy” interests in the aggregation therefore outweights the public interest.

 Accordingly, we hold as a categorical matter that a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy; and that, when the request seeks no “official information” about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is “unwarranted.”

The American ruling in Reporters Committee, that an aggregation of information from what is otherwise public may not serve the public interest, remarkably parallels the very recent decision of the European Court of Human Rights in Satakunnan Markkinapörssissä Oy v. Stamedia Oy v. Finland, decided July 21, 2015. The case arose out of the courts of
Finland, where the government, by law, makes public the taxable income and assets of its citizens. The two defendants, a newspaper and a magazine, published the lists of the data and offered SMS text delivery service of individualized data for a fee.

Finland’s data protection agency brought an action challenging the publications. Initially, the publications won a ruling that their work constituted journalism, which is permitted under data privacy laws, rather than the activity of personal data processing that is controlled under EU law. On appeal, Finland’s highest court disagreed, holding that the publication of the tax database was excessive and unnecessary to the public interest because it did not contribute to public debate.

When the case reached the European Court of Human Rights (ECHR), that tribunal upheld the Finnish court. The ECHR, while acknowledging that “the general subject-matter” of tax data is a matter of Finnish public record and public interest, the extent of the data published was not protected journalistic activity. The decision contains virtually no discussion of the specific basis or weight given for the purported privacy interest or the degree of publication that the court would not consider excessive.

Both the Reporters Committee case here and the Satakunnan Markkinapörssi Oy; ruling abroad reflect judicial skepticism about the publication of aggregated data, even where the original records are public information. More troubling still, the latest wave of legislation in the United States seeks to prevent once-public information from even remaining available to journalists and others.

### “Online Erasers” and Expungement Laws

In trying to address what may be legitimate policy concerns, some state legislatures have adopted laws with the potential to compromise the clear rule established by Cox Broadcasting and its progeny.

For example, in 2013, attempting to address the long-term reputational implications of social media behavior and postings of minors, the California Legislature enacted a law to allow minors to use an “online eraser” to delete their online posts. More specifically, the law provides that websites and mobile applications directed to minors, or that have actual knowledge that a user is a minor, must allow registered users under 18 to remove (or ask the provider to remove or anonymize) publicly posted content.

The law did not become effective until January 1, 2015, and therefore, its practical application remains unclear. However, the statute could be used to impose liability for otherwise challenge accurate reporting. For example, under a broad reading, it is possible that the statute could applied to journalists whose reporting relied, in part, on social media content posted by minors, which the minors later sought to have “erased.”

Similarly, there is also a growing trend to allow for the expungement of criminal records, under certain circumstances. Expungement laws may restrict public access to criminal records in cases where the individual was acquitted or the charges were dismissed. Where the charge or conviction was against a minor, or where the underlying charge was not serious.

These laws allow individuals to omit references to their criminal records on job and housing applications, and require that criminal background checks do not show expunged charges or convictions. The laws are designed provide relief from the collateral consequences of a criminal charge or conviction—such as an inability after parole or acquittal to find employment or housing because of the results of a criminal background check. Supporters believe that these laws may help reduce recidivism by giving people who have served their punishment opportunities that would be shut off to them if their criminal records remained available.

### Conclusion

Cox Broadcasting v. Cohn was a crucial decision that established important protections for accurate journalism based on public documents. As a doctrine that precludes liability for accurately publishing public information, it remains bedrock, essential law, even if the face of growing efforts to close off once-public sources of information.

Unfortunately, however, legal trends here and abroad threaten to pose new barriers to accessing and publishing accurate information through public records. This developing patchwork of rulings and statutes could one day make reporting on newsworthy people less reliably complete. And ultimately, the rising wave of privacy hysteria could erode the foundation to First Amendment protections that Cox Broadcasting has provided for decades.

### Endnotes

2. Id. at 472.
4. Id.
5. Id.
6. Id. The statute, Ga. Code Ann. s 26—9901 (1972) made publishing or broadcasting the name of the victim a misdemeanor.
7. Id. at 473-74.
8. Id. at 474-75.
9. Id.
10. Id. at 475.
11. Id. (citing Briscoe v. Reader’s Digest Assn., Inc., 4 Cal.3d 529, 541, 93 Cal. Rpt. 866, 874, 483 P.2d 34, 42 (1971)).

In Briscoe, the California Supreme Court permitted a claim to advance on behalf of a man who had been convicted of hijacking a truck and served his punishment. Readers Digest magazine, 11 years later, mentioned him and the crime in an article about hijacking. The California court held that a jury could find the publication offensive and non-newsworthy: “He committed a crime. He was punished. He was rehabilitated. And he became, for 11 years, an obscure and law-abiding citizen. His every effort was to forget and have others forget that he had once hijacked a truck.”

As noted infra, the California Supreme Court expressly overruled Briscoe years later in Gates v. Discovery Comm’ns, Inc., 34 Cal. 4th 679, 101 P.3d 552 (2004).
opinion.

15. Id. at 476. The Court noted that its decision was not addressing “an action for the invasion of privacy involving the appropriation of one’s name or photograph, a physical or other tangible intrusion into a private area, or a publication of otherwise private information that is also false although perhaps not defamatory.” Id. at 488.

16. Id. at 491-92.

17. Id. at 495.

18. Id. at 496.

19. Id.

20. See The Florida Star v. B.J.F., 491 U.S. 524 (1989) (newspaper could not be held civilly liable for publishing the name of a rape victim); Smith v. Daily Mail Pub. Co., 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979) (statute violated the First and Fourteenth Amendments in prohibiting truthful publication of alleged juvenile delinquent’s name, lawfully obtained by newspapers by monitoring police band radio frequency and interviewing eyewitnesses); Bartrick v. Vopper, 542 U.S. 514 (2001) (no civil damages against a broadcaster who lawfully obtained another’s illicit recording of a cell phone conversation and broadcast the contents in violation of federal wiretapping statute); McNally v. Pulitzer Pub. Co., 532 F.2d 69 (8th Cir. 1976) (no liability for publishing newspaper article quoting psychiatric report used at court hearing to determine plaintiff’s competency to stand trial, even portions not read in open court); Scheetz v. The Morning Call, Inc., 946 F.2d 202 (3d Cir. 1991) (no Section 1983 claim for disclosure of information contained in police report concerning wife’s allegations of spousal abuse); Nicholson v. McClatchy Newspapers, 177 Cal. App. 3d 509, 223 Cal. Rptr. 58 (Ct. App. 1986) (no liability where newspapers published unfavorable evaluation of individual who was investigated by state bar as a prospective judicial appointee, even though the evaluation was confidential under state law).


24. Id. at 693.

25. Id.

26. Id.


28. Id. at ¶ 15.

29. Id. at ¶ 17.

30. In order to find that Google was subject to the Directive, the European Court of Justice first found that Google was a “data processor” and a “data controller.” The determination that Google was a data processor was expected but the determination that it was a “data controller” was seen as more controversial. The court’s decision turned on Google’s control over its algorithm and search functions, which the court said determined the “purpose and means” of its web searches. See id. at ¶¶ 21-41.

31. Id.

32. See id. at ¶ 93 (“[E]ven initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.”)

33. Id.

34. See id. at ¶ 16. (noting that the Spanish data protection agency took the view that the publication by La Vanguardia was legally justified” as it took place upon order of the Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible.”)

35. Id. at ¶¶ 84-87. Because the original publication on La Vanguardia’s website was deemed legally justified, the ECJ did not require the newspaper to remove the information from its web archives.

36. Id. at ¶ 94.

37. Id. at ¶ 80.

38. Id. at ¶¶ 94-96.

39. Id. at ¶ 96.


43. See Kennedy Van der Laan, Media Report, Dutch Google Spain ruling: More Freedom of Speech, Less Right to Be Forgotten for Criminals (Sept. 26, 2014), available at http://www.mediereport.nl/persrecht/26092014/google-spanish-judgment-in-the-netherlands-more-freedom-of-speech-less-right-to-be-forgotten-for-criminals/ (discussing Court of Amsterdam decision involving claims by owner of escort agency who was convicted to six years’ imprisonment in 2012 for “attempted incitement of contract killing” that he had a right to have links to online publications connecting him to the crime removed from Google search results).


45. Id.

46. Id.

47. Id. See also Jill Lepore, Jeffrey Toobin, Jonathan Blitzer, “Google and the Right to Be Forgotten,” The New Yorker (September 29, 2014).


49. 109 S.Ct. at 1471.

50. Id. at 1476.

51. Id. at 1475 note 13.

52. Id. at 1481 (citation and italics omitted).

53. Id. at 1485.


55. Id. at ¶ 111.
56. Id. at ¶17.
57. Id. at ¶65.
58. Id. at ¶72.
59. See SB 568 (California Business & Professions Code Sec. 22581).
60. Because the statute itself does not include a private cause of action or another enforcement mechanism, it is unclear how violations of the statute will be enforcement. See SB 568 (California Business & Professions Code Sec. 22581).
61. See, e.g. Alaska Stat. § 12.62.180(b) (records of criminal cases in which a person was acquitted or had charges dismissed are confidential); Cal. Penal § 851.8(d) (In a case where a person has been arrested and charged, but no conviction has occurred, the court may, with the concurrence of the prosecuting attorney, order that the records may be sealed and destroyed); Col. Rev. Stat. § 24-72-308 (criminal record sealed where the charges are completely dismissed or the person is acquitted). For further examples, see Margaret Colgate Love, NACDL Restoration of Rights Resource Project, Judicial Expungement, Sealing, and Set-aside (October 2014), available at http://files.equaljusticeworks.org/Session%20%2321%20EOLC%20Handouts%20Combined.pdf.
62. See, e.g. Ala. Code §§12-15-136-12-15-137 (delinquency adjudications (with exceptions) sealed after final discharge or court order if no pending criminal proceedings); D.C. Code § 16-2335(a)(records are sealed when individual reaches age of majority and after two-year waiting period with no subsequent convictions). For further examples, see Margaret Colgate Love, Judicial Expungement, Sealing, and Set-aside (October 2014).
63. See, e.g. S.D. Codified Laws § 23-6-8.1 (records of misdemeanor offenses may be destroyed after ten years); Wyo. Stat. Ann. § 7-13-1501 (certain misdemeanors may be expunged five years after completion of sentence where offense did not involve use of firearm). For further examples, see Margaret Colgate Love, Judicial Expungement, Sealing, and Set-aside (October 2014), supra FN 56.
64. Indeed, advocates argue that expungement law should go even further than most do. See, e.g. Margaret Colgate Love, “The Debt That Can Never Be Paid: A Report Card on the Collateral Consequences of Conviction,” Crim. Just., Fall 2006, at 16, 24 (“If reintegration of criminal offenders is a desirable social goal, as well as an important means of ensuring public safety, it is critical to begin serious discussion of the growing contrary pressures that seem to consign all persons with a criminal record to the margins of society, and to a permanent outcast status in the eyes of the law. In particular, we must find a way to persuade employers and others in a position to control access to benefits and opportunities that it is safe to go behind the fact of a criminal record, to deal with individuals rather than stereotypes and generalities. The most effective way to accomplish this is to find a way to recognize when individuals have completed their journey through the criminal process, and to make the record itself reflect their graduation.”)
65. See, e.g. Martin v. Hearst Corporation, 777 F.3d 546 (2d. Cir. 2015) cert. denied, (U.S. Oct. 5, 2015) (holding that statute requiring the state to erase official records of an arrest under certain circumstances does not make historically accurate news account of arrest tortious, and affirming summary judgment for defendants); G.D. v. Kenny, 15 A.3d 300, 315–16 (N.J. 2011) (“[T]he expungement statute does not transmute a once-true fact into a falsehood. It does not require the excision of records from the historical archives of newspapers or bound volumes of reported decisions or a personal diary. . . . It is not intended to create an Orwellian scheme whereby previously public information—long maintained in official records—now becomes beyond the reach of public discourse on penalty of a defamation action. Although our expungement statute generally permits a person whose record has been expunged to misrepresent his past, it does not alter the metaphysical truth of his past, nor does it impose a regime of silence on those who know the truth.”).
What do the NFL’s Washington Redskins football team and the Asian-American dance rock band The Slants have in common that is of any interest to First Amendment lawyers? Both are involved in litigation in which they are claiming that Section 2(a) of the Lanham Act violates the First Amendment by permitting the United States Patent and Trademark Office (“PTO”) to deny or cancel a federal trademark registration to any mark it considers to be disparaging to a substantial portion of identifiable persons or institutions.1

Though focusing on similar legal theories, the cases are on separate tracks in different federal courts. Last April, the parties in The Slants case were ordered by the Federal Circuit to deny or cancel a federal trademark registration to any mark it considers to be disparaging to a substantial portion of identifiable persons or institutions.1

The Slants describe themselves as an all-Asian American “dance rock band” that offers “catchy dance beats, strong hooks, and a bombastic live show that is ‘not to be missed.’”2 Band member and “front man” Simon Shiao Tam sought to register the band’s name in 2010. The examiner refused registration, ruling that the mark was disparaging under Section 2(a) to persons of Asian descent. Mr. Tam’s appeal to the TTAB was dismissed for procedural reasons. Mr. Tam promptly filed a second application in 2011, which the examiner again rejected. Mr. Tam appealed to the TTAB which affirmed the refusal to register the mark. In doing so, the TTAB noted that Mr. Tam had stated that he wanted to “own” the stereotype that the name represents. Nevertheless, the TTAB found it “abundantly clear” from the record that the mark was disparaging to persons of Asian descent.3

Mr. Tam then appealed the TTAB decision to the Federal Circuit.4 In the appeal, Mr. Tam raised several constitutional challenges including an argument that Section 2(a) violated the First Amendment. In an opinion by Judge Moore, the Federal Circuit panel affirmed the Board’s decision.5 In rejecting Mr. Tam’s constitutional claims, the Court held that In re McGinley, a 1981 opinion of its predecessor court (the Court of Customs and Patent Appeals (“CCPA”)), explicitly foreclosed a First Amendment challenge by holding that denial of federal registration did not in any way limit the applicant’s use of, or speech about, the mark.6

However, Judge Moore attached to the panel Opinion a lengthy document titled “additional views.” In her additional views, Judge Moore concluded that Section 2(a) was an unconstitutional restraint of speech and urged en banc review of the McGinley decision.7 In April, merely one week after the panel’s opinion, the Federal Circuit vacated the decision and sua sponte granted en banc review of the specific issue of whether Section 2(a) violates the First Amendment.8 The en banc panel heard oral argument on October 2, 2015 from counsel on behalf of Appellant Tam, Appellee Michelle Lee (director of the PTO), and various ACLU entities.9 A written decision is expected in the coming months.

The Redskins Litigation

The current Redskins dispute has a long sordid history. Attacks on the Redskins mark in the PTO and in federal court began more than 20 years ago. In 1992, seven Native Americans filed a petition with the TTAB for cancellation of several of the Redskins marks. The petition asserted that several variations of the Redskins marks were disparaging under Section 2(a) of the Lanham Act.10 Seven years later, the Board agreed, granting the petition and finding that the marks “may be disparaging of Native Americans to a substantial composite of this group of people . . . [and] may bring Native Americans into contempt or disrepute.”11

Pro-Football appealed the TTAB decision, arguing that the doctrine

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of laches barred the cancellation. Pro-Football then filed a civil action in the U.S. District Court for the Eastern District of Virginia seeking reversal of the cancellation. In this action, Pro-Football alleged not only that the TTAB erred in its determination due to a lack of substantial evidence of disparagement at the time of registration, but also pled that the case raised serious First and Fifth Amendment constitutional issues. As noted above, the Court felt compelled to follow the express written consent of the American Bar Association.

As this issue will be decided in the Fourth Circuit on August 6, 2015, briefing is scheduled to continue through February 2016. The TTAB once again ordered cancellation, which was also relied upon in the opinion affirming the PTO's refusal to register a “scandalous” mark. In her additional views in the Tam decision, Judge Moore recommended that “[i]t is time for this court to revisit McGinley’s holding on the constitutionality of Section 2(a) of the Lanham Act.” Inheriting the start. The mark at issue was a photo of a naked man and woman embracing. According to the trademark application, it was to be used for a “Newsletter Devoted to Social and Interpersonal Relationship Topics” and for “Social Club Services.” The CCPA was a good bit more specific, noting that the newsletter “has to do with discussions of sexual topics such as bisexuality, homosexuality, masturbation, and fornication” and that the services included “sponsoring and arranging parties for ‘swinging,’ which appears to be a form of group sex.” The Examining Attorney and the TTAB denied registration on moralistic grounds with the TTAB concluding that “Applicant’s mark is immoral and scandalous.” The TTAB noted, however, that these were not so bad for the registrant since he could still use the mark, although without the statutory benefits that would follow from registration.

McGinley appealed, but the CCPA affirmed by referring to dictionary definitions of “scandalous” and a 1938 decision refusing to register MADONNA (not the entertainer of later years) for wines on the grounds that such use would be scandalous. The Court also found that no First Amendment rights were abridged by the refusal to register the mark because “[n]o conduct is proscribed, and no tangible form of expression is suppressed.” The dissent, however, specifically criticized the majority for its reliance on the 1938 MADONNA decision because “the decision is no longer of precedential value in view of the social changes in the ensuing 43 years.” Indeed, one might well make the same observation in 2015 about the “swingers” in the 1981 McGinley decision. Certainly, Judge Moore noted in her additional views that McGinley has been “widely criticized.”

Does Section 2(a) Violate the Unconstitutional Conditions Doctrine? At the heart of the First Amendment analysis is whether the federal trademark registration system is a government benefit or whether it is an exercise of Congressional funding under the Spending Clause. In its 2013 decision in Agency for International Development v. Alliance for Open Society International, Inc., the Supreme Court explained the “unconstitutional conditions” doctrine and its effect. The issue in the case arose from the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 (“Leadership Act”) in which Congress appropriated billions of dollars to combat HIV/AIDS worldwide. The receipt of funds was contingent on a “funding restriction” that none of the funds would be used to promote or advocate the legalization or practice of prostitution or sex trafficking and a “policy requirement” that all recipients must have a policy explicitly opposing prostitution and sex trafficking. The plaintiffs brought a declaratory judgment action, seeking a declaration that the “policy requirement” violated their First Amendment rights.

As to the unchallenged funding restriction, the Court observed that under the Spending Clause of the Constitution, Congress has the power to expend funds for state or private programs and to set the limits for receipt of those funds to insure that they are used in the manner Congress intended even if the conditions “affect the recipient’s exercise of its First Amendment rights.”

The First Amendment Issues in the Slants Case As this issue will be decided in the Federal Circuit’s en banc decision before any decision by the Fourth Circuit in the Redskins case, a review of the Tam litigation is a logical starting point for a discussion of the First Amendment issues. As noted above, in the opinion affirming the PTO’s original denial of the Slants mark, the Court felt compelled to follow the CCPA’s 1981 In Re McGinley decision, which was also relied upon heavily by Judge Lee in his opinion in the Redskins case. In McGinley, the court held that the PTO’s refusal to register a “scandalous” mark did not abridge the applicant’s First Amendment rights because denial of registration did not affect the applicant’s right to use the mark. In her “additional views” in the Tam decision, Judge Moore recommended that “[i]t is time for this court to revisit McGinley’s holding on the constitutionality of Section 2(a) of the Lanham Act.”

The First Amendment Issues in the Redskins Case In a July 8, 2015 decision, Judge Lee rejected Pro-Football’s constitutional arguments and denied its motion for summary judgment on all counts. Instead, the Court sided with the Native Americans’ cross-motion for summary judgment on all counts. Pro-Football appealed this decision to the U.S. Court of Appeals for the Fourth Circuit on August 6, 2015. The TTAB concluded that “a substantial composite of Native Americans found the term REDSKINS to be disparaging in connection with respondent’s services during the relevant time frame of 1967-1990.”

Pro-Football then filed a civil action in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit, the latter court ruled that laches barred even the youngest petitioner’s claim.

While that appeal was pending, younger Native Americans who could avoid the laches defense filed another petition for cancellation. The TTAB once again ordered cancellation of the Redskins registrations. Based on definitions of the word “redskins” and the viewpoints of Native Americans, the Board concluded that “a substantial composite of Native Americans found the term REDSKINS to be disparaging in connection with respondent’s services during the relevant time frame of 1967-1990.”

Pro-Football then filed a civil action in the U.S. District Court for the Eastern District of Virginia seeking reversal of the cancellation. In this action, Pro-Football alleged not only that the TTAB erred in its determination due to a lack of substantial evidence of disparagement at the time of registration, but also pled that the case raised serious First and Fifth Amendment constitutional issues.

The court held that the PTO’s refusal to register a “scandalous” mark did not abridge the applicant’s First Amendment rights because denial of registration did not affect the applicant’s right to use the mark. In her “additional views” in the Tam decision, Judge Moore recommended that “[i]t is time for this court to revisit McGinley’s holding on the constitutionality of Section 2(a) of the Lanham Act.”

McGinley continued to be a point of focus in the en banc briefing and argument, and thus further discussion of this decision is warranted.

In Re McGinley—Swingers Beware Viewed from the world we inhabit in 2015, the McGinley mark and the reactions to it seem as amusingly dated as a Hugh Hefner article about his “Playboy Philosophy.” The registrant in McGinley found himself in a seriously uphill battle from the start. The mark at issue was a photo of a naked man and woman embracing. According to the trademark application, it was to be used for a “Newsletter Devoted to Social and Interpersonal Relationship Topics” and for “Social Club Services.” The CCPA was a good bit more specific, noting that the newsletter “has to do with discussions of sexual topics such as bisexuality, homosexuality, masturbation, and fornication” and that the services included “sponsoring and arranging parties for ‘swinging,’ which appears to be a form of group sex.” The Examining Attorney and the TTAB denied registration on moralistic grounds with the TTAB concluding that “Applicant’s mark is immoral and scandalous.” The TTAB noted, however, that these were not so bad for the registrant since he could still use the mark, although without the statutory benefits that would follow from registration.

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to the policy requirement, the Court emphasized that the “[g]overnment may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit.”39

In other words, conditions that define the limits of the government program are constitutionally appropriate, but those that leverage the funding to regulate speech outside the contours of the particular program violate the First Amendment.

Observing that the distinction “is not always self-evident,” the Court held that the policy requirement was an unconstitutional restraint of speech. The court noted that the funding restriction already ensured that no funds would be used on programs that promoted or advocated sexual trafficking, so the policy requirement “must be doing something more.”38

The court found that the “something more” was requiring recipients to profess a specific belief which violated their right of free speech in order to receive the benefits.

Against this doctrine, Judge Moore concluded in her “additional views” that the trademark registration system is a “regulatory regime, not a government subsidy program.”39 Combined with the fact that applicants, not the treasury, currently fund the trademark registration process, Judge Moore reasoned that trademark registration is not a system funded under the Spending Clause.40 Rather, it is akin to other programs that have violated the “unconstitutional conditions” doctrine.41

The parties briefing this issue in the Tam appeal have approached the “unconstitutional conditions” doctrine in starkly different ways.

Mr. Tam emphasized the Alliance court’s distinction between “conditions that define the federal program and those that reach outside it.”42 As applied to the federal trademark registration program, Mr. Tam argued that prohibition of “disparaging” marks was an unconstitutional condition because it reaches outside the commercial objectives of the trademark registration program.43

Banning marks based on their expressive content—i.e., not on whether the marks are misleading, deceptive, or confusing—does not help consumers identify the source of goods nor protect producers from wrongful appropriation of goodwill.44 Mr. Tam argued that this illustration clearly shows that the condition is outside the objective of the federal trademark registration program, and given the significant benefits of registration, Section 2(a) violates the unconstitutional conditions doctrine.

The government offered a completely different approach. It agreed that a condition that leveraged funding to regulate speech outside the contours of the federal program would be an unconstitutional condition.45 But under the government’s reading, denial of a “disparaging” mark only regulates speech within the contours of the federal trademark system, because the registrant is not forced to forgo use of the mark in any way except for within the federal trademark system.

The government also distinguished Alliance and Texas Lottery Commission. It argued that Alliance was distinguishable because the unconstitutional condition there concerned statements made by participants on their “own time and dime.”46 In Texas Lottery Commission, the government argued, the prohibition on gambling only applied to the challenger because of their First Amendment activity (political advocacy).47 In comparison to both of these cases, the government argued that Mr. Tam was seeking the benefits of the federal trademark registration scheme without the lawful conditions for registration placed within it.48

What are the Benefits of Federal Trademark Registration and Why Do They Matter?

There seems to be little question that federal registration is indeed a “benefit” and that a registrant whose mark is found to be “disparaging” does not gain that specific benefit. Just this year the United States Supreme Court in B&B Hardware, Inc. v. Hargis Industries, Inc.49 described the benefits of registration as “substantial” and “significant.” Judge Moore, however, did not simply rely on this precedent but detailed the benefits in her “additional views.” As she noted, a federal registration owner of a federally registered mark is granted access to federal court irrespective of diversity and may be able to recover treble damages upon proving willful infringement.50 In sum, owners of federally registered marks “are afforded additional protection not provided by the common law.”51

So if a federal registration is a “benefit” that the government is denying to certain marks deemed “disparaging,” the question becomes whether a trademark is protected speech and if so whether Section 2(a) should be analyzed under a strict scrutiny or intermediate scrutiny analysis.

At the heart of the First Amendment analysis is whether the federal trademark registration system is a government benefit or whether it is an exercise of Congressional funding under the Spending Clause.
Federal Trademark Registrations: Whose Speech?
The government did not appear to contest the substantial benefits of federal trademark registration in the Tam en banc appeal. Instead, it argued that Congress constitutionally chose to confer those benefits only on certain categories of marks. The government also argued that emphasis on the registrant’s First Amendment rights was misplaced. Rather, the government urged that federal trademark registrations are a form of government speech that is not subject to the First Amendment’s rules designed to protect the marketplace of ideas. To buttress this argument, the government relied on Walker v. Texas Division, Sons of Confederate Veterans, Inc. In Walker, the Supreme Court rejected a First Amendment challenge to the Texas Department of Motor Vehicles Board’s rejection of a license plate bearing the Confederate battle flag. The Supreme Court ruled that the private party could not compel Texas to include a Confederate battle flag on its specialty license plates. In Tam, the government analogized the license plates to the Official Gazette of the PTO and the Principal Register, arguing that these are forms of “government speech” within which Tam (or any private party) cannot compel the government to publish his “speech” (i.e., his mark).

Are federal trademark registrants left to guess what marks the PTO will find “scandalous” or “disparaging?”

After being pressed by the Court during the en banc oral argument, the government clarified its position on this point. The government stated that it does not believe that an applicant’s use of the mark in the marketplace is government speech. However, the government does believe that issuing the registration certificate and placing an applicant’s mark on the register are forms of government speech.

Mr. Tam contested that trademarks are government speech in both his briefing and at oral argument. Mr. Tam emphasized that trademarks belong to the entity whose goodwill is associated with them, and that the mark-holders—not the government—are charged with preventing registered marks from becoming generic. Mr. Tam also distinguished Walker, arguing that a legally-managed, government-issued license plate, over which Texas had sole control of the design, typeface, and color, was not akin to private trademarks, which are designed and enforced by the mark-holder. Mr. Tam argued that the Principle Register is simply a list of protectable marks: those marks are not “used” by the government to communicate anything about the government.

Are Trademarks Protected Speech?
Judge Moore correctly observed that “[t]oday . . . it is unquestionably true that trademarks are protected speech under Supreme Court commercial speech jurisprudence.” Indeed, in Friedman v. Rogers, the Supreme Court held that use of a trade name to identify an optometrical practice constituted commercial speech. But some trademarks seem to do more than simply disseminate information as to who is producing and selling what products, for what reason and at what price. Recall Mr. Tam’s assertion that by trademarking the term “Slants” he was trying to take ownership of Asian stereotypes. As Judge Moore noted, by doing so the band uses the name to “weigh in on cultural and political discussions about race and society that are within the heartland of speech protected by the First Amendment.” Should Section 2(a)’s limitations on some marks be reviewed under a strict scrutiny analysis and its restriction of other marks reviewed under an intermediate scrutiny analysis?

Mr. Tam argued that because the “disparaging” prohibition is both a content-based, and viewpoint-based, regulation of speech, in that it focuses on the expressive content of a mark, it should be subject to strict scrutiny. Mr. Tam contends that Section 2(a) fails under this analysis.

In the alternative, Mr. Tam argued that the “disparaging” prohibition fails even under intermediate scrutiny. This argument centers on the government’s alleged inability to meet the first prong of the intermediate scrutiny test: showing that the asserted governmental interest is substantial. Mr. Tam pointed out that the only alleged “interest” in prohibiting “disparaging” registrations is to protect some subset of the public from offense. But this “heckler’s veto” is a classically insufficient justification for the suppression of expression under the First Amendment.

In its briefing, the government did not directly address the issue of the appropriate level of scrutiny, although it did mention that Section 2(a) would satisfy even intermediate scrutiny if applied. Instead, the government repeatedly argued that Section 2(a)’s prohibition does nothing to drive ideas or viewpoints from the marketplace, and that the government has a legitimate interest in limiting federal trademark registrations to those that are not disparaging. However, during oral argument the government clarified its position to be that the use of a trademark is commercial speech subject to intermediate scrutiny.

The government also argued that the fact that Mr. Tam’s application was denied shows that Section 2(a) is viewpoint neutral. The thrust of this argument is that because Mr. Tam was seeking to “own” the term, and not use it as a racial slur, the government’s rejection of it is proof that the government will reject what it perceives as “slurs” no matter which way the term is being used.

Is Section 2(a) Unconstitutionally Vague?
Also at issue in both The Slants and the Redskins cases, albeit to a lesser degree, is whether Section 2(a) is unconstitutionally vague. A regulation is not void for vagueness when it is “sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.”

Are federal trademark registrants left to guess what marks the PTO will find “scandalous” or “disparaging?” Does the specter of a Section 2(a) denial cause a registrant seeking to use a mark that is not only a source
The test requires the examiner to determine whether a mark is “disparaging.” The ACLU, in an amicus brief on behalf of Mr. Tam in the Slants litigation, asserted that “the only consistent result of the application of the disparagement clause is inconsistency.” The ACLU also set forth numerous examples of registration contradictions. For example, it compared determinations where MADONNA as a mark for wine was rejected as “scandalous,” but later accepted as a mark for the same, and where PUSSY POWER was rejected as a mark for entertainment purposes, but PUSSY POWER REVOLUTION was approved as a mark for clothing. It further compared an application for COCAINE that was rejected for soft drinks but accepted for clothing, and THE COMPLETE A**HOLE’S GUIDE TO . . . which was rejected for a series of self-help books while MANAGING YOUR INNER A**HOLE was approved for use on books discussing the development of emotional intelligence.

With these glaring inconsistencies, the ACLU, Pro-Football, and Mr. Tam claim that § 2(a) fails to give the ordinary person an understanding of what is truly prohibited and amounts to nothing more than PTO censorship.

The government’s response to the vagueness charge appears to be reliance on the known, two-part test used by examiners when evaluating whether a mark is “disparaging.” The test requires the examiner to determine:

1. what is the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services; and

2. if that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols, whether that meaning may be disparaging to a substantial composite of the referenced group.

Therefore, the government argues, the ordinary person is on notice as to the standard under Section 2(a) that will be applied to their mark upon examination.

**In re Tam Oral Argument: Copyright Comparison Intrigues Judges**

At the Federal Circuit’s en banc hearing in the Tam litigation on October 2, 2015, the court addressed many of the issues raised in the parties’ briefs. However, various judges raised a seemingly new concern that was not explicitly addressed in the briefing: could Congress constitutionally limit copyright registrations to those that are not “disparaging” in the same way it has limited trademark registrations under Section 2(a)? If not, why may it do so in the trademark regime?

The court repeatedly returned to this analogy and pushed the government to distinguish the copyright and trademark regimes. The government offered several alleged distinctions: a copyright holder cannot fall back on state law protections in the absence of a federal copyright regime, whereas a trademark holder can; the government does not “prosecute” copyrights in the same manner in which it “prosecutes” trademarks, it merely registers the copyrighted material with the Library of Congress; and copyright protection protects core political speech, whereas the sole purpose of the trademark regime is to protect consumers in the marketplace.

Several judges did not seem convinced by these distinctions. First, they responded that even though there are common law trademark protections in the absence of federal registration, the benefits of federal registration are substantial. Moreover, even to the extent state law regimes permit enforcement of “disparaging” marks, First Amendment rights should not turn on whether there are other, less effective protections, which could be similarly hindered by states at any time. Next, the judges contested that copyright protection is the only means by which an author may “use” his work. The judges argued that the holder of a work that is not copyrighted is still free to “use” the work; it would simply lack the means to prohibit others from using or copying the work, arguably the same shortcoming a would-be federal trademark registrant faces.

Unsurprisingly, counsel for Mr. Tam forcefully responded in rebuttal that the trademark regime should be analogized to the copyright regime, and that the restriction on “disparaging” marks (or works) is unconstitutional when applied to both.

**Conclusion**

The Redskins and Slants cases offer an intriguing insight into the intersection of the First Amendment and the Lanham Act. The forthcoming appellate decisions are sure to shed light on the current contours of the First Amendment and the Lanham Act. Whether a collision between the two is avoided remains to be seen.

**Endnotes**

1. Section 2(a) states in part: “No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute. . . .” 15 U.S.C. § 1052(a) (2006).


4. Under trademark law, a party who is dissatisfied with a decision reached by the TTAB may either appeal to the Court of Appeals for the Federal Circuit, thereby preserving the TTAB record and waiving a civil action, or it may initiate a civil action in district court. See 15 U.S.C. § 1071 (2011).

5. In re Tam, 785 F.3d 567, 573 (Fed. Cir. 2015).

6. Tam, 785 F.3d at 572; see also In re McGinley, 660 F.2d 481 (C.C.P.A. 1981).

7. Tam, 785 F.3d at 574.

8. In re Tam, 600 F. App’x 775 (Fed. Cir. 2015).
9. Additional amici requested leave to allow argument, but only the ACLU entities’ motions were granted. See, e.g., Order, In re Tam, No. 14-1203, ECF No. 159 (Fed. Cir. Sept. 3, 2015).
11. Id. at *47.
12. As mentioned in endnote 6, supra, a party dissatisfied with a TTAB decision may appeal to the Federal Circuit or file a civil action in district court.
17. Id. at *34.
18. Id. at *29.
21. Id. at *5-6.
23. Tam, 785 F.3d at 573 (Moore, J., additional views).
24. See, e.g., McGinley, 660 F.2d at 482.
25. Id.
26. Id. at 483.
27. See id.
28. Id., id. at 485-86.
29. Id. at 484.
30. Id. at 487 (Rich, J., dissenting).
32. 133 S.Ct. 2321 (2013)
33. Id. at 2326.
34. Id.
35. Id. at 2328.
37. Id. at 2330-31.
38. Id. at 2330.
39. Id. at 2330.
40. Id.
41. See, e.g., id.; see also Dep’t of Tex., Veterans of Foreign Wars v. Tex. Lottery Comm’n, 760 F.3d 427 (5th Cir. 2014) (en banc) (ruling that Texas’s bingo program violated the “unconstitutional conditions” doctrine where it allowed charitable organizations to hold bingo games so long as the resulting funds were not used for lobbying); Bullfrog Films, Inc. v. Wick, 847 F.2d 502 (9th Cir. 1988) (ruling that the “unconstitutional conditions” doctrine prevented the government from implementing a treaty under which certain “educational, scientific, and cultural” audio-visual materials were subject to benefits).
42. For Appellant at 21, In re Tam, No. 14-1203, ECF No. 64, (Fed. Cir. June 11, 2015); see also Alliance, 133 S.Ct. at 2330 (emphasis added).
43. Id.
44. Id.
46. Id. at 34.
47. Id. at 34-35.
48. Id.
49. 135 S.Ct. 1293, 1300, 1310 (2015)
50. E.g., In re Tam, 785 F.3d 567, 575-76 (Fed. Cir. 2015) (Moore, J., additional views).
51. Id.
52. Id.
53. E.g., In re Int’l Flavors & Fragrances Inc., 183 F.3d 1361, 1365 (Fed. Cir. 1999).
60. Id.
61. In re Tam, 785 F.3d 567, 575 (Fed. Cir. 2015) (Moore, J., additional views).
62. 440 U.S. 1 (1979)
63. Id. at 11.
64. Tam, 785 F.3d at 575 (Moore, J., additional views).

77. Id. ("Compare Madonna, In re Riverbank Canning Co., 95 F.2d 327 (C.C.P.A. 1938) (affirming rejection of mark for use on wines as scandalous), with Madonna, Registration No. 3,545,635 (accepted for use on wine); Pussy Power, U.S. Trademark Application Serial No. 77,387,209 (filed February 2, 2008) (rejected for use for entertainment services), with Pussy-Power-Revolution, Registration No. 4,507,246 (accepted for use on clothing); Cocaine, U.S. Trademark Application Serial No. 78,829,207 (filed March 3, 2006) (rejected for use on soft drinks and energy drinks), with Cocaine, Registration No. 1,340,874 (accepted for use on clothing); Cum, U.S. Trademark Application Serial No. 78,059,173 (filed April 19, 2001) (rejected for use on perfume), with Cum, Registration No. 1,044,903 (accepted for "no description entered"); The Complete Asshole’s Guide To . . ., U.S. Trademark Application Serial No. 76,351,811 (filed December 21, 2001) (rejected for use on series of books providing information relating to advice, counseling, self-help, and humor), with Managing Your Inner Asshole, U.S. Trademark Application Serial No. 85,711,056 (filed August 23, 2012) (accepted for use on books on the development of emotional intelligence—not registered on other grounds); BigCock, U.S. Trademark Application Serial No. 85,418,794 (filed September 9, 2011) (rejected for use on energy drinks), with OneFootCock, Registration No. 4,544,038 (accepted for use on alcoholic beverages); Messias, In re Sociedade Agricola E. Comercial Dos Vinhos Messias, S.A.R.L., 159 U.S.P.Q. 275 (T.T.A.B. 1968) (rejected for use on wine and brandy), with Il Messia, Registration No. 4,093,035 (accepted for use on wine)."

78. E.g., In re Geller, 751 F.3d 1355, 1358 (Fed. Cir. 2014); Brief for Appellee at 10, In re Tam, No. 14-1203, ECF No. 127 (Fed. Cir. July 16, 2015).

79. An audio recording of the hearing is available online at http://www.cafc.uscourts.gov/oral-argument-recordings.

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MICHAEL E. BAUGHMAN AND ELI SEGAL

In Davis v. Electronic Arts, Inc., the Ninth Circuit recently found that former NFL football players have a “right of publicity” to control the use of their likenesses in a video game in which users create their own fantasy games involving real-life players. The court relied on a pair of earlier decisions—one by the Ninth Circuit, one by the Third Circuit—that reached the same conclusion as to a video game involving NCAA players. All three decisions recognized that, under Supreme Court precedent, video games are expressive works—communicating ideas and even social messages—and are thus entitled to the same level of First Amendment protection as more traditional forms of expression, such as books, plays, and movies. Yet all three decisions nonetheless concluded that, because the video games were insufficiently “transformative,” the First Amendment was trumped by the athletes’ interests in profiting from the use of their public personas.

These cases illustrate the struggles courts have faced in reconciling this relatively new tort with the First Amendment rights of the publishers of expressive works who incorporate into those works images or stories of real-life people. While courts have developed a variety of “tests” to strike the right balance, all have serious constitutional flaws. Surprisingly, few courts have examined the right of publicity under the well-established line of Supreme Court cases seeking to balance other publicity-based torts with the First Amendment. The power that courts have been willing to provide to celebrities to control the use of their personas under the right of publicity seems odd given how the Supreme Court has dealt with defamation, invasion of privacy, intentional infliction of emotional distress, and a series of other disfavored statutes that have sought to prohibit publicity of one kind or another.

The video games, again, were undeniably expressive works. There was nothing false about the portrayals of the athletes in these games. And the use of the athletes’ identities did not harm their reputations, cause them emotional distress, or damage them in any other way we traditionally think of as harm caused by publicity. To the contrary, the video games, if anything, enhanced the subjects’ notoriety and fame in a positive way.

It is true that the interests at stake in defamation, invasion of privacy, and intentional infliction of emotional distress are different than in the right of publicity. Instead of protecting the interest in being free from harm from publicity, the right of publicity protects the interest in exploiting the value of one’s own identity. But why would this supposed right to control the use of and profit derived from one’s identity deserve more weight on the constitutional scale than the right to be free from real harm caused by publicity?

Suppose that during a news conference about the video game at issue in Davis, the CEO of Electronic Arts accused one of the former NFL players that is a plaintiff in the case of murder. Even if the statement were false and even if the CEO were negligently in failing to determine the truth, the former player, as a public figure, would have no right to recover damages absent a showing that the defendant knew the statement was false or subjectively entertained serious doubts as to its truth.

Consider a humorous greeting card depicting a famous hotel heiress and poking fun at her celebrity. What if, instead, a celebrity gossip website revealed that the heir was the victim of a sexual assault, in violation of a statute specifically prohibiting the release of such information? The Supreme Court has made clear that the First Amendment prohibits imposing liability in the latter scenario—even if the victim were a purely private person and suffered great emotional distress as a result of the disclosure. Yet the Ninth Circuit found that the First Amendment imposes no bar on Paris Hilton controlling Hallmark’s use of her image in a parody of her public persona in a greeting card.

Rather than applying murky, unpredictable balancing tests to determine whether a work is sufficiently “creative,” or “expressive,” or “transformative” to outweigh this right of publicity in any given case, courts should instead consider analyzing this cause of action under the well-established law governing liability for publicity. Under this rubric, recovery would be allowed only where, in addition to whatever elements the tort may require, the publicity is false in some provable way. The Supreme Court has held that in the case of “truthful information which . . . has [been] lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.”

Granting celebrities a monopoly on the use of their names and likenesses for profit would not appear to be such an interest. As a petition for certiorari has been filed in the Davis case, the Supreme Court now has the opportunity to correct the unconstitutional
road down which the right of publicity has wandered.

**The Right of Publicity’s Origin**

It was not until 1953 that the Second Circuit coined the term “right of publicity.” In a case involving professional baseball players, the court determined that a new cause of action was needed to address a perceived economic wrong that, in the court’s view, was beyond the reach of the right of privacy:

> [A] man has a right in the publicity value of his photograph. . . . This right might be called a “right of publicity.” For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.

In the 70-plus years that have followed, many states have recognized a right of publicity—by statute, common law, or both. The Restatement of Unfair Competition has done so, too. And while the precise contours differ from jurisdiction to jurisdiction, the essence of any right of publicity claim is the use of another person’s identity (e.g., name, likeness) for profit and without consent. As one scholar in this area has recognized, the tort is often justified by principles of natural rights (the notion that we all have an inherent, property-like right to control the use of our identities) and unjust enrichment (the notion that it is unfair to permit one person to profit from another’s identity).

While many state courts have addressed the issue, the sole case in which the Supreme Court touched on the right of publicity, *Zacchini v. Scripps-Howard Broadcasting Co.*, does not provide much guidance for resolving the inherent tension between the tort and the First Amendment. That is because Zacchini “involved only a small slice of the right of publicity and its holding was based on an unusual and narrow set of facts.” In *Zacchini*, the plaintiff sued over a news broadcast of his entire “human cannonball” act. The case thus did not involve the mere “appropriation of an entertainer’s reputation,” but, rather, “the appropriation of the very activity by which the entertainer acquired his reputation in the first place.” Stressing this crucial distinction, the Supreme Court explained that “the broadcast of [plaintiff’s] entire performance, unlike the unauthorized use of another’s name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of [plaintiff’s] ability to earn a living as an entertainer.” Drawing a parallel to copyright and patent law, the Court found that the cause of action protected the economic incentive for the plaintiff to develop and perform his act and thus was not constitutionally problematic under the circumstances.

**A Sea of Tests**

Absent Supreme Court guidance for situations other than the unauthorized broadcast of a plaintiff’s entire act, courts have crafted a range of analytical approaches to determine when, in the context of expressive works, the right of publicity must yield to the First Amendment. Those approaches include the predominant use test, the Rogers test, the transformative use test, and free-form ad hoc balancing.

Under the predominant use test, the First Amendment trumps the right of publicity where the speech is predominantly “expressive,” but succumbs where the speech predominantly “exploits the commercial value” of the plaintiff’s identity. Applying this test, the Missouri Supreme Court rejected a First Amendment challenge to a professional hockey player’s suit based on a character named after him in a comic book series—even though the hockey player and the character did not resemble each other apart from their shared names and tough-guy personas. A federal district court reached the same result as to a claim by Elvis Presley’s estate against an Elvis impersonator who imitated the King of Rock and Roll to a T—in appearance, dress, and performance style. According to the court, “although [it] contain[ed] an informational and entertainment element, the impersonator’s show serve[d] primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society.”

Under the Rogers test, the First Amendment protects the use of a person’s name or likeness unless that use is “wholly unrelated” to the content of the speech at issue or is “simply a disguised commercial advertisement for the sale of goods or services.” Applying this test, the Second Circuit rejected a claim by Ginger Rogers based on a movie, titled “Ginger and Fred,” about two fictional Italian cabaret performers who imitated Rogers and Fred Astaire and became known in Italy as “Ginger and Fred.” Similarly, the Kentucky Supreme Court dismissed a claim based on the use of the plaintiff’s dead husband’s name, image, and voice in a song about him, concluding that the use of his likeness was “sufficiently related to the underlying work” and was not just a disguised advertisement.

But the Sixth Circuit refused to dismiss a right of publicity claim by Rosa Parks, based on an OutKast song called “Rosa Parks.” While the song’s lyrics did not explicitly reference Parks, they included the hook, “Aha hush that fuss, Everybody move to the back of the bus”—which, according to the band and the district court, was the tie-in to Parks. According to the Sixth Circuit, however, a jury would have to determine whether “Rosa Parks” was “wholly unrelated” to the content of the song.

Other courts—including the Third and Ninth Circuits in the football video game cases—have endorsed the transformative use test. The California Supreme Court adopted this test based on copyright law and explained that the inquiry boils down to “whether the celebrity is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.” In other words, the key question is “whether
a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.”31

Courts have found all of the following insufficiently “transformative” to preclude right-of-publicity claims:

• football video games in which users control realistic avatars of actual pro or college players;32
• t-shirts with realistic drawings of the Three Stooges;33
• the video game Band Hero, in which users simulate performing in the band No Doubt by controlling realistic avatars of No Doubt members;34 and
• a birthday card with an image of Paris Hilton’s head superimposed on a cartoon waitress’s body and uttering Hilton’s “that’s hot” catchphrase.35

Yet courts using the same test have found all of the following sufficiently “transformative” to make right-of-publicity claims:

• a painting featuring realistic images of Tiger Woods at the center, with a collage of images of caddies and of other golf greats around the perimeter;36
• a rap star’s use of the name and persona of a notorious, real-life cocaine dealer to create for himself a fictional celebrity identity of drug-kingpin-turned-rapper;37
• a comic book series featuring half-human, half-worm villains based, in a number of ways, on a pair of real-life musicians;38
• a video game in which a character shared certain facial features, clothing, hair color and style, and catchphrases with the former lead singer of the “retro-funk-dance musical group” Deee-Lite;39 and
• a warfare video game, with “missions” involving a realistic avatar of former Panamanian dictator Manuel Noriega.40

Finally, still other courts have not articulated any particular test, opting instead to engage in free-form, ad hoc balancing of the competing interests in the particular case. The Tenth Circuit did so in holding that baseball cards featuring caricatures of major league baseball players were not actionable.41 The court found that, as parodies of celebrities, the baseball cards were an “especially valuable means of expression.”42 On the other hand, the court concluded that, in the specific context of parody, society’s interest in protecting major leaguers’ publicity rights was “negligible.”43 Similarly, the Eighth Circuit held that the First Amendment right to use major league baseball players’ names and statistics in fantasy sports products “superseded” the players’ publicity rights.44 As for the First Amendment side of the scale, the court emphasized that “recitation and discussion of factual data concerning the athletic performance of players . . . command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection.”45 And as for the right of publicity side, the court stressed that baseball players already “are rewarded handsomely . . . for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements.”46


While courts have developed a variety of tests to balance the First Amendment against the right of publicity, in doing so, they generally have not considered the already well-settled body of Supreme Court case law addressing the intersection between the First Amendment and state law remedies for damage caused by publicity, stemming from the landmark case of New York Times v. Sullivan.47 The overarching theme of this line of cases is that non-false speech on matters of public concern—particularly speech concerning public people—is almost always protected by the First Amendment, absent a state interest of the highest order. Indeed, even some false speech is protected in order to encourage unfettered discussion about public issues.

For example, the Supreme Court has made clear that preventing reputational harm is not an interest that justifies a damage remedy for true speech—or even for some false speech. The Court has explained that “[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concern at the root of any decent system of ordered liberty.”48 But “[t]o ensure that true speech on matters of public concern is not deterred,” the Court has nonetheless mandated that plaintiffs who sue for defamation based on speech on matters of public concern must prove that the speech was false.49 Speech on matters of public concern that cannot be proven true or false thus is not actionable as defamation. Nor is speech—such as rhetorical hyperbole, imaginative expression, parody, and sarcasm—that cannot reasonably be understood as stating “actual facts,” as only facts can be false.50

To provide even further “breathing space” for speech about public officials and public figures in particular, the Supreme Court has required defamation plaintiffs in either category to prove actual malice—that the speech was published with knowledge of its falsity or with reckless disregard for whether it was false or not.51 In doing so, the Court has emphasized that the state interest in protecting public people from reputational harm is less than its interest in protecting private people.52 Public officials and public figures have voluntarily assumed an increased risk of defamation by choosing to inject themselves into the limelight.53 In other words, we as a society—for better or worse—scrutinize and otherwise focus much of our attention on such people. That is simply part of the trade-off when entering the arenas of politics and celebrity. Moreover, despite the “strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation,” private figure defamation plaintiffs must prove some level of fault to recover, too; there can be no strict liability, even as to false and defamatory publications.54 Protecting privacy is also an insufficient state interest to justify
imposing liability for non-false speech about matters of public concern. In fact, in *Time Inc. v. Hill*, the Supreme Court held that to recover for invasion of privacy based on speech about matters of public interest, any plaintiff—private or public—must prove knowledge of falsity or reckless disregard of the truth.54 The Court emphasized that “[w]e create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person’s name, picture or portrait, particularly as related to nondefamatory matter.”55 An actual malice standard was necessary because “[e]ven negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity,” as it would “place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.”56

The prevention of emotional distress does not rise to the level of a state interest of the highest order either. In *Hustler Magazine v. Falwell*, Jerry Falwell sued *Hustler* claiming that a parody interview of him—which included his picture—suggested that Falwell had engaged in a drunken incestuous rendezvous with his mother in an outhouse.57 The Supreme Court held that, to recover for intentional infliction of emotional distress (“IIED”), public figures and public officials must prove that the speech at issue “contains a false statement of fact which was made with ‘actual malice,’ i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.”58 The Court stressed that “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern” and that importing the actual malice standard to the IIED context was necessary to ensure adequate “breathing space” for such speech.59 Indeed, even in a case where the IIED claim was based on picketing near a soldier’s funeral with signs blaming the death on America’s tolerance of homosexuality, the Supreme Court held that the First Amendment precluded recovery because the speech related to matters of public concern.60 As the Court put it: “Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”61

Consistent with its approach to defamation, invasion of privacy, and IIED in general, the Supreme Court has also struck down statute after statute that prohibited the publication of true speech regarding matters of public concern but failed to promote a state interest “of the highest order.”62 For example, in *Florida Star v. B. J. F.*, the Court deemed unconstitutional a Florida statute that prohibited publishing rape victims’ names, even though the plaintiff, B. J. F., “testified that she had suffered emotional distress from the publication of her name . . . ; that her mother had received several threatening phone calls from a man who stated that he would rape B. J. F. again; and that these events had forced B. J. F. to change her phone number and residence, to seek police protection, and to obtain mental health counseling.”63 In *Smith v. Daily Mail*, the Court reached the same conclusion as to a West Virginia statute that prohibited publishing juvenile defendants’ names.64 So too in *Bartnicki v. Vopper*, as to Pennsylvania and federal statutes that prohibited intentionally publishing the contents of illegally intercepted communications, including, in as the case before the Court, communications about matters of public concern.65 In the words of the *Bartnicki* Court, statutes that “impose[] sanctions on the publication of truthful information of public concern” “implicate[] the core purposes of the First Amendment.”66

### Protecting privacy is also an insufficient state interest to justify imposing liability for non-false speech about matters of public concern.

One may reasonably question why, rather than analyzing the right of publicity under one of the four approaches discussed above—the predominant use, *Rogers*, transformative, and ad hoc balancing tests—courts should not simply apply the Supreme Court’s well-established, falsity-focused line of publicity cases. While cases involving false endorsement may pass First Amendment muster under such an analysis, most right of publicity plaintiffs do not claim that the speech at issue was false in any way. Instead, they simply seek to protect their interest in controlling the use of their own name or likeness. Is that interest entitled to more weight than one’s reputation, privacy, or right to be free from outrageous conduct that inflicts emotional harm?

We submit that it is not. Indeed, the traditional rationales offered for the right of publicity—protecting natural rights and preventing unjust enrichment—are equally applicable to a defamatory, privacy-invading, distress-inducing, above-the-fold article about a celebrity. Moreover, while the tort protects celebrities’ right to control the use of their own names, the Supreme Court has made clear that public persons are entitled to less protection from publicity, not more.68 Thus, given this well-established First Amendment principle that public persons are subject to legitimate public comment, the very rationale upon which the right of publicity tort is based is constitutionally suspect. In any event, whatever worth one may attribute to the values furthered by the right of publicity, they do not outweigh the risks that enforcing such a
right poses to free expression. What is more, in addition to permitting liability for non-true speech about public people, the four approaches that most courts employ when balancing First Amendment and publicity rights suffer other constitutional infirmities, as well:

- All four tests put the court—be it judge or jury—in the role of art critic. For all four require the court to assess the expressive significance of the use of the prospective plaintiff’s identity—by evaluating whether that use is more expressive than commercial, related to the expressive content of the speech as a whole, transformative, or of great enough expressive value to outweigh any countervailing interests. The Supreme Court has repeatedly cautioned that this is precisely the type of role that courts should avoid under the First Amendment.69

- Given their subjective nature, all four approaches are unpredictable. This is a particularly dangerous flaw in the First Amendment context, where the concern regarding chilling effects is paramount.70 Indeed, even had he known what test the court would apply, how could the comic book author have predicted with any degree of confidence whether naming a tough-guy character after a tough-guy hockey player would be deemed more commercially motivated than expressive? How could Outkast have predicted whether “Rosa Parks” would be found sufficiently related to a song that talks about moving to the back of the bus but doesn’t mention the civil rights hero by name? How could Electronic Arts have predicted that designing lifelike football games that enable users to be actual players would be held non-transformative, particularly where dissenting Third Circuit and Ninth Circuit judges had a different view? And how could the fantasy sports company have predicted whether the expressive value of talking about sports statistics would be ruled sufficiently weighty to trump the rights of major league players to profit from the use of those statistics?

- Finally, with the possible exception of the Rogers test, all four approaches threaten forms of speech that have long been integral to American culture—biographies and historical fiction; plays, movies, television shows, and songs about real people; and photography, to name just a few.

In rejecting a First Amendment challenge to the right of publicity claim before it, the Supreme Court in Zacchini did not fully consider the Court’s line of falsity-focused cases—in part because not all of the cases had yet been decided. For two reasons, however, the Court did suggest that requiring falsity and fault would be inappropriate as to the plaintiff’s claim—even though the Court had required them as to the invasion of privacy claim at issue in Time, Inc. v. Hill.71 Because both reasons are inapplicable in most right of publicity cases, Zacchini should not preclude courts from considering the falsity-focused constitutional analysis that we advocate here.

First, the Zacchini Court stressed the state interest in protecting the right to profit from one’s own creative work, so as to encourage the creation of such works in the first place.72 Again, the Court was particularly troubled that the defendant had broadcast Zacchini’s entire human cannonball act, noting that the interest at stake in encouraging creativity was “closely analogous to the goals of patent and copyright law.”73 But while there is a legitimate interest in forbidding the wholesale copying and publication of another person’s creative work—an interest which is grounded in the Constitution’s Copyright Clause and which we do not address in detail here—most right of publicity cases do not involve such circumstances.74 In fact, none of the other cases discussed in this article do. Far more than protecting the right to control the use of one’s own creative works, the tort generally bestows a right to control others’ creative works—and it is that right that is at issue in most right of publicity cases, including all of the cases discussed in this article other than Zacchini. In those circumstances, there is no need to incentivize the plaintiff because the plaintiff has nothing to do with the relevant work’s creation. Indeed, if the state is interested in encouraging creative works, enforcing a right of publicity is counterproductive, as it inevitably chills creative works that depict, discuss, or otherwise incorporate real life individuals.

Second, under the narrow set of facts in Zacchini, the five-justice majority observed that a liability finding would not deprive the public of the pleasure of viewing the human cannonball act; it was just a question of “who gets to do the publishing.” But that, too, is not the situation in most right of publicity cases, where the question instead is whether the work will be created and made available to the public at all. The tough-guy hockey player would not have written his own comic book series. Rosa Parks would not have penned her own eponymous rap song. The football players would not have produced their own video game. Paris Hilton would not have created her own greeting card poking fun at herself. And even where celebrities are willing, in theory, to license the use of their identity, they only do so for works they deem worthy of production. Moreover, many would-be creators would surely choose to forgo creating and publishing a work about a celebrity rather than pay a licensing fee.

* * *

In sum, the supposed interests furthered by typical right of publicity cases involving expressive works are not worth the threat posed to the free flow of ideas about public persons and public issues. Aggressive application of the tort risks chilling protected speech about matters of legitimate public concern and discussion. Analyzing the constitutionality of the right of publicity in any given case under well-settled law regarding other publicity-based torts, courts should find the right of publicity tort generally unavailable absent some provable falsehood. In 2001, before...
becoming derailed by the transformative use test, the Ninth Circuit took a falsity-focused approach to the right of publicity, requiring Dustin Hoffman to prove actual malice to recover based on a magazine’s publication of an image of Hoffman from the movie “Tootsie.”76 It did not matter to the court that Hoffman’s claim was for right of publicity, rather than for defamation, invasion of privacy, or intentional infliction of emotional distress. Nor should it have mattered. For none of these torts further a state interest of the highest order, as is required by the Supreme Court to penalize non-false expression about public people and other public issues.

Endnotes
1. 775 F.3d 1172 (9th Cir. 2015).
2. Id. at 1176-81 & nn. 2-3; Keller v. Electronic Arts, Inc., 724 F.3d 1268 (9th Cir. 2013); Hart v. Electronic Arts, Inc., 717 F.3d 141 (3d Cir. 2013).
3. Davis, 775 F.3d at 1176 (citing Brown v. Entm’t Merchants Ass’n, 131 S. Ct. 2729, 2733 (2011) for this proposition); Keller, 724 F.3d at 1270-71 (same); Hart, 717 F.3d at 148 (same).
4. Davis, 775 F.3d at 1175-81; Keller, 724 F.3d at 1270, 1273-79; Hart, 717 F.3d at 165-70 & n.47.
5. Right of publicity claims based on “commercial” speech, such as commercial advertisements, as opposed to “expressive” speech, implicate their own array of constitutional issues and are beyond the scope of this article. See, e.g., Jordan v. Jewell, 743 F.3d 509 (7th Cir. 2014).
8. Hilton v. Hallmark Cards, 599 F.3d 894 (9th Cir. 2010).
11. Id.
17. Zacchini, 433 U.S. at 563-64.
18. Id. at 576.
19. Id.
20. Id. at 576-77.
22. Id. at 372-74.
25. Id. at 997, 1004-05.
28. Id. at 442-43, 452.
29. Id. at 460-61.
31. Id. at 809.
32. Davis, 775 F.3d at 177-78; Keller, 724 F.3d at 1273-79; Hart, 717 F.3d at 165-70.
33. Id. at 810-11.
35. Hilton, 599 F.3d 894.
36. ETW Corp. v. Jireh Publ’g, 332 F.3d 915, 918, 938 (6th Cir. 2003).
42. Id. at 972.
43. Id. at 976.
45. Id. at 823-24.
46. Id. at 824.
47. 376 U.S. 254 (1964).
50. Milkovich, 497 U.S. at 20; see also Gertz., 418 U.S. at 339 (“Under the First Amendment there is no such thing as a false idea.”).
52. Gertz, 418 U.S. at 343.
53. Id. at 344-45.
54. Id. at 348.
56. Id. at 389.
57. Id.
59. Id. at 56.
60. Id. at 50, 56.
62. Id. at 460-61.
64. 491 U.S. at 528, 532-41.
65. 443 U.S. at 103-06.
66. 532 U.S. at 527-35.
67. Id. at 533-34.
68. Gertz, 418 U.S. at 345.
69. See Brown, 131 S. Ct. at 2733 (“Under our Constitution, ‘esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.’” (quoting United States v. Playboy Entertainment Group, Inc., 529 U. S. 803, 818 (2000))).
72. Id. at 573.
73. Id. at 573-76.
74. See generally, e.g., Rothman, supra note 14 (discussing differences between copyright law and right of publicity).
75. Zacchini, 433 U.S. at 573.
76. Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186-87 (9th Cir. 2001) (applying the actual malice standard to Hoffman’s right of publicity claim and stating that “[w]e must first identify the purported false statement of fact”).
FTC Reviews Video Game Reviews: Settlement Holds Important Lessons for Companies Who Use Influencers

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On September 2, 2015, the Federal Trade Commission (the “FTC”) announced that an online entertainment network had agreed to settle charges that it engaged in deceptive advertising by paying “influencers” — individuals with large social media followings — to post YouTube videos endorsing Microsoft’s Xbox One system and several games. According to the FTC, influencers paid by Machinima, Inc., failed to disclose adequately that they were being paid for their seemingly objective opinions. As part of the settlement, the company has agreed to take steps to ensure that influencers disclose that they have a connection to any company whose products they review.

Machinima’s campaign has generated a lot of attention, both after the FTC’s press release, and more than a year earlier, when various press reports speculated about whether an FTC action would be forthcoming. This type of action is not new, however. In fact, the FTC bases its actions on its Guides Concerning the Use of Endorsements and Testimonials in Advertising, commonly known as the “Endorsement Guides.” Moreover, the FTC has engaged in a series of actions involving similar campaigns in social media.

The Endorsement Guides
The Endorsement Guides have been around since 1980, long before social media and long before words like “influencers” were common in a marketer’s vocabulary. In an effort to keep pace with changes in advertising, the FTC released a new version of the Endorsement Guides in 2009. One of the things the FTC did in the revised version is clarify that the term “endorsements” covers more than just a celebrity spokesperson talking about a product on TV. The terms also apply to comments in social media. Accordingly, the Guides include various provisions that apply to Facebook posts, tweets, video reviews, and other promotions in which companies encourage consumers to speak on their behalf.

Over the past six years, the FTC has conducted a number of investigations involving endorsements in social media campaigns. In some cases, the FTC entered into settlements with the marketers (such as Machinima) who ran the campaigns, in which the marketers agreed to make significant changes to their practices. In other cases, the FTC decided not to pursue enforcement actions and, instead, closed the investigations. The resulting settlements and closing letters hold valuable lessons for marketers.

What Types of Statements Are Covered
According to the FTC, a statement made by a person in social media will be deemed to be an “endorsement” if, when “viewed objectively, the relationship between the advertiser and the speaker is such that the speaker’s statement can be considered ‘sponsored’ by the advertiser.” The FTC encourages advertisers to ask whether, in making statements about a product or service, the speaker is acting independently or on behalf of the advertiser. If the speaker is acting independently, the statement will not be an “endorsement” subject the Endorsement Guides. However, if the speaker is acting on behalf of the advertiser, the statement will qualify as an “endorsement” and be subject to the Endorsement Guides.

The FTC writes that the facts that will determine the answer to this question “are extremely varied and cannot be fully enumerated,” but would include various factors, including:

- whether the speaker is compensated by the advertiser or its agent; whether the product or service in question was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of products or services from the same or similar advertisers, or the likelihood of future receipt of such products or services; and the value of the items or services received.

On the edges, the answer to the question is easy. For example, if a company pays a person to promote its products, that is clearly an endorsement. And if an employee says positive things about a company’s products, that’s probably an endorsement, too. In the middle, though, the questions get more complicated. For example, it’s not clear at what point a review prompted by a free sample falls under the scope of the Endorsement Guides. Therefore, the question of whether a specific statement is covered sometimes to be determined on a case-by-case basis.
Liability for Claims Made by Endorsers

Most advertisers know that they must ensure that claims in their ads are truthful, and that they may be held liable for any false or misleading claims. And savvy advertisers also know that they may also be held liable if they take a false or misleading claim made by a consumer and use it in their ads. There is nothing new about that. However, the Endorsement Guides go a step further and state that an advertiser may be liable for claims made by endorsers, even if the advertiser does not use those claims itself.

The FTC writes that an “advertiser’s lack of control over a specific statement made via these new forms of consumer-generated media would not automatically disqualify that statement from being deemed an ‘endorsement’ within the meaning of the Guides.” Therefore, an advertiser may be liable for an endorser’s statements, even if the advertiser did not authorize those statements or have the ability to control them. The FTC’s position on liability for statements made by endorsers could expand the scope of content over which advertisers are responsible.

In the Endorsement Guides, the FTC provides an example of an advertiser that asks a blogger try a new lotion. Although the advertiser does not make any claims about the lotion’s ability to cure skin conditions, the blogger writes that the lotion cures eczema. The FTC writes that the “advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger’s endorsement.” This is (understandably) a troubling proposition for many advertisers because most social media campaigns inherently involve giving up some level of control over the messages.

Although the FTC acknowledges that an advertiser may have no control over statements made by an endorser, the FTC still believes liability may appropriate because it is “foreseeable” that an endorser may make a false claim and, therefore, that by engaging in social media, the advertiser has assumed the risk “and the potential liability that accompanies that risk.” The FTC does note, however, that it would exercise its “prosecutorial discretion” and consider “the advertiser’s efforts to advise these endorsers of their responsibilities and to monitor their online behavior in determining what action, if any, would be warranted.”

The possibility that an endorser may make false or misleading statements is always — or at least, should be — a concern for marketers. Thus far, however, none of the FTC’s actions involving endorsements in the social media space have focused on this issue.

Disclosure of Material Connections

The Endorsement Guides state that if there is a “material connection” between an advertiser and an endorser, the endorser must disclose that connection. Although this may not seem controversial, what constitutes a material connection may be broader than most people think. For example, even though giving a blogger a free low-value sample may not trigger the disclosure requirement, giving the blogger a few of those samples can. Even intangible benefits, such as a chance to win a prize, could necessitate a disclosure. The FTC states that although the endorser has “primary responsibility” for disclosing the connection, advertisers should establish procedures to make sure endorsers make the disclosures and to take appropriate steps if an endorser does not.

Closing Letters

 Shortly after the updated Guides were released, the staff of the FTC’s Division of Advertising Practices conducted an investigation into whether AnnTaylor Stores had violated Section 5 of the FTC Act in connection with a blogging promotion conducted by the company’s LOFT division. LOFT had provided gifts to bloggers who attended previews of its Summer 2010 collection, and the FTC was concerned that some of the bloggers failed to disclose that they received gifts for posting blog content about that event.

Ultimately, the FTC staff decided not to recommend enforcement. In a letter addressed to LOFT’s attorneys closing the investigation (commonly referred to as a “closing letter”), the FTC staff explained that their decision was based primarily on three factors. First, there had been only one preview event, so presumably there was no pattern of violations. Second, only a small number of bloggers posted content about the preview, and several of those bloggers disclosed that LOFT had provided them with gifts. And third, LOFT adopted a written policy stating that “LOFT will not issue any gift to any blogger without first telling the blogger that the blogger must disclose the gift in his or her blog.” The staff noted that they expected LOFT to honor its policy and to monitor bloggers to make sure they comply.

Since 2010, a number of other companies have found themselves in a similar position to LOFT. For example, the following year, the FTC investigated a social media promotion that had been conducted by one of Hyundai’s advertising agencies. As part of that promotion, bloggers were given gift certificates as an incentive to include links to Hyundai videos in their posts or to comment on Hyundai’s upcoming Super Bowl ads. Many of the bloggers did not disclose that they had received the gift certificates, however. After reviewing the promotion, however, the FTC decided not to pursue the case for a few reasons. First, the FTC determined that Hyundai did not know about the incentives, that a small number of bloggers were involved, and that some of them did disclose they had received an incentive. Second, although advertisers can be held responsible for the actions of their agents, the actions in this case ran counter to both Hyundai’s and the agency’s social media policies. Moreover, the FTC noted that the agency promptly took action after it learned that some bloggers hadn’t made the appropriate disclosures.

These companies (and others) emerged from the FTC investigations relatively unscathed. Not all companies have gotten off so easily, though.

Settlements with the FTC

In 2010, a public relations agency hired by video game developers
agreed to settle FTC charges that it engaged in deceptive advertising in social media. According to the FTC, Reverb Communications encouraged its employees to pose as ordinary consumers and post reviews of the games on iTunes store, without disclosing that the reviews came from paid employees working on behalf of the developers. Under the settlement order, Reverb and its owner were required to remove any previously posted endorsements that misrepresented the authors as independent users. The agreement also barred them from engaging in similar conduct in the future.

The following year, the FTC announced a settlement with a company that sold guitar lesson DVDs using social media. According to the complaint, Legacy Learning Systems recruited affiliates to promote its courses through endorsements. In exchange, affiliates received commissions on sales resulting from referrals. The FTC charged that the company disseminated deceptive ads by representing that the endorsements reflected the views of ordinary and “independent” consumers, without clearly disclosing that the affiliates were compensated. To settle the case, the company agreed to pay $250,000 and monitor affiliates to ensure they are disclosing the commissions.

In 2014, the FTC announced that it had reached a settlement with Deutsch LA over a campaign the agency had created to promote Sony’s PlayStation Vita gaming device. One of the agency’s executives sent an e-mail to employees stating, in part:

To generate buzz around the launch of the device, the PS Vita ad campaign will incorporate a #GAMECHANGER hashtag into nearly all creative executions. #GAMECHANGER will drive gamers to Twitter where they can learn more about the PS Vita and join in the conversation. The campaign starts on February 13th, and to get the conversation started, we’re asking YOU to Tweet about the PlayStation Vita using the #GAMECHANGER hashtag.

In response, various employees posted tweets touting the device’s game-changing features. The FTC argued that a reasonable person reading the tweets would likely be misled into believing that they represented the opinions of independent consumers. The settlement generally requires Deutsch LA to ensure that endorsers disclose any connection they have to the company whose products they review.

The latest case involves the Machinima campaign, discussed above. According to the FTC, Machinima, the operator of a popular YouTube network, paid two influential gaming bloggers to create videos promoting the new Xbox One console and three new games, but did not require the bloggers to disclose that they were paid for the reviews. The bloggers posted four videos that had more than 1.6 million views. To capitalize on this success, Machinima later recruited and paid more people to upload positive reviews, again without requiring a disclosure. This generated another 30 videos and 30 million views in a five-week period.

As Jessica Rich, Director of the FTC’s Bureau of Consumer Protection, said: “When people see a product touted online, they have a right to know whether they’re looking at an authentic opinion or a paid marketing pitch. That’s true whether the endorsement appears in a video or any other media.” Under the proposed consent order settling the case, Machinima is required to ensure its influencers clearly disclose when they have been compensated in exchange for their endorsements. In addition, the company is required to follow up within 90 days of the start of a campaign to ensure the disclosures are still being made. Like other FTC orders, this one also includes various administrative requirements that run for 20 years. And although there were no monetary penalties associated with the order, if a company violates a final order, it is liable for a civil penalty of up to $16,000 for each violation.

Staying Out of Trouble
The FTC’s settlements and closing letters include valuable lessons to companies who use endorsers to advertise. The first step is, of course, to figure out whether a third party qualifies as an “endorser” under the Endorsement Guides. The analysis is not always easy, but an advertiser should think carefully about whether it is providing an incentive to a third party to speak on its behalf and whether that incentive would come as a surprise to a typical consumer.

When working with an endorser, an advertiser should prepare a contract or other guidelines that govern what the endorser can and cannot do. The document should require endorsers to disclose any connections between them and the advertiser. Moreover, because the advertiser may be liable for claims made by the endorsers, the document should include some guidance about what endorsers can and cannot say. It bears repeating that, according to the Guides, endorsements “must reflect the honest opinions, findings, beliefs, or experience of the endorser.” So there is a fine line between providing guidance and putting words in the mouths of the endorsers.

It is not sufficient to have an agreement with endorsers, however. As the FTC noted in its comments to the Endorsement Guides and in its closing letters to various companies, advertisers must also monitor endorsers and take steps to ensure they comply with the advertiser’s policies. Therefore, it may be necessary for the advertiser to assign an employee or agent to review statements made by endorsers in social media to make sure that claims are accurate and that the appropriate disclosures are being made. If an endorser does not comply with the advertiser’s policies, it should contact the endorser to correct the problem or, if the problems continue, consider terminating its relationship with the blogger.

Unfortunately, there is no one-size-fits-all approach to social media. The advertiser’s marketing team should work closely with its legal team to identify the company’s goals, the social media platforms it wants to leverage, the types of claims endorsers may make, the incentives that may be given to the endorsers, and a variety of other factors in order to come up with an approach...
that best fits its needs and offers legal protection. Companies that take shortcuts in this area are much more likely to attract unwanted attention from regulators.

Endnotes
1. See, e.g., Tim Peterson, Microsoft, Machinima "Native" Ad YouTube Blunder Risks FTC Ire, AdAge (Jan. 24, 2014).
3. The term “closing letter” refers to the letter the FTC staff sends to a company to notify them that the staff has decided not to recommend an enforcement action.
5. Id.
6. Id.
7. 16 C.F.R. § 255.1.
8. 74 Fed. Reg. at 53127.
9. 16 C.F.R. § 255.5.
12. Section 5 of the FTC Act (15 USC 45) prohibits “unfair or deceptive acts or practices in or affecting commerce.”
15. In re Reverb Communications, Inc., et al., FTC File No. 092 3199 (Nov. 22, 2010).
19. For example, “for five (5) years after the last date of dissemination of any endorsement covered by this order,” Machinima must “maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying” various types of documents related to the company’s compliance.
20. 16 C.F.R. § 255.1.

The ever-changing digital landscape is a tricky place for legal practitioners. The rules and laws governing electronic communications have grown out of legal concepts imported from more traditional fields, adapted from prior law, and created to address the unique features of the constantly evolving digital landscape. Charting a course through the digital domain has grown easier, but remains fraught with potential hazards. This volume offers a compass and some landmarks for that journey.

Providing analysis of relevant case law, this volume is an accessible tool for those with general legal knowledge who do not encounter this area regularly. It explores, in detail, questions and concepts related to liability, defamation, privacy, copyright infringement, website terms of use, and employer’s rights and risks in relation to employees’ off-duty online conduct. This thorough treatise was written by an impressive panel of attorneys from across the country with expertise in First Amendment issues, media law, intellectual property, advertising, e-commerce, data privacy, and other relevant practice areas.

Your clients count on you to chart the correct path. This book is your guide to successfully navigate the wilds of electronic communications in the digital frontier.
Flowerpot to SecureDrop
continued from page 1

correspondingly punish publication of the information, absent a need to further a state interest of the highest order," applies when news organizations set up SecureDrop and instruct a source on how to use it? This article explores these questions to identify the ramifications of SecureDrop and to suggest best practices to preserve for the digital world newsgathering protections developed in the analog world.

The Flowerpot, Then and Now
The signal is well-known. It was 1972. Bob Woodward wanted information, but his source, Deep Throat, “did not like to be called at his office.” They hatched a scheme. When Woodward needed to meet the source, later identified as FBI Assistant Director Mark Felt, he would place a flowerpot with a red flag in it on his balcony.

Now the flowerpot is gone. Woodward has long-since moved, and newsgathering, specifically gathering classified, confidential, or sensitive information from sources, is now a digital affair in many respects. This fact has not escaped Government officials. In fact, the Obama Administration’s unprecedented crusade against leakers often depends in part on evidence of online interactions between sources and reporters to try and convict alleged sources, like Sterling and Kim, under the Espionage Act.

SecureDrop aims to fix this. Conceived by the late Aaron Swartz and developed by the Freedom of the Press Foundation, a non-profit “focused on exposing mismanagement, corruption, and law-breaking in government,” SecureDrop “is an open-source whistleblower submission system that media organizations can use to securely accept documents from and communicate with anonymous sources.” As SecureDrop puts it, “In many of the recent leak prosecutions in the United States, sources have been investigated because authorities are able to retrieve both metadata and content of communications from third parties like email and phone providers in secret.” SecureDrop “eliminate[s]” these third parties “from the equation.”

News organizations have joined in, setting up their own SecureDrops. In short, this is done through a somewhat complicated process. News organizations establish a landing page describing SecureDrop at their regular “.com” URLs, create “.onion” URLs accessible only through the anonymous web browser, Tor, which conceals an end user’s location by routing and rerouting her internet activity through a network of servers around the world, and set up the hardware on the backend, including a server, air-gapped computer, and several USB drives to transport documents from the server to the air-gapped computer, where they can be decrypted and read.

Using SecureDrop from the source’s perspective is simpler, although it too requires some effort. So news organizations have set out instructions on their landing pages explaining how to use the system. Although each organization’s page differs in some respects, each is similar to the extent that they set out three basic steps sources must follow to use SecureDrop: first, the source must “[d]ownload and install software to access the Tor network.” preferably from a coffee shop that she does not normally frequent; next, the source must copy-and-paste the organization’s SecureDrop address into the Tor browser—the only place it is accessible; finally, the source must follow a set of further instructions describing how to upload documents or messages. Notably, when a source correctly uses SecureDrop not even the news organization knows the source’s identity.

In sum, SecureDrop from a news organization’s perspective involves a back-of-house component, i.e., actually setting up the system, but also front-of-house component, i.e., explaining to a source how to use the system. Despite this decidedly tech-involved structure, most news organizations have suggested that SecureDrop is no different as a practical matter from a mailbox or the traditional “transom” over which things can arrive. And the Freedom of the Press Foundation generally agrees, comparing SecureDrop to a high-tech version of the “Contact Us” forms available on many news organizations’ websites.

But of course SecureDrop is not exactly like those things as a technical matter, which begs the question: are the technical differences between a mailbox (or, for that matter, a flowerpot) and SecureDrop material for First Amendment purposes? Is publishing sensitive information delivered to a reporter anonymously through an unmarked, manila envelope—an activity protected by the First Amendment in most if not all cases—the same as publishing sensitive information delivered anonymously through SecureDrop? To answer these questions, the next section reviews the Supreme Court’s most relevant case in this regard, Bartnicki v. Vopper.

Bartnicki v. Vopper, and the Mailbox Background
Bartnicki v. Vopper raised “an important question concerning what degree of protection, if any, the First Amendment provides to speech that discloses the contents of an illegally intercepted communication.” It was the early 1990s and a teacher’s union and school district were locked in “contentious” negotiations over collective bargaining. Gloria Bartnicki, the union’s negotiator, called Anthony Kane, the union president, from a cell phone in her car. During that conversation Kane candidly said, “If they’re not gonna move for three percent, we’re gonna have to go to their, their homes . . . [t]o blow off their front porches.” Unbeknownst to him and Bartnicki, that call was not private; it was being intercepted by a third party.

When the parties received a controversial arbitration proposal several months later, Fredrick Vopper, a local radio personality, broadcast the intercepted call on his show. Another
station did the same, as did several newspapers that published the contents of the call. Bartnicki and Kane filed suit against Vopper, alleging violations of both state and federal laws that prohibited, among other things, the willful disclosure of "the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception." Vopper did not personally intercept the call. Rather "an unknown person . . . surreptitiously intercepted" it and anonymously delivered it to Jack Yocum's mailbox; Yocum, the head of an organization opposed to the union, was later added as a defendant.

After the district court denied the parties' cross-motions for summary judgment, it certified to the Third Circuit two controlling questions of law. First, "whether the imposition of liability on the media Defendants under the [wiretapping statutes] solely for broadcasting the newsworthy tape . . . , when the tape was illegally intercepted and recorded by unknown persons who were not agents of [the] Defendants, violates the First Amendment." Second, "whether the imposition of liability . . . on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment." The Third Circuit applied intermediate scrutiny to the statutes and held them unconstitutional because "they deterred significantly more speech than necessary to protect the privacy interests at stake." The court thus ordered the lower court to enter summary judgment for defendants. The Supreme Court granted certiorari.

The Court's Opinion
Justice Stevens, writing for the Court, initially set out a few factual assumptions. First, the defendants knew or should have known that the initial interception was unlawful. Second, the defendants "played no part in the illegal interception"; they "found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception." Third, the defendants' "access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else." And fourth the "subject matter of the conversation was a matter of public concern." On the law, Justice Stevens explained that the wiretapping statutes at issue were "content-neutral law[s] of general applicability." Simply, the statute "singly [out] [communications] by virtue of the fact that they were illegally intercepted." In other words, the statutes targeted communications for their "source rather than the[j]ir subject matter." Distinguishing the Court's line of jurisprudence "holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news," Justice Stevens explained that the statutes at issue were direct "regulation[s] of pure speech" that prohibited disclosure of information.

Thus, he eschewed reliance on the Court's general applicability case law, choosing instead the general rule as defined in Smith v. Daily Mail Publishing Co. that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." Indeed, so long as "a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order." This view, Justice Stevens wrote, was consistent with New York Times v. United States, where the Court, in "resolv[ing] a conflict between the basic rule against prior restraints on publication and the interest in preserving the secrecy of information," placed no weight on the fact that the "newspaper[s] intended to publish information obtained from stolen documents." Yet Justice Stevens recognized that that case—and the Daily Mail cases—"explicitly left open the question of whether the government can punish both the "unlawful acquisition" and the "ensuing publication" when "information has been acquired unlawfully by a newspaper or by a source." The question in Bartnicki nevertheless was not that; it was a "narrower version" of it: "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?"

The Court's narrow reading of the question was in step with its historical "refusal to construe the issue presented more broadly" or "to answer categorically whether truthful publication may ever be punished consistent with the First Amendment." Applying strict scrutiny to that question, Justice Stevens rejected the Government's two-fold interests. First, it had offered an "interest in removing an incentive for parties to intercept private conversations." The Court recognized that this might in some cases be valid, but found it to be "plainly insufficient" in this case for three reasons: (1) the identity of the interceptor was nearly always known, allowing the government to undertake the "normal method of deterring unlawful conduct" by punishing the "person who engages in" the interception; (2) no evidence suggested that "Congress viewed the prohibition against disclosures as a response to the difficulty of identifying persons" intercepting communications; and (3) no evidence showed that the non-disclosure provision "reduce[d] the number of illegal interceptions" in any event.

Second, the Government had asserted an "interest in minimizing the harm to persons whose conversations have been illegally intercepted." Justice Stevens discarded this "considerably stronger" interest too. Although an interest in "privacy of communication is . . . important," ultimately it is insufficient where "truthful information of public concern" is concerned. Finding both interests insufficient, Justice Stevens concluded his short opinion with the broader point: "We think it clear that . . . a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."
Justice Breyer’s Concurring Opinion
Justices Breyer and O’Connor joined the majority opinion.53 They also filed a concurring opinion to stress why “the Court’s holding does not imply a significantly broader constitutional immunity.”54 Focusing also on competing interests, Justice Breyer noted that the “statutes directly interfere[d] with free expression” by prohibiting publication but also “help[ed] to protect personal privacy” by deterring illegal interceptors.55 Where competing values like these meet, the “key question” for Justice Breyer “becomes one of proper fit”: “whether the statutes strike a reasonable balance between their speech-restricting and speech enhancing consequences.”56

The statutes struck no such balance, he wrote, because they “disproportionately interfere[d] with media freedom.”57 First, the defendants themselves “engaged in no unlawful activity other than the ultimate publication of the information another had previously obtained.”58 Indeed, they “neither encouraged nor participated directly or indirectly in the interception.”59 And, second, there was no claim that the defendants had “ordered, counseled, encouraged, or otherwise aided or abetted the interception, the later delivery of the tape by the interceptor to an intermediary, or the tape’s still later delivery by the intermediary to the media.”60 Next, the plaintiffs, because of the violent nature of the conversation, “had little or no legitimate interest in maintaining the privacy of the particular conversation.”61 Finally, the plaintiffs had ceded at least some privacy because they “were ‘limited public figures.’”62 In sum, “the speakers’ legitimate privacy expectations [were] unusually low, and the public interest in defeating those expectations [was] unusually high.”63 Thus, because the balance tipped in favor of speech, Justices Breyer and O’Connor settled with the majority.

Chief Justice Rehnquist’s Dissent
Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented.64 Emphasizing privacy concerns, the Chief Justice distinguished the Daily Mail line of cases on the ground that the statutes there “regulated the content or subject matter of the speech.”65 In addition, the information in Bartnicki, unlike the other Daily Mail cases, did not come from the government,66 was not already publicly available, and would only encourage self-censorship of those wishing to have private cell phone conversations.67 At any rate, the Chief Justice explained, Daily Mail did not settle whether the press could be punished for acquiring information unlawfully.68

On this last point, the dissenting Justices disagreed with their colleagues that the media defendant lawfully obtained the information and criticized the Court for placing “an inordinate amount of weight upon the fact that the receipt of an illegally intercepted communication has not been criminalized”:

But this hardly renders those who knowingly receive and disclose such communications “law-abiding,” and it certainly does not bring them under the Daily Mail principle. The transmission of the intercepted communication from the eavesdropper to the third party is itself illegal; and where, as here, the third party then knowingly discloses that communication, another illegal act has been committed. The third party in this situation cannot be likened to the reporters in the Daily Mail cases, who lawfully obtained their information through consensual interviews or public documents.69

Thus, where at least one side of the transaction was unlawful, the dissent would have found that the information was unlawfully obtained and that Daily Mail did not apply.

* * *

Bartnicki then provides some useful guidance in evaluating the potential legality of SecureDrop. First, “a stranger’s illegal conduct [in obtaining the information] does not suffice to remove the First Amendment shield from speech about a matter of public concern.”70 Second, even where the subsequent transaction of information between the source and the reporter is unlawful (at least on one side), such unlawful transfer as opposed to initial unlawful acquisition does not mean the reporter unlawfully obtained the information.71 These two aspects of the decision are unequivocally helpful to SecureDrop. A third guidepost, however, is less helpful. At least on its face, Bartnicki applies only where the reporter “played no part” in the initial unlawful acquisition of information.72 Indeed, in a footnote, the majority explicitly held its ruling did “not apply to punishing parties for obtaining the relevant information unlawfully.”73 And the concurrence further muddied the waters by suggesting without elaboration that information may be “unlawfully obtained” where a news organization or reporter “encourage[s],” “participate[s] directly or indirectly,” or “aide[s] and abet[s]” the acquisition of the information.74 So, the question then becomes, does the creation of SecureDrop constitute “aiding and abetting” the unlawful acquisition of information?

“Unlawfully obtained”: How far is too far?
As a result, the borders of “unlawfully obtaining” information, while left unclear in Bartnicki, are vital to understanding what legal risks SecureDrop may pose to news organizations. To understand those boundaries, existing case law reveals four fact scenarios that fill in the boundaries of lawfully obtaining information.

Scenario 1: Knowledge of Illegal Acquisition and Unknown Source
The first scenario is the simplest and is reviewed above in the description of Bartnicki. Simply, a news organization has not “unlawfully obtained” information merely because an unknown third party unlawfully acquired it in the first instance and the organization played no part in that acquisition.75 This is true even where the organization knows or has reason to know that the initial acquisition was unlawful.76 It is equally true even where the disclosure to the reporter is itself unlawful.

Scenario 2: Knowledge of Illegal Acquisition and Known Source
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It is also relatively clear that a news organization does not forfeit Bartnicki’s protections simply because it knows the identity of the source, knows that the source illegally acquired the information, and has some amount of contact with the source in the process of receiving the unlawfully acquired information.

In Jean v. Massachusetts State Police, for example, police conducted a warrantless search of a man’s home and were captured on a nanny cam. The man then contacted Jean, a local activist, through her website and explained to her what had happened. He then gave Jean a copy of the tape, which she promptly posted on her website along with critical commentary about the district attorney. The police threatened Jean, asserting that her hosting of the video violated a Massachusetts state law that prohibited an individual from “willfully disclosing . . . the contents of any wire or oral communication, knowing that the information was obtained through interception.”

Noting that the privacy interests discussed in Bartnicki were especially weak where the recording was of police acting in the course of their duty, the First Circuit explained, “the only possible ground for distinguishing this case from Bartnicki is the assertion of the police that Jean . . . did not obtain the recording lawfully.” The police argued that Jean did not do so because the Massachusetts statute also contained a provision forbidding “permitting, participating in a conspiracy to commit, or acting as an accessory to a person who commits a violation” of the statute. The argument went that, under this section, Jean “assisted, conspired, or served as an accessory” by “voluntarily accepting the tape . . . and then disseminating it.”

The court rejected this argument. In doing so, it assumed that Jean acted unlawfully under the Massachusetts law by conspiring to disclose the tape, but that that was not the question. Indeed, even Yocum and Vopper purportedly violated the law by further disseminating the tape. The question instead was whether the First Amendment permitted liability to be imposed for those actions. Turning to the police’s argument, the Court explained that “the fact that Yocum received the tape ‘passively’ and Jean received the tape ‘actively’ is a distinction without a difference: both made the decision to proceed with their disclosures knowing that the tape was illegally intercepted.”

The court next dealt with Justice Breyer’s qualifiers relating to encouraging or aiding and abetting the interception or subsequent delivery of the tape to an intermediary, concluding that the Massachusetts statute did not “forbid the receipt of the tape itself.” In other words, she could not aid and abet her own receipt of the tape, which was otherwise lawful.

Thus, the court concluded, Jean “did nothing unlawful.”

Ultimately, the D.C. Circuit in Boehner v. McDermott largely agreed with this analysis. There, a Florida couple intercepted a cellphone call between the Republican leadership in the House, including John Boehner, and recorded that call. They hand delivered that tape to Representative McDermott, a member of the House Ethics Committee, in a manila envelope with a note attached to it, explaining that the call was overheard on a scanner, that it was important to an ethics investigation, and that they hoped he would act on it. After an in-person discussion with the couple, McDermott accepted the envelope. He later listened to the tape and called two reporters, one of whom made a copy of the tape. The district court found in favor of Boehner and concluded “the crucial issue to be whether Representative McDermott lawfully obtained the tape.” In its view, he did not because it followed from the fact that McDermott knew the tape was illegally intercepted when he accepted it that he illegally obtained it.

The D.C. Circuit, sitting en banc, disagreed, rejecting a prior panel’s analogy that “someone who accepts the . . . bag [with a diamond ring in it] from a thief, knowing the ring inside to have been stolen . . . is guilty of receiving stolen property” and thus forfeits Bartnicki’s protections. The court explained that it was not unlawful for McDermott to receive the information and therefore, under Bartnicki, “otherwise-lawful receipt of unlawfully obtained information remains in itself lawful, even where the receiver knows or has reason to know that the source has obtained the information unlawfully.” In doing so, the en banc court rejected the prior panel’s attempt to distinguish Bartnicki on the basis that there is a difference between one who unknowingly receives illegally obtained information and one who knowingly receives illegally obtained information, explaining that the Supreme Court “directly dispelled that notion.”

But the en banc court did suggest, unlike Jean, that perhaps the result would be different if a statute prohibited the receipt of illegally obtained information.

**Scenario 3: Knowledge of Illegal Acquisition and Encouraging a Known Source**

A third scenario is one where the news organization or reporter knows of the unlawful interception by another and encourages or aids and abets that interception. Decided a year before Bartnicki, the Fifth Circuit’s Peavy v. WFAA-TV, Inc. best illustrates this case.

Charles Harmon, a third party, bought a police scanner and used it to overhear a conversation between two neighbors—one of whom he was in a dispute with. The conversations included “threats to his safety” and “what he perceived to be public corruption.”

Harmon then contacted the TV station WFAA, and then Riggs, an investigative reporter for the station, with the Harmon. At the meeting, Riggs said that he wanted copies of the tapes and “instructed” Harmon “not to turn the tape recorder on and off while recording intercepted conversations, and not to edit them, so that the tapes’ authenticity could not be challenged.” In all, Harmon provided
the station with eighteen tapes covering 188 conversations.105

Riggs and WFAA both asserted that the First Amendment protected their conduct. The question was whether the First Amendment prohibited liability under state and federal statutes where the defendants “knew, or had reason to know, the communications were intercepted in violation of the Acts . . . but who did have undisputed participation concerning the interceptions.”106 The court found that it did not. Comparing the case to Bartnicki, which at that time was only a Third Circuit opinion, the court noted that in that case “there was no evidence defendants encouraged or participated in the interception.”107 But here it was “quite arguable that defendants did not lawfully receive the contents of the tapes,” based on the reporter’s ongoing interactions with Harmon as the tapes were made and his instructions regarding how to make the tapes.108 Thus, even though Riggs himself did not make the tapes, he encouraged or procured the making of the tapes such that he unlawfully obtained the tapes and forfeited the protection of the Bartnicki principle.109

Scenario 4: Illegal First-Hand Acquisition

Finally, there is a fourth scenario, one in which there is an illegal acquisition by a reporter. The Seventh Circuit’s recent opinion in Dahlstrom v. Sun-Times Media, L.L.C., grapples with the scenario where a reporter obtains information in a way prohibited by statute (and later publishes).110 There, Sun-Times reporters researched and wrote an article about a death that occurred after the decedent had an “altercation” with the nephew of then-Mayor Richard Daley.111 “Suspicious that the [Chicago Police] may have manipulated the homicide investigation” because of the suspect’s “connections,” the Sun-Times obtained photographs and additional identifying information such as birthdates of Chicago police officers who participated in a line up with the suspect that the Sun-Times at least suggested was rigged by using officers who appeared similar to the suspect.112 Reporters had “knowingly obtained this additional identifying information from motor vehicle records maintained by the Secretary of State.”113 Yet a federal statute made it “unlawful for any person knowingly to obtain or disclose personal information[] from a motor vehicle record.”114

The Sun-Times argued, in part, that the non-disclosure provision violated the First Amendment under Bartnicki.115 The Seventh Circuit rejected this argument. First, it found that the statute was content-neutral because its “public safety goals are ‘unrelated to the content of [the regulated expression].’”116 In distinguishing Bartnicki, the court explained that Bartnicki concerned “the unlawful interception and recording . . . by an unknown third party” and the press had “obtained lawfully” the information.117 But here the “Sun-Times itself unlawfully sought and acquired the officers’ personal information from the Secretary of State, and proceeded to publish it.”118

Turning to the “still-open question” of whether disclosure of unlawfully obtained information is constitutional, the court found that the prohibition on disclosure furthered an important government interest because, unlike Bartnicki, “[w]here the acquirer and publisher are one and the same, a prohibition on the publication of sensitive information operates as an effective deterrent against the initial unlawful acquisition.”119 And the court found the privacy interests both worthwhile and furthered by punishing disclosure where the information was sensitive.120 Further tipping the balance, the court found that the publication of the officers’ “personal details both intruded on their privacy and threatened their safety, while doing little to advance Sun-Time’s reporting” because the photographs of the officers, which were legally obtained, illustrated completely the Sun-Time’s thesis: that the officers were picked to make the line up most difficult. In short, “where members of the press unlawfully obtain sensitive information that, in context, is of marginal public value, the First Amendment does not guarantee them the right to publish that information.”112

So where does this leave Secure Drop?

Bartnicki’s Application to SecureDrop

Where a publication’s use of SecureDrop falls on this four-scenario scheme is crucial to understanding the potential availability of a Bartnicki defense. First, the analogies are useful here. A mailbox, a “Contact Us” form, or a reporter’s email address, all of which are set up by the news organization to (at least in part) enable communication between the organization and sources, are well-positioned to benefit from the Bartnicki rule. These “drop boxes,” like SecureDrops, come with instructions and routing information, albeit in a simpler form, e.g., “Our address is . . . ,” and news organizations often solicit reader tips and scoops through them. But setting up a drop box and soliciting information has never divested a news organization of Bartnicki protections, and there is nothing specific to SecureDrop, as a drop box, that would require a contrary conclusion.

Similarly, the complex technological nature of SecureDrop should not change this result. It could be argued that a news organization is taking a more active role by using SecureDrop than those in the Bartnicki cases. As discussed above though, the implementation of the SecureDrop technology affects only the transfer of information; it does not affect the acquisition of the information, which is the focus of the inquiry. And the instructions that a news organization provides on its SecureDrop landing pages are, importantly, instructions only on how to use SecureDrop to transfer information safely and securely; they are not instructions on how to illegally acquire information and they are not instructions on what to leak (or at least they should not be as discussed shortly). Thus, as in Jean, while it can be debated how “active” a news organization is when it uses SecureDrop, it remains passive in all the right ways: the initial acquisition of the information.122

Moreover, the fact that a SecureDrop box will make some sources more comfortable with leaking and therefore more apt to do so, should not remove it from Bartnicki. This is
nothing more than a variation of the argument presented to and rejected by the Supreme Court in Bartnicki. As the Court made known there, “The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it,” even if they may well be difficult to find. There is nothing unlawful—as a matter of law or fact—about setting up SecureDrop as the Freedom of the Press Foundation advertises it. Thus, even if trade secrets or classified material are compromised through the use of SecureDrop, private parties and the Government maintain ways of redressing any such damage and deterring any such further conduct by going after the source directly.

But all of this analysis changes, arcing toward the third and fourth scenarios set forth above, if the implementation of SecureDrop, cloaked in anonymity as it is, appears to “aid and abet” the unlawful acquisition of documents. This may occur, for example, if a news organization encourages readers to use SecureDrop to “screw your boss” or “let the world really know what’s happening at [insert the name of a large multinational company here].” Both of these, edge closer to acquisition, and thus potential liability.

Best practices would, therefore, be to structure any copy on a news organization’s SecureDrop landing page carefully to avoid any appearance that it is instructing a source on how to acquire information in the first place. The introduction especially should be both effective as a practical matter and protective as a legal matter. Avoid mentioning “classified” or “confidential” information or soliciting, directly or indirectly, the disclosure of such information. As the non-profit, investigative journalism outfit ProPublica tersely puts it, “ProPublica’s SecureDrop server is a way for you to share information and files with ProPublica more securely than with conventional email or other electronic means.”

And be brief; less is more in this context. Long introductions on landing pages could backfire in litigation if they promote leaking confidential or stolen documents, thereby arguably involving a news organization in the illegal acquisition of information. Consider instead carefully explaining the purpose of SecureDrop in a separate editorial that focuses on privacy issues fundamental to reporting (not on a desire to promote leaks of sensitive information) as other organizations have done.24

In short, a smart and scanty landing page preserves as much as possible the similarities between traditional methods of communication and SecureDrop. As The New Yorker aptly emphasized, on launching StrongBox, its version of SecureDrop, “StrongBox is . . . , in one sense, . . . an extension of the mailing address we printed in small type on the inside cover of the first issue of the magazine, in 1925, later joined by a phone number (in 1928—it was Bryant 6300) and e-mail address (in 1998),”125 This march-of-time equivalence proves up the notion discussed above that SecureDrop, while different in fact, is similar in kind to its predecessors.

But what about anonymous communications between sources and reporters, which SecureDrop also allows? This functionality should also be largely unproblematic if used carefully. Indeed, the defendants in Boehner and Jean had interactions with their known sources—even discussing what the source hoped to get out of the transaction—after the initial acquisition.126 Yet both courts found that mere after-the-fact interaction with a source should not result in a defendant losing Bartnicki protections.

Reporters must nevertheless be sure not to entangle themselves in the initial unlawful interception in the process as did the reporter in Peavy. Thus, for example, a deeply involved relationship with a source during the unlawful interception, a back-and-forth about what other documents the source can access and disclose, or a “can you do this?” instruction to the source would potentially walk a reporter further and further from Bartnicki’s shelter. While it is unclear if Peavy resolved the aiding and abetting question correctly, its holding should not be ignored as a matter of best practices. In short, just because the communications are anonymous and encrypted should not be interpreted as a license to ignore risk.

Conclusion
Bartnicki’s protections certainly should apply where a news organization or reporter is punished for publishing information anonymously received via SecureDrop because SecureDrop facilitates only the transfer of the information, and not the unlawful obtaining of it in the first instance.

Yet to reduce risk, a news organization should carefully tailor its SecureDrop landing page to prevent the appearance that it is attempting to influence what or how a source acquires and discloses information. Additionally, reporters for their part must remember that the closer they get to the initial unlawful obtaining of information through communicating with the source via SecureDrop, the more difficult it may be to invoke successfully the Bartnicki principle. Much has changed in the last forty years; much has not. SecureDrop now offers a safe and anonymous way for sources to communicate with a news organization or reporter through technology that ironically was developed to recapture the anonymity of the flowerpot of analog years past. The technical means differ from conventional methods, but the ends are surely the same and that at least ought to be all that matters.

Endnotes
firstlook.org/theintercept/2015/05/12/stephen-kim-ex-state-department-official-leak-case-released-prison; see also In the Matter of Search of E-mail Account [Redacted] (j利于@gmail.com, No. 10-mj-291, Dkt. No. 20 (D.D.C. May 28, 2010).


6. Bob Woodward & Carl Bernstein, All the President’s Men, p. 23.


13. Id.

14. A listing of news organizations currently using SecureDrop can be found at https://freedom.press/securedrop/directory. To see the interface, you can use a demo version available at https://securedrop.org/demo. To learn more about how Tor works, you can visit https://www.torproject.org/about/overview, but to boil things down a bit, “[t]he idea is similar to using a twisty, hard-to-follow route in order to throw off somebody who is tailing you—and then periodically erasing your footprints.”


18. 532 U.S. at 518.

19. Id.

20. Id. at 518-19.

21. Id. at 519.

22. Id.

23. Id.

24. Id. at 524.

25. Id.

26. Id.

27. Id. at 521.

28. Id.

29. Id.

30. Id.

31. Id. at 525.

32. Id.

33. Id.

34. Id.

35. Id.

36. Id. at 526.

37. Id.

38. Id.


40. 532 U.S. at 526-27.

41. Id. at 527 (citing 443 U.S. 97, 102 (1979)).

42. Id. at 528 (emphasis added) (citing 403 U.S. 713, 754 (1971) (per curiam)).

43. Id.

44. Id. (citing B.J.F. v. Florida Star, 491 U.S. 524, 535 n.8 (1989)).

45. Id. (quoting Boehner v. McDermott, 191 F.3d 463, 484-85 (D.C. Cir. 1999) (Senette, dissenting)).

46. Id. at 529.

47. Id.

48. Id. at 530.

49. Id. at 529.

50. Id.

51. Id. at 534 (quoting Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 214 (1890) (“The right of privacy does not prohibit any publication of matter which is of public or general interest.”)).

52. Id. at 535.

53. Id. (Breyer, J., concurring) (“I join the Court’s opinion.”). Indeed, in Justice Stevens’ absence, Justice O’Connor, as the next most senior Justice in the majority, announced the opinion of the Court for Justice Stevens.

54. Id. at 536.

55. Id.

56. Id.

57. Id. at 538.

58. Id.

59. Id. (marks and citation omitted).

60. Id. (noting further that “the statutes do not forbid the receipt of the tape itself”).

61. Id. at 539.

62. Id.

63. Id.

64. Id. at 541 (Rehnquist, C.J., dissenting).

65. Id. at 545.

66. Id. at 546-47.

67. Id.

68. Id. at 547.

69. Id. at 548 (citations omitted).

70. Id. at 528 (citing B.J.F., 491 U.S. at 535 n.8), 535.

71. See, e.g., id. at 548 (Rehnquist, C.J., dissenting).

72. Id. at 525.

73. Id. at 532 n.19 (citing Branzburg, 408 U.S. at 691).

74. Id. at 538.

75. Id. at 525, 528.

76. Id. at 525.

77. 492 F.3d 24, 25 (1st Cir. 2007).

78. Id.

79. Id.

80. Id. at 25 n.2.

81. Id. at 30.

82. Id. at 30-31 (alterations omitted).

83. Id. at 31.

84. Id.

85. Id.

86. Id.

87. Id. at 32.

88. Id. at 33 (emphasis added).

89. 484 F.3d 573 (D.C. Cir. 2007). The court, however, ruled in favor of Boehner on other grounds. See generally id.

90. Id. at 574.

91. Id. at 576.

92. Id.

93. Id.

94. Id. at 577.

95. Id.

96. Id. at 584 (quoting Boehner v.
McDermott, 441 F.3d 1010, 1013 (D.C. Cir. 2006). The prior panel decision was vacated just over a week after the Court decided Bartnicki. McDermott v. Boehner, 532 U.S. 1050 (2001).

97. 484 F.3d at 585.
98. Id.
99. Id. (quoting B.J.F., 491 U.S. at 536 (“Even assuming the Constitution permitted a State to proscribe receipt of information, Florida has not taken this step.”)).
100. 221 F.3d 158 (5th Cir. 2000).
101. Id. at 164.
102. Id.
103. Id.
104. Id.
105. Id. at 165.
106. Id. at 180.
107. Id. at 188 (emphasis added).
108. Id. at 189.
109. In Bartnicki, the Court distinguished Peavy on just this ground, noting in the margin that “the media defendant in fact participated in the interceptions at issue” in that case. 532 U.S. at 522 n.5. Shortly after the Court decided Bartnicki it denied certiorari in Peavy. WFAX-TV, Inc. v. Peavy, 532 U.S. 1051 (2001). Along the same lines is Quigley v. Rosenthal, 327 F.3d 1044 (10th Cir. 2003). There, the Tenth Circuit in dicta distinguished Bartnicki, in part, because the defendant in Quigley “knew” that a third party was recording the plaintiffs’ telephone conversations at the time the recordings were being made and “agreed that the [third party] should continue recording the [plaintiffs’] telephone conversations.” Id. at 1052, 1067. 110. 777 F.3d 937 (7th Cir. 2015).
111. Id. at 940.
112. Id.
113. Id. at 941.
114. Id. (quoting 18 U.S.C. § 2722(a)).
115. Id. at 950.
116. Id.
117. Id. at 951.
118. Id. at 953.
119. Id. (emphasis added).
120. Id.
121. Id. at 954. The defendant in Dahlstrom filed a petition for a writ of certiorari with the Supreme Court on July 30, 2015. Sun-Times Media, LLC v. Dahlstrom, No. 15-158. It is fully briefed and remains pending.
122. 492 F.3d at 31-32 (holding that even though Jean “arguably participated with [the illegal interceptor] in a conspiracy to disclose the content of the illegally recorded oral communication,” that alone was not enough to forfeit the protections of Bartnicki). In many ways, SecureDrop is less active than tried-and-true newsgathering in cases like Daily Mail. 443 U.S. at 99 (explaining that the reporters obtained the perpetrator’s name “by asking various witnesses, the police, and an assistant prosecuting attorney”).
123. Bartnicki, 532 U.S. at 529.
124. See, e.g., Davidson, supra note 1515.
125. See id.
126. As noted, Jean communicated with her source via her website without forfeiting Bartnicki protections. Jean, 492 F.3d at 25. And in Boehner, McDermott met with the illegal interceptors “in a small anteroom adjacent to the Ethics Committee hearing room.” Boehner, 484 F.3d at 576.

THE PROGENY:
JUSTICE WILLIAM J. BRENNUAN’S FIGHT TO PRESERVE THE LEGACY OF NEW YORK TIMES V. SULLIVAN

BY LEE LEVINE AND STEPHEN WERMIEL

Celebrate the 50th anniversary of Justice William J. Brennan’s landmark opinion in New York Times Co. v. Sullivan with this fascinating and insightful book!

New York Times Co. v. Sullivan, credited with defining the “central meaning” of the First Amendment, has protected the freedom of expression for the past 50 years. This book focuses on “the progeny” of that decision—examining how Justice Brennan nurtured and developed the constitutional law of defamation and related claims from this important milestone.

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