Online Forums and Chat Rooms in Defamation Actions

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The open, anonymous character of the Internet and the growth of online postings in chat rooms, on blog sites, and in online forums, have given rise to a host of new questions and concerns about the admissibility of online statements in the context of defamation actions. Emboldened by their anonymity, individuals who post comments online tend to speak candidly and colorfully. To the extent that these online comments overstep the limits of protected free speech, they may give rise to defamation actions.

When online comments are posted anonymously, it can be difficult for libel plaintiffs to track down the posters of such comments. Although libel plaintiffs might consider suing website hosts and Internet Service Providers (ISPs) as easily identifiable targets for their defamation claims, such suits are typically unsuccessful because federal legislation immunizes host websites and ISPs from liability for statements posted by others.

Nevertheless, the uninhibited nature of anonymous comments posted in online forums makes such forums an attractive source of possible evidence for defamation plaintiffs because such comments are frequently inflammatory and could unduly prejudice a jury against a defamation defendant. Notwithstanding the bar to holding media defendants directly liable for third party comments posted on their websites, plaintiffs seek alternative justifications for introducing such comments at trial. For example, a defamation plaintiff might seek to introduce a third party’s online comments as additional evidence of the reputational injury allegedly caused by a media defendant’s own statements. Anonymous posters of information on websites, of course, cannot be cross-examined as to the basis for their comments, and media defendants must anticipate arguments to keep such statements out of evidence.

Although online comments are hearsay, various exceptions to the hearsay rule may overcome a hearsay objection. Defendants seeking to exclude statements made on websites therefore should be prepared to argue for their exclusion on various evidentiary grounds in addition to hearsay, including lack of authenticity, relevance, and trustworthiness—among others.

Communications Decency Act

In 1996, Congress enacted the Communications Decency Act (CDA), which grants website hosts statutory immunity from liability for content they distribute but do not directly create. In enacting the CDA, Congress acknowledged that the Internet offers “a forum for a true diversity of political discourse,” that the Internet has “flourished, to the benefit of all practitioners.”

(Continued on page 18)
FROM THE CHAIR

JERRY BIRENZ

By the time you read this, my two-year term as Chair of the Forum on Communications Law will have ended. I have mixed feelings about that. On the one hand, I feel like I’ve reached my stride, that most or all of the “moving parts” of the Forum are in great working order with exciting new activities underway that soon will burst into bloom. On the other hand, I’m exhausted and ready to let someone new be the octopus with his hands in so many projects.

In any event, I have greatly enjoyed these past two years and all of the challenges, fun, satisfaction and, yes, frustrations they brought. Most of all I have enjoyed working with and learning from some great people.

For all that I have gained over the past two years, I have to thank Tom Kelley, who recommended me to the Nominating Committee, and who over the years has said such kind words about me and has tolerated my rock ‘n roll t-shirts at Governing Committee meetings. Tom’s sense of humor, insights, relaxed manner, and brilliance contributed to making him a great Chair, and I hope that I did not let him down.

Forum Annual Conference

The activity that most dominates the Chair’s time is the planning for the Annual Conference. George Freeman, Kelli Sager, and Barbara Wall are an amazing fireball of ideas, knowledge, connections, and dedication. I was in awe as I participated with them in planning programs, social events, and other aspects of the Conference, and as I continue to work with them (and Dick Goehler) on the upcoming annual conference (scheduled for February 8–10 in Key Largo, Florida—plan to be there!), I am confident that future annual conferences will continue to be valuable and fun.

In conjunction with the Annual Conference, the Forum has been fortunate to have its Training and Development Committee, formerly headed by Pilar Johnson and Jill Meyer, and now by Laurie Michelson, organize and conduct a practicum for younger lawyers to give them some real world-ish experience in arguing motions to some of the sharpest judges and doing prepublication review for some of the toughest clients you’ll ever meet. The structure organized by the T&D Committee allowed for specific, substantive, no holds barred, constructive, and immediate feedback to the participants—the most important part of any such training session.

Representing Your Local Broadcasters

The Forum’s other annual conference activity—the “Representing Your Local Broadcasters” seminar put on in conjunction with the annual National Association of Broadcasters Convention in Las Vegas, has been managed superbly by Jerry Fritz, Guylyn Cummins, and Gregory Schmidt, another powerhouse team who, guided by Jerry, never seemed to run out of new and interesting ways of presenting information. Pressed by his real day job, Jerry has stepped down as head of that effort, following this past year’s 25th Conference but his inspiration will, I’m sure, guide his successors. Jerry actually wanted to retire when I first became Chair, but before he had a chance to do so, I called and told him that I would resign from the post before it started unless he agreed to continue in that position, so I managed to hold on to him for two more years.

Conference for the Minority Lawyer

Another, lesser known seminar run by the Forum is contributing to Forum’s goals in a different way—the Forum’s presentation on media-related issues at the annual “Conference for the Minority Lawyer.” Jon Avila leads that effort, and each year puts on a fascinating program (this year it was about the free speech issues in the “Mohammed Cartoon” controversy) to interest minority lawyers in our corner of the legal world.

Database Privacy

Jon Avila and Jenell Trigg also created the Forum’s newest seminar activity—a complete and in-depth study of the numerous aspects of database privacy, one of the hottest and fastest developing areas of our practices. They put together a stellar cast of federal and state government officials, industry figures, and attorneys who taught us everything we could possibly want to know about database privacy, with one of the most complete compendiums of useful materials on the subject that is available anywhere. Over 100 people were attracted to the very first session,

(Continued on page 26)
What Recent Additions to California’s Anti-SLAPP Statute Mean to Media Companies

DANIEL A. ROZANSKY AND MICHAEL J. NIBORSKI

Since 1992, defendants in expression related lawsuits in California have enjoyed the protection of California’s so-called anti-SLAPP statute, under which a defendant may file a special motion to strike at an early stage of proceedings to challenge expression related claims. The original intent of the statute was to address the growth in meritless lawsuits filed primarily to chill a party’s exercise of its First Amendment rights to free speech and petition. Recently, the California Legislature enacted California Code of Civil Procedure Sections 425.17 and 425.18, which became effective in January 2004 and October 2005, respectively, to address what it deems the unappealing trend of the offensive rather than defensive use of the anti-SLAPP statute.

The essence of Sections 425.17 and 425.18 is to exempt certain types of lawsuits from the protections normally afforded under the original anti-SLAPP statute. Adding layer upon layer of complexity, these new provisions allow certain exceptions and, compounding the confusion, create exceptions to those exceptions.

Given the extensive evolution of the anti-SLAPP statute over the past fourteen years and the complexity of Sections 425.17 and 425.18, a thorough understanding of the mechanics and potential impact of this legislation is an essential tool for practitioners representing media companies. The following hypothetical will serve as a focal point for our discussion:

P is a company that manufactures, advertises and sells nonprescription health products, including diet pills, vitamins, and a host of other supplements that purportedly serve as alternatives to prescription drugs. Because P uses only natural ingredients, the supplements are exempt from regulation by the U.S. Food and Drug Administration. D is a television network that produces a news magazine program featuring investigative journalism reports. R is an investigative reporter who works with D to research and develop material for the program. At D’s request, R secures a job as a sales associate at P. Over the course of several months working as a salesperson at P, R utilizes hidden video and audio recordings to surreptitiously gather information on alleged fraud and corruption at P. D runs a feature program exposing P’s misconduct and broadcasts portions of the hidden recordings. P files a lawsuit against D and R for invasion of privacy, defamation, and fraud.

The implications of the anti-SLAPP statute for this scenario are discussed below, with particular focus on the implications of Sections 425.17 and 425.18.

What the New Provisions Actually Do

Under California’s anti-SLAPP statute, the filing of a special motion to strike a complaint (or any cause of action contained therein) triggers a two-part analysis.

First, the court determines whether the defendant filing the special motion to strike has made a threshold showing that the challenged cause of action arises from protected activity, i.e., speech or petition related conduct. If the defendant fails to make this initial showing, the special motion to strike must be denied.

If the defendant meets its initial burden, the plaintiff must introduce evidence and make a prima facie showing of the probability of prevailing on the merits of the lawsuit. If the plaintiff cannot meet this burden, the defendant’s anti-SLAPP motion must be granted.

The mere filing of an anti-SLAPP motion automatically stays discovery unless the plaintiff can make an extraordinary showing of the need for limited discovery. Even if a plaintiff successfully moves for limited discovery, courts ordinarily confine the scope of such discovery to the issues raised in the anti-SLAPP motion.

A successful anti-SLAPP motion entitles the defendant to its reasonable attorney fees and costs. The adjudication of an anti-SLAPP motion provides the losing party with an immediate right of appeal.

In our hypothetical, D presumably would file an anti-SLAPP motion to challenge P’s complaint and D would be able to make a threshold showing that it was engaged in a protected activity, speech. The next question is whether P can make a prima facie showing that it has a probability of prevailing in its lawsuit. If P is unable to make the requisite prima facie showing, its lawsuit would be dismissed, and D would be entitled to recover its reasonable attorney fees and costs incurred in connection with the anti-SLAPP motion. In contrast, if P successfully opposed D’s anti-SLAPP motion, P would not be entitled to recover its attorney fees and costs incurred in opposing the motion unless P demonstrated that D’s anti-SLAPP motion was frivolous. Further, if D’s motion were unsuccessful, D would have an immediate right of appeal.

We now turn to the effect of the recent amendments to the anti-SLAPP statute and examine the application of these amendments to our hypothetical lawsuit, focusing on the implications of these amendments for media defendants.

Section 425.17

Section 425.17 contains four key provisions codified in subsections (b) through (e).

Section 425.17(b) exempts from the anti-SLAPP statute certain actions “brought solely in the public interest or...
on behalf of the general public.” However, the exemption is not automatic. The legislature defined the preconditions for the application of subsection (b) very narrowly. Only very select types of public interest cases or class actions qualify for an exemption under Section 425.17. The following conditions must exist to trigger the application of Section 425.17(b):

1. “[T]he plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of persons of which plaintiff is a member” (attorney fees, costs, and penalties being excluded from the consideration).

2. “[T]he action, if successful, would enforce an important right affecting public interest and would confer a significant benefit . . . on the general public or a large class of persons.”

3. “Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff’s stake in the matter.”

Recent changes allow exceptions to the exceptions, thereby compounding the confusion.

Section 425.17(c), which exclusively applies to lawsuits involving commercial speech, exempts actions against a person “primarily engaged in the business of selling or leasing goods or services” if both of two specified conditions exist:

1. The statement or conduct at issue “must be about the speaker’s or a business competitor’s business and must be made to obtain sales or leases of goods or services, or must have been made in the course of delivering the person’s goods or services.”

2. The intended audience must be an actual or potential buyer or be likely to repeat the statement or conduct to a potential buyer or customer.

Although subsections (b) and (c) exempt two specific categories of actions from the special motion to strike procedure under the anti-SLAPP statute, subsection (d) of Section 425.17 creates exceptions to subsections (b) and (c) that allow certain defendants to retain the protection of the anti-SLAPP statute and to continue to utilize the special motion to strike procedure.

Subsection (d) creates three categories of exceptions to the application of subsections (b) and (c), the first two of which are directly applicable to media defendants. In short, these two exclusions preserve for media defendants the broad protection from litigation arising out of their news and entertainment activities originally afforded them under the anti-SLAPP statute, by carving them out of the limitations the recent amendments have imposed.

Subsection (d)(1) creates an exception for any person in connection with the gathering of, or refusal to disclose, news sources as set forth in Article I, Section 2, subdivision (b) of the California Constitution and Section 1070 of the Evidence Code. The provision carves out an additional exception for “any person engaged in the dissemination of ideas or expressions in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communications to the public.”

Even more helpful for media defendants, subsection (d)(2) specifically exempts from the reach of Sections 425.17 (b) and (c) any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

Finally, Section 425.17(e) eliminates the right to immediately appeal a denial of an anti-SLAPP motion if the court’s ruling is based on the conclusion that the action or cause of action is exempt pursuant to Section 425.17.3 However, nothing in the statute or case law prohibits a defendant dissatisfied with a ruling pursuant to Section 425.17, subdivision (b) or (c), from seeking immediate writ review.

Section 425.18: SLAPPback Actions

Courts generally deem a party’s right to file a lawsuit as speech or petition related conduct that will trigger the anti-SLAPP statute. Therefore, by definition, a malicious prosecution action—because it arises out of the act of one party filing a lawsuit against another party—triggers the right to bring an anti-SLAPP motion.

The body of law involving anti-SLAPP motions in malicious prosecution cases has grown rapidly over the past years. Indeed, because of the powerful benefits of the anti-SLAPP statute, it is virtually inconceivable that any defendant would pass on the opportunity to file an anti-SLAPP motion in any applicable case, particularly in a malicious prosecution case. This cycle of litigation gave legislators pause, resulting in what they colorfully labeled a “merry-go-round of abuse.” In response, the legislature enacted Section 425.18.

Section 425.18 creates separate procedures for bringing anti-SLAPP motions in malicious prosecution lawsuits arising out of a prior action that was itself dismissed pursuant to a successful anti-SLAPP motion. This specific type of malicious prosecution lawsuit is called a SLAPPback action. Section 425.18 sets out new rules governing the rights of the malicious prosecution defendant (the unsuccessful plaintiff in the underlying case) with respect to bringing its own anti-SLAPP motion against the complaint filed by the malicious prosecution plaintiff (the successful defendant in the underlying case).

Section 425.18 substantially alters the breadth of anti-SLAPP protection in SLAPPback actions as follows:

1. There no longer is any right to mandatory attorney fees for the defendant who succeeds in bringing an anti-SLAPP motion to a SLAPPback action;

2. The time for filing an anti-SLAPP motion to strike a SLAPPback action is extended from sixty to 120
days after service of the complaint, but the court’s discretion to permit filing after six months is strictly limited;

3. The filing of an anti-SLAPP motion to a SLAPPback action no longer automatically stays discovery in the case; and

4. A court order denying an anti-SLAPP motion to a SLAPPback action is no longer directly appealable. Instead, Section 425.18 provides for an expedited writ process (the aggrieved party must file a writ petition within twenty days of service of the notice of entry of the order denying the anti-SLAPP motion).16

Simply put, in limited circumstances involving malicious prosecution actions, the new statute dilutes the ability of the plaintiff whose underlying case was dismissed pursuant to an anti-SLAPP motion from availing itself of the full protections of the anti-SLAPP statute in a subsequent malicious prosecution action.

What the New Provisions Mean for Media Defendants

Section 425.17
The court’s opinion in Blanchard v. DIRECTV, Inc.17 illustrates how narrowly the public interest exemption of subdivision (b) is likely to be construed. DIRECTV sent demand letters to thousands of people who purchased a specific device that would allow them to unlawfully pirate DIRECTV’s satellite television programming. The plaintiffs were some of the people who received the letters and subsequently brought a lawsuit against DIRECTV, alleging violations of California Business and Professions Code Sections 17200 et seq., the plaintiffs’ civil rights, and extortion. In response to DIRECTV’s anti-SLAPP motion, plaintiffs argued that DIRECTV could not avail itself of the anti-SLAPP statute with regard to the 17200 claim because the plaintiffs’ case fell within the public interest exemption of Section 425.17(b).

The court disagreed with the plaintiffs’ argument, finding that the 17200 claim was not brought in the public interest as that term is defined in Section 425.17(b). The court reasoned that plaintiffs had failed to show a successful 17200 action would lead to a wholesale change in the practice at issue, i.e., sending demand letters. Therefore, plaintiffs had failed to meet the second and third requirements of subsection (b). More importantly, however, the court held that plaintiffs’ claim was entirely personal to them and that private enforcement was unnecessary and did not result in a disproportionately high financial burden in relation to plaintiffs’ stake in the matter.18

Ultimately, the court affirmed the dismissal of the complaint pursuant to DIRECTV’s anti-SLAPP motion and held subsection (b) inapplicable. The significance of this case for media companies is that it provides some comfort that courts, at least initially, have demonstrated an intention to construe subsection (b) very narrowly, reserving its application only for those cases involving matters involving a significant public interest in which the plaintiff truly acts as a private attorney general.

The case of Ingels v. Westwood One Broadcasting Services, Inc.,19 further illustrates the application of the new statutes to media companies. In that case, Marty Ingels, a caller to The Tom Leykis Radio Show, sued the radio station and Tom Leykis personally, asserting violations of the Unruh Civil Rights Act as a result of the show’s alleged refusal to let the caller participate in the show based on his age. Defendants filed an anti-SLAPP motion, which was granted. The California Court of Appeal affirmed the trial court’s decision, noting that because Ingels sought damages “personal to himself,” his claim failed to meet the first requirement of Section 425.17(b).20

Ingels also is instructive as to the intersection of the exemption offered by subsection (b) and the exception to that exemption set forth in subsection (d). The Ingels court noted that even if Ingels were seeking relief no greater than relief sought for the general public, Section 425.17(d)(2) caused his claims to be “exempted from the 425.16 exemption.”21 Although radio stations were not specifically enumerated in the language of Section 425.17(d)(2), the court found that the language of the statute specifically provides that “it is not inclusive” and further noted that the radio show was “designed and produced to elicit viewpoints from members of the public on issues of public interest which are contemporaneously aired to the public at large.”22 The court found no distinction was to be drawn between the radio show and other media defendants explicitly protected by the language of Section 425.17(d)(2).

Consequently, the mechanism of the special motion to strike was available to the media defendants to defend against Ingels’ suit. Ingels is significant because it demonstrates the initial willingness of courts to construe the exceptions to the

These two exclusions preserve for media defendants the protection afforded them under the original Anti-SLAPP statute.

exemptions to the anti-SLAPP statute broadly in order to promote freedom of speech and the free expression of ideas, thereby offering media companies the protections they have long-enjoyed under the anti-SLAPP statute. Drawing on the Ingels opinion, other courts have adopted a similarly broad construction to the exceptions of subsection (d).23

Under the facts of our hypothetical, the lawsuit brought by P against D, arising out of the television program, would most likely be deemed to fall outside of subsections (b) or (c). D likely would retain all of its rights to bring an anti-SLAPP motion to P’s complaint. In addition, even if a unique set of facts existed giving P an argument that the case fell within subsections (b) or (c), D could avail itself of the exceptions in subsection (d) created to protect an action against a company based upon the production and dissemination of a creative work, i.e., the television program. In fact, subsection (d) expressly preserves anti-SLAPP protection for
defendants sued as a result of their work in connection with motion picture or television programs. D’s advertising related to the program also is protected by the exceptions listed in subsection (d). D would be able to assert all procedures available under the anti-SLAPP statute.

If a court were to rule that P’s action was exempted under subsection (b) or (c), and no exception existed under subsection (d), D’s only recourse would be to file writ petition to the appellate court. D would not have an automatic immediate right of appeal as provided under the original anti-SLAPP statute.

Section 425.18
Section 425.18 provides only an incremental benefit to media companies. In the event that a media company is sued in an action that is dismissed via an anti-SLAPP motion, and then sues in a subsequent action for malicious prosecution, the original plaintiff—now the defendant in the malicious prosecution case—no longer will have the right to challenge the media company’s malicious prosecution complaint with the full force of the traditional anti-SLAPP statute. Because a plaintiff bringing a baseless action now will (or should) know that if it is sued for malicious prosecution, it will not be able to avail itself of the full benefit of the anti-SLAPP statute in its defense, it is possible that a slight reduction in frivolous lawsuits may occur. In the event that a media company is contemplating a suspect action in order to achieve some strategic objective, it too must now be aware that it will no longer enjoy the full benefit of an anti-SLAPP motion should its suspect suit be challenged in a future malicious prosecution action.

Again, our hypothetical case helps to illustrate the practical effect of Section 425.18. P sues D for invasion of privacy, defamation, and fraud arising out of D’s broadcast of a television news magazine program featuring an undercover investigation of P’s company and exposure of P’s suspect business practices. D brings an anti-SLAPP motion and prevails, thereby achieving a dismissal of P’s complaint. D decides that P’s lawsuit was baseless and brought in bad faith, and files its own lawsuit against P for malicious prosecution. P then files its own anti-SLAPP motion seeking to strike D’s malicious prosecution complaint. P’s anti-SLAPP motion is no longer governed by the original anti-SLAPP statute, but instead is subject to the limitations of Section 425.18. P would have no automatic right to collect its attorney fees if it prevailed on its anti-SLAPP motion. In addition, there would be no automatic stay of discovery and P would have no immediate right to appeal if the court denied its anti-SLAPP motion. [4]

Endnotes
1. The acronym SLAPP refers to Strategic Lawsuits Against Public Participation. The anti-SLAPP statute is codified at California Code of Civil Procedure Section 425.16.
3. Id.
4. Id. at 329–30.
5. Plaintiffs opposing anti-SLAPP motions in federal court actions generally are entitled to broader discovery than in state court actions due to the inherent conflict between the state rule of civil procedure staying discovery and the federal rule of civil procedure providing for liberal discovery. See Rogers v. Home Shopping Network, Inc., 57 F. Supp. 2d 973 (C.D. Cal. 1999).
6. CAL. CIV. PROC. CODE §425.16(c).
7. CAL. CIV. PROC. CODE §425.16(i).
8. CAL. CIV. PROC. CODE §425.16(c).
10. Id. at 1155. If, for example, a consumer sued a company for false or deceptive advertising under California Business and Professions Code Section 17500, et seq., the company could not avail itself of the anti-SLAPP statute.
12. Id. at 234.
15. Id.
16. CAL. CIV. PROC. CODE §§425.18 (c), (d), and (e).
18. CAL. CIV. PROC. CODE §425.17(b)(3).
20. Id. at 1067.
21. Id.
22. Id. at 1068.
23. See, e.g., Major v. Silna, 134 Cal. App. 4th 1485, 1494 (Cal. Ct. App. 2005) (applying the subsection (d) exception to a lawsuit brought by plaintiff against the supporter of a political candidate, alleging that the supporter had disseminated literature in violation of a campaign finance ordinance); see also Harkey v. Don Cornelius Prod., Inc., 2004 WL 2244463, at *3 (Cal. Ct. App. Oct. 6, 2004) (unpublished opinion) (holding that warning statements about the use of unauthorized tickets to the Soul Train Music Awards show published on defendants’ website fell within the subsection (d) exception).
The Relevance of Bad Faith to Fair Use Analysis

KAI B. FALKENBERG

Your client, Celebrity Weekly, obtains an unauthorized copy of a bombshell Lifestyle Magazine exclusive interview with Angelina Jolie. The editor wants to know whether they can publish highlights of the interview before the Lifestyle issue hits the stands. Lifestyle had refused to provide Celebrity Weekly with an advance copy of the interview but Celebrity Weekly managed to get it anyway. How does that play in the fair use analysis? Can Celebrity Weekly still claim a fair use defense even though they obtained the interview by unauthorized means?

Unfortunately, the case law is inconsistent and provides no clear answer to this question. The Supreme Court’s decision in Harper & Row v. Nation Enterprises appears to inject the defendant’s good or bad faith into its analysis of the fair use defense’s first statutory factor (the purpose and character of the use).1 The Court addressed the issue again nearly ten years later, suggesting in a footnote to its opinion in Campbell v. Acuff-Rose Music, Inc. that the bad faith subfactor should not be central to the fair use analysis. However, the Campbell opinion fails to shed any further light on the appropriate role for bad faith in the fair use inquiry.2

Given the continued ambiguity, federal appellate courts have opted to give differing weight to a defendant’s bad faith conduct. The Federal Circuit, at one end of the spectrum, has interpreted Harper & Row as requiring “an individual [to] possess an authorized copy of a literary work” as a prerequisite to claiming fair use.3 The Ninth and Second Circuits, on the other hand, both have read Harper & Row, as clarified by Campbell, more narrowly—ruling that the bad faith of a defendant is not dispositive of a fair use defense but merely a subfactor that weighs in plaintiff’s favor.4

Four factors, pursuant to Section 107 of the Copyright Act, are relevant to determining whether a particular case is a fair use:

1. the purpose and character of the use of the copyrighted work;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Whether analysis of the first statutory factor, the purpose and character of the use, should include consideration of the propriety of a defendant’s conduct can be a contentious issue in copyright infringement suits. Some argue that a defendant’s bad faith conduct is central to the analysis of the first statutory factor. Others consider the defendant’s conduct entirely irrelevant not just to the analysis of the first factor but also to the overall availability of a fair use defense.

The debate over the role of bad faith in a fair use analysis arose in the wake of the Supreme Court’s decision in Harper & Row, which came about after an undisclosed source provided The Nation magazine with an unauthorized copy of President’s Ford’s soon to be published memoirs.5 Using excerpts from the manuscript, The Nation published a piece on why President Ford pardoned President Nixon—timing the piece to scoop an article scheduled to appear in Time Magazine. As a result of The Nation article, Time canceled its agreement to license prepublication excerpts from the purloined manuscript. Harper & Row, Ford’s publisher, then brought a copyright action against The Nation. On appeal, the Second Circuit reversed the lower court’s finding of infringement, holding that The Nation’s act was a legitimate fair use of the copyrighted material. The Supreme Court reversed, in a five-to-three opinion authored by Justice O’Connor. In evaluating the character and purpose under the first fair use factor, the Court noted that it could not ignore The Nation’s stated purpose of scooping the forthcoming book and Time Magazine excerpts. O’Connor wrote that “The Nation’s use had not merely the incidental effect but the intended purpose of supplanting the copyright holder’s commercially valuable right of first publication.”6 “Also relevant to the ‘character’ of the use,” the Court continued, “is the propriety of the defendant’s conduct.”7 “Fair use presupposes good faith and fair dealing,” the Court said, therefore finding The Nation’s knowing exploitation of a purloined manuscript as weighing against The Nation (and a finding of fair use) on the first factor.8 The Court continued its analysis of the remaining fair use factors, ultimately concluding that The Nation’s publication of verbatim excerpts from the unpublished manuscript was not a fair use.

Federal Circuit, Bad Faith, and Fair Use Defense

Relying on this discussion in Harper and Row, the Federal Circuit in Atari Games Corp. v. Nintendo of America, Inc., ruled that as a broad proposition, bad faith by a defendant forecloses a fair use defense.9 The court considered Atari’s invocation of fair use in a claim arising out of Atari’s reverse engineering of the Nintendo game system. The Federal Circuit held that the fair use defense was unavailable because Atari had obtained a copy of Nintendo’s source code from the U.S. Copyright office by lying about its reason for needing the code. “To invoke the fair use exception,” the Federal Circuit ruled, citing Harper & Row, “an individual must possess an authorized copy of a literary work.”10 “Because Atari was not in authorized possession of the

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Copyright Office’s copy of [Nintendo’s source code], any copying [of that code],” the court held, “does not qualify as a fair use.”12

Supreme Court Revisits Relevance of Bad Faith

Two years after the Federal Circuit’s decision in Atari, the Supreme Court briefly revisited the bad faith issue in Campbell, a parody case involving the song “Pretty Woman.”13 The defendants, the rap group 2 Live Crew, had sought permission to parody the classic Roy Orbison ballad. Despite being denied permission, the defendants parodied the song anyway. The copyright holder sued, and the Supreme Court held that 2 Live Crew’s parody could be a fair use and remanded the case for further factual findings. In a footnote to its discussion of the first fair use factor (the character and purpose of the use), the Court noted: “[R]egardless of the weight one might place on the alleged infringer’s state of mind, we reject [plaintiff’s] argument that 2 Live Crew’s request for permission to use the original should be weighted against a finding of fair use.”14 “Even if good faith were central to fair use, . . . being denied permission to use a work does not weigh against a finding of fair use.”

Ninth and Second Circuits Holding on Bad Faith

Following Campbell, some courts read the footnote as confirming that a finding of good faith is not central to fair use and cannot therefore be dispositive. Shortly after Campbell was decided, the U.S. District Court for the Northern District of California refused to bar a defendant from claiming fair use, although it assumed he had obtained some of the works without authorization. In Religious Technology Center v. Nетcom On-Line Communication Services, organizations affiliated with the Church of Scientology brought an infringement action against a former Scientologist who posted a large amount of the church’s copyrighted work in an online forum dedicated to discussion of issues related to Scientology.15 The court considered defendant’s conduct in obtaining the copied works but ultimately determined that plaintiff’s showing on bad faith was mixed.16 It was more likely than not, the court found, that the defendant had received at least some of the copies in an improper manner.17

Nevertheless, the court ruled, the fact that the copies obtained were unauthorized did not preclude fair use. Although the court would weigh in plaintiff’s favor when analyzing the first fair use factor, it held that bad faith should merely be considered in conjunction with the other factors. The Religious Technology court reasoned that “[n]othing in Harper & Row indicates that the defendant’s bad faith was itself conclusive of the fair use question, or even of the first factor.”18 After Campbell, the court held, “it is clear that a finding of bad faith, or a finding on any one of the four factors, cannot be considered dispositive.” Accordingly, the court decided to “treat bad faith as merely one aspect of the first factor.”19

The Ninth Circuit endorsed this approach two years later in Los Angeles News Service v. KCAL-TV Channel 9, a lawsuit involving the copyrighted video of the Reginald Denny beating.20 The Los Angeles News Service (LANS) sued television station KCAL after the station used LANS’s footage of the beating without a license. After LANS refused to grant KCAL a license, KCAL obtained a copy of the tape from another station.21

KCAL asserted a fair use defense and the Ninth Circuit, in analyzing the first fair use factor, assessed whether defendant’s conduct was in bad faith.22 Citing Campbell, the Ninth Circuit ruled that the fact that KCAL had requested a license but had been refused one was relevant, but not dispositive of its fair use defense. As the court reasoned, “‘the propriety of the defendant’s conduct’ is relevant to the character of the use at least to the extent that it may knowingly have exploited a purloined work for free that could have been obtained for a fee.”23

The court went on to consider all four factors, and then found that KCAL had not made a fair use of the videotape. The Ninth Circuit thus signaled that a defendant’s improper conduct, while relevant to the first fair use factor, would not foreclose a fair use defense.

The Second Circuit reached the same conclusion in NXIVM Corp. v. The Ross Institute, involving producers of business training seminars who brought an infringement action against individuals who posted NXIVM’s copyrighted course materials on the Internet.24 The defendants, who ran nonprofit websites providing information to the public about controversial groups, had obtained NXIVM’s course materials from a former participant in NXIVM’s seminars.25 The former participant provided the copyrighted information to the defendants despite having signed a nondisclosure agreement that precluded her from disseminating the materials to others. NXIVM moved for a preliminary injunction to require that their copyrighted information be removed from defendants’ websites.26 The district court denied the preliminary injunction, finding no likelihood of success on the merits because defendant’s fair use defense was likely to succeed.27

On appeal, the Second Circuit concluded that the district court had not fully analyzed the impact of defendant’s alleged misappropriation of the NXIVM course manuals in assessing fair use. However, following its own review of the relevant fair use factors, including the propriety of the defendant’s conduct, the Second Circuit found that defendant’s fair use defense still was likely to defeat plaintiff’s infringement claim.

Turning to the first factor in the fair use analysis, the court recognized that the propriety of the defendant’s conduct
is “an integral part of the analysis under the first factor” that the district court had failed to consider.39 “[T]o the extent [the defendants] knew [their] access to the manuscript was unauthorized or was derived from a violation of law or breach of duty, this consideration weighs in favor of plaintiffs,” the Second Circuit ruled.40 Also relevant within this subfactor, the court found, was the fact that the defendants could have acquired the manuscripts legitimately by paying the requisite fees to enroll in NXIVM’s seminars.31

Assuming the defendants had engaged in bad faith, the court went on to consider how much weight this subfactor should be afforded when assessing the first fair use factor.32 The Second Circuit rejected the broad interpretation of Harper & Row set out in the Federal Circuit’s Atari opinion, noting that “the rule enunciated in Atari would foreclose the fair use defense altogether based upon defendants’ bad faith.” As the Second Circuit explained, “[b]ecause the Harper & Row Court did not end its analysis of the fair use defense after considering and ascertaining the defendants’ bad faith there, we believe that the bad faith of a defendant is not dispositive of a fair use defense.”33

Agreeing with the court in Religious Technology Center, the Second Circuit found that the Supreme Court’s Campbell decision “further supports [the] conclusion that a finding of bad faith is not to be weighed very heavily within the first fair use factor and cannot be made central to fair use analysis.” 34 According to the Second Circuit in NXIVM, Campbell recognized “the continued relevance of Harper & Row, but clarified that the bad faith factor can be de-emphasized and will not be dispositive of the first fair use factor.”35 Given the continued ambiguity, however, the Second Circuit noted it would “await from the Supreme Court a clearer renunciation than the Campbell footnote of bad faith’s relevance (however attenuated) to the fair use inquiry.”

Even with the bad faith subfactor weighing in plaintiffs’ favor, the court found the first factor still favored defendants in light of the transformative nature of the secondary use as criticism.36 If no statutory factor could be dispositive after Campbell, then neither could any single subfactor, the Second Circuit reasoned.37

**Should Bad Faith Even Be Considered?**

Concurring with the majority decision in NXIVM, Judge Jacobs wrote separately to suggest that a finding of bad faith should not just be afforded little weight in the fair use analysis but rather no weight whatsoever. Jacobs asserted that Harper & Row’s bad faith analysis was unnecessary to the outcome in the case. “Rejection of the fair use defense,” wrote Judge Jacobs, “was compelled by the essential statutory considerations.” 40 The Supreme Court’s consideration of fair use in Campbell, thus, “treated as an open question whether the secondary user’s good or bad faith is pertinent to the fair use inquiry (contrary to its observation in Harper & Row).”31 As Judge Jacobs points out, “Campbell’s contrary-to-fact phrasing—‘[e]ven if good faith were central to fair use’—rather suggests that it should not be.”42 Believing the issue as yet unresolved by the Supreme Court, Judge Jacobs offered his assessment “that a secondary user’s good or bad faith in gaining access to the original copyrighted material ought to have no bearing on the availability of a fair use defense.”43 As Judge Jacobs went on to explain, the central objectives of copyright would be served if “the morality and good behavior of secondary users” formed part of the fair use analysis.44

Fair use, Judge Jacobs observed, is a statutory right, not “a privilege conferred on the well-intentioned.”45 Its purpose is to encourage the creation of original, transformative works. In considering the first fair use factor, two questions are critical: first, whether the secondary work copies the original with the same literary intention or rather with a new transformative purpose; and second, whether the secondary work usurps some of the market for the first by serving as an alternate means of acquiring the quoted material.46

Bad faith, the concurrence noted, is not relevant to either of those inquiries. If a person obtains an original work by improper means, that person likely will be subject to a host of civil and criminal charges. “[B]ut the question of fair use itself,” Judge Jacobs concluded, “should be decided on the basis of the transformative character and commercial effects of the secondary use. If the use satisfies the criteria of § 107, it is fair because it advances the utilitarian goals of copyright.”47

Just as fair play is not a defense to infringement, Jacobs contended that “bad faith should be no obstacle to fair use”:

Thus, a hotelier who stocks each room with photocopies of a newly copyrighted translation of the Bible is not saved from infringement by his piety; similarly, a movie reviewer who critiques—and reveals—a surprise ending is not deprived of the fair use by his malice or spite. Nor should a book critic be denied the fair use protection because she gained access to a prepublication manuscript by deceit. Fair use is not a permitted infringement; it lies wholly outside the domain protected by the author’s copyright.48

If bad faith is factored into the fair use analysis, Judge Jacobs opined, it likely will lead “to the suppression of transformative works that are valuable to the expansion of public knowledge.”49 Given that bad faith is a slippery concept, publishers may be unwilling “to risk liability on the basis of (unknown or unsuspected) tactics and morals of authors who produce transformative works.”50 This, Judge Jacobs lamented, would be a result contrary to the public good that copyright exists to promote.51

**What Is Bad Faith?**

As Judge Jacobs’ concurrence in NXIVM warns, the notion of what constitutes bad faith is difficult to define. Factoring bad faith into the fair use analysis makes predicting the outcome of a fair use claim even more complicated. For example, if a secondary user obtains the original work by deceit, will that always constitute bad faith? In Atari Games Corp., Atari obtained Nintendo’s source code by lying to the Copyright Office—clear evidence of bad faith, the Federal Circuit held.52 But what if the conduct is not so egregious? What if the original work is obtained
Factoring bad faith into the analysis makes predicting the outcome of a fair use claim even more complicated.

from an anonymous source? Must the recipient investigate whether its receipt of the work was authorized? And what about publishing a work after being denied permission? Does that alone constitute bad faith?

The decision in Religious Technology Center suggests that it may be the defendant’s burden to establish that the original works were obtained properly. In that case, the court held that some of the works defendant copied were from books that were properly in his possession. But other works he copied were received over the Internet or anonymously through the mail. As to these, the court held, they were more likely unauthorized than not, given evidence that plaintiffs had kept the works confidential. Other courts may similarly infer that works obtained anonymously must be unauthorized absent proof to the contrary.

The Second Circuit opinion in NXIVM, however, suggests that a finding of bad faith presupposes that the defendant “knew that his access to the copyrighted works was unauthorized or was derived from a violation of law or breach of duty.” Only then, the court held, would a defendant’s conduct weigh against a finding of fair use.

Following NXIVM, for example, a New York district court considered a copyright infringement claim brought by Eminem’s record company arising from the unauthorized distribution by defendants of two songs that he composed. The defendants claimed their distribution of the recordings constituted fair use insofar as they were exposing the alleged racism of a prominent entertainer. In a motion for summary judgment, Eminem countered that the defendants had acted in bad faith, having obtained the recordings after they had been stolen, a factor weighing against a finding of fair use. But the court held that whether the recordings had been stolen rather than simply abandoned had not been established. And even if they had been stolen, the parties disputed whether defendants were aware of that fact, precluding any finding on summary judgment of defendants’ bad faith.

Another factor courts have considered is whether copying a work, despite having been denied permission, is evidence of bad faith. The Supreme Court resolved this question in Campbell, finding that it does not constitute bad faith. In Campbell, 2 Live Crew parodied the Roy Orbison song after having been denied permission to use the song. Campbell argued that the defendants’ request for permission to use the original should be weighed against a finding of fair use. The Court disagreed, finding that the defendants’ “actions do not necessarily suggest that they believed their version was not fair use; the offer may simply have been made in a good-faith effort to avoid [] litigation.” According to the Court, if the use is otherwise fair, then permission is unnecessary.

Proceeding without permission does not therefore establish bad faith.

In addition, several courts have found relevant whether the defendant knowingly exploited a work for free that could have been purchased for a fee. In Los Angeles New Service, for example, the court noted that the fact that KCAL had requested a license but was refused one was not dispositive. But it nevertheless held the defendant’s conduct improper given that the defendant had “obtained a copy of the tape from another station, directly copied the original, superimposed its logo on [plaintiff’s] footage, and used it for the same purpose for which it would have been used had it been paid for.”

In NXIVM Corp., the Second Circuit similarly considered relevant the fact that the defendants could have paid the requisite fee to enroll in NXIVM’s seminars and obtain their materials legitimately. But in that case, defendants would not have been using the seminar materials for the same purpose for which they would have paid for them. The court, in any event, assumed that defendants had engaged in bad faith conduct but nevertheless still found defendants’ republication of the seminar materials to be a fair use.

A finding of bad faith also could be predicated on the violation of a contractual duty. In NXIVM Corp., the plaintiff required its seminar participants to sign a nondisclosure agreement. Violation of that agreement, the Second Circuit noted, “would be a breach of a contractual duty but would not ipso facto be a copyright infringement.” However, the court continued, “such a violation of a contractual duty, would be relevant in assessing the bad faith subfactor within the first factor.”

**Advising Clients**

Without further guidance from the Supreme Court on the relevance of bad faith to the fair use inquiry, advising clients on the viability of a fair use defense is difficult. Nevertheless, there are some lessons to be learned from those cases addressing the issue following Harper & Row and Campbell. Absent a clearer renunciation of the good faith principle, clients should be advised that their conduct in acquiring copyrighted materials likely will be considered at least as a subfactor within the first factor of a fair use analysis. Where clients receive the copyrighted material anonymously, courts may well assume that the clients’ possession of such material is unauthorized absent evidence to the contrary.

Where clients have obtained the copyrighted material through their own deceptive or unauthorized means, a finding of bad faith is more certain and likely to have a greater negative impact on the court’s analysis of the first fair use factor. Following Campbell, clients need not fear that using copyrighted material after having been denied permission will automatically constitute bad faith conduct. But if the material could have been lawfully obtained by simply paying a fee, courts may well take that factor into account. Given the increasing competition among media

(Continued on page 15)
Reduction the Glare of False Light: Why the Tort Should Be Limited to Personal Information Unrelated to Professional Conduct

STEVEN D. ZANSBERG

Imagine a news report that erroneously alleges business tycoon Donald Trump had falsified the records at one of his Atlantic City casinos to evade taxes. Or consider an article falsely accusing the CEO of General Motors of intentionally misstating that company’s earnings in order to boost the value of his own stock holdings prior to selling them at a hefty profit. Assuming that the plaintiffs could prove both falsity and actual malice, both individuals would have valid libel claims against the publishers of those statements. But would either also have a viable claim for false light invasion of privacy premised upon those same published reports? After all, these articles cannot seriously be claimed to have invaded either businessman’s right of privacy. They merely impugned each man’s professional persona in the marketplace and damaged his professional reputation.

In November 2005, the Utah Supreme Court affirmed a trial court judgment finding that a medical doctor had established his claim for false light invasion of privacy based upon a television news report that was found to falsely portray how he had discharged his professional duties in rendering medical care to a patient.1 Without complying with the state’s regulations for dispensing controlled substances, the doctor had prescribed the appetite suppressant Fen-Phen to a television station’s health reporter, who presented herself as a patient who wanted to lose weight. She was accompanied by a hidden camera that recorded the doctor-patient interaction.2 Although it vacated significant portions of the lower courts’ judgment, Utah’s Supreme Court affirmed the jury award of $500,000 in compensatory damages to the doctor as a result of the broadcast, allowing the judgment to stand on his claim for false light invasion of privacy. The television station had argued, both in its initial appeal and in an unsuccessful petition for reconsideration, that the tort labeled false light invasion of privacy could not, as a matter of law, be applied to a report that focuses exclusively upon one’s performance of professional duties owed to the general public, and certainly not, as in that case, when the performance of those duties directly affects the health and safety of the general public.

This article argues that the Utah Supreme Court erred. It explains why false light invasion of privacy cannot, without undermining the analytical foundation for the tort, be applied to published statements concerning a public official’s discharge of official duties, a public figure’s activities that are the basis for his or her public figure status, or even a private figure’s professional conduct that is directed toward the general public.

The Four Tort Claims Under Invasion of Privacy

The American Law Institute’s Restatement of Torts recognizes four tort claims under the general heading “invasion of privacy”:

1. “unreasonable intrusion upon . . . seclusion;”
2. “appropriation of [the plaintiff’s] name or likeness.”
3. “unreasonable publicity . . . to [the plaintiff’s] private life;” and
4. “publicity that unreasonably places [the plaintiff] in a false light before the public.”

Of the four, none has posed greater consternation for judges, lawyers, and the media than the last item, which is commonly referred to as “false light invasion of privacy.” Commentators have questioned the very need for such a tort and have pointed to the thorny problems stemming from the murkiness of its definitional parameters.4 For these reasons, the highest courts in several states have declined to recognize the tort under their own state’s common law and have declared the claim redundant or overlapping with the defamation torts of libel and slander.4

In contrast, those courts that have embraced the tort have done so by recognizing that the plaintiff’s interests the claim seeks to vindicate (the right to be let alone or a right of privacy) are somewhat distinct from the interests protected by the defamation torts, i.e., reputation, standing in the community, or good name.5 Assuming, arguendo, that this distinction warrants recognition of false light invasion of privacy, such an independent tort should appropriately be applied only to those situations that warrant the recognition of such a legal claim—circumstances in which the plaintiff’s private affairs, as opposed to his public persona or conduct, is the focus of publicity that portrays that conduct in a false light.

The origins of the right of privacy in America are generally traced back to the seminal Harvard Law Review article by Samuel D. Warren and Lewis D. Brandeis.7 Subsequently, in an almost equally influential law review article, Dean Prosser catalogued and outlined the contours of four separate claims for invasion of privacy that had been recognized at common law.8

The Restatement of Torts later formally adopted these same four causes of action. With the exception of misappropriation, which is properly treated as

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a commercial tort, all of the claims are intended to vindicate the plaintiff’s right to be let alone, to protect a certain sphere of personal or intimate solitude, seclusion, or privacy. This is clearly the case with the related tort claims of intrusion upon seclusion and publicity given to private facts. Indeed, those courts that have distinguished between a false light invasion of privacy and defamation have recognized that a claim for invasion of privacy protects a right or interest that is separate and distinct from damage to one’s reputation, i.e., the right of privacy.

**Public or Private?**

As originally articulated by Dean Prosser, the false light claim was not restricted only to publications that addressed a personal and intimate aspect of the plaintiff’s life. Writing in 1960, Dean Prosser accurately cited several cases in which, as he described it, it is . . . clear that either the public figure or the man in the news can maintain an action when false or fictitious statements are published about him, or when his picture is used with an innuendo which places him in a false light before the public.

However, if a public figure may maintain an action labeled as invasion of privacy through false light based upon an inaccurate portrayal in connection with a matter over which the plaintiff has no reasonable expectation of privacy, e.g., for purposes of a publication of private facts claim, then what meaningful distinction is there between the plaintiff’s claim for defamation and false light? Arguably, there is none.

Why, then, should the law recognize a claim for false light invasion of privacy and that should therefore be afforded a different statute of limitations than the one that applies to an action premised upon damage to reputation. For such cases to have any validity, the claim for false light invasion of privacy must be limited to circumstances in which the defendant’s publication actually intrudes upon privacy interests, as opposed to reputational harm flowing from the defendant’s publication.

Not surprisingly, then, one legal encyclopedia states that “[i]n order to be actionable, an action for false light invasion of privacy must involve the private affairs of the subject, and cannot relate to any matter which is inherently ‘public’ or ‘of legitimate interest to the public.’” Although that rule may not have been the law as it existed at the time of Dean Prosser’s law review article, it accurately describes the trend of cases that has emerged more recently, as described below. More importantly, it is a rule that makes sense and should be followed in the future.

**Public Officials, Official Conduct, and False Light**

Several courts have found that public officials may not assert a false light claim when they are the subject of a news report that focuses upon their discharge of their official duties. In *Godbehere v. Phoenix Newspapers, Inc.*, the Arizona Supreme Court rejected a claim for false light that was brought by police officers on the basis of news reports concerning how they conducted themselves in discharging their official duties while on the job. The court stated, succinctly, “there can be no false light invasion of privacy for matters involving official acts or duties of public officers.”

The Georgia Court of Appeals followed this line of reasoning in rejecting a false light claim brought by a police officer who had been indicted and charged with sodomy (the charges were later dismissed), allegedly based upon an incomplete and distorted presentation of the supporting evidence by the investigating officers. The court stated that “where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one’s legal right of privacy.”

Furthermore, the court found, “any information released by defendants . . . relating to the prosecution of the plaintiff (a public official) relates to a matter of public interest and therefore does not constitute an invasion of plaintiff’s right to privacy.”

In *Neish v. Beaver Newspapers, Inc.*, the court held that an attorney who served as solicitor for a borough could not state a claim for false light invasion of privacy based on an unflattering news report that focused upon his conduct as the borough solicitor: “the [plaintiff’s] stature in the community as a public figure resulted in a relinquishment of insulation from scrutiny of his public affairs.”

Following *Neish*, another Pennsylvania court held that the administrator of a public hospital, who was deemed to be a public official, could state no claim for false light premised upon a news report that was critical of his conduct as a hospital administrator. Most recently, a federal court applying Pennsylvania law rejected a false light claim (for lack of sufficient publicity) that was brought by a public high school football coach, commenting in dicta that to prevail on a false light claim, plaintiff must show that defendants “publicized *private* facts which placed him in a false light . . . that such facts are not of legitimate concern to the public.”

Applying the same rationale, albeit some forty years earlier, the U.S. Court of Appeals for the Seventh Circuit, applying the law of Indiana, affirmed the dismissal of an unspecified invasion
of privacy claim brought by a former sheriff based upon the publication of a photo of the plaintiff in a friendly pose with his arm around the notorious outlaw John Dillinger:

[The plaintiff] was at that time a public official . . . that being the case, we think it cannot be said that the republication of that story constitutes any invasion of his private rights. It is the unwarranted publicizing of a person’s private affairs and activities which furnishes the basis for the cause of action.3

Private Figures Whose Conduct Occurs in the Public’s Eye
Some courts have extended this same rationale to private figure plaintiffs whose conduct has legitimately become the focus of public interest and press attention. For example, in *Hagler v. Democrat-News, Inc.*, the court held that a news report that featured a photograph of the plaintiff’s business sign in the vicinity where drug arrests were made was not actionable as false light portrayal because “an action for false light invasion of privacy lies only where publicity was given to a matter which was not the subject of legitimate public interest.”

In *Langworthy v. Pulitzer Publishing Co.*, the court rejected a false light claim brought by an attorney on the basis of a tongue-in-cheek news report concerning the plaintiff’s having phoned police to report a break-in to his home in which a “gang” of nine children, aged two to thirteen, allegedly stole “three pieces of Swiss cheese, a piece of cake, some jello and $20.” The court emphasized that the plaintiff admitted he did report the robbery to the police and “[t]hat report and the resulting action of the police was a matter of public interest and the defendant could comment thereon in its newspaper.” As a result, the news story “did not constitute ‘a serious, unreasonable, unwarranted and offensive interference’ with his private affairs.”31

Report on a Business Person’s Professional Conduct Is Not Actionable
To date, at least three courts have applied this general rule—that a plaintiff’s conduct which is itself a matter of public interest or concern cannot give rise to any claim labeled as invasion of privacy—to preclude the assertion of a false light claim premised upon a publication that focused on the plaintiff’s professional conduct. In *Patton v. Royal Industries, Inc.*, California’s Court of Appeal affirmed the dismissal of a false light claim that was premised upon the defendants’ having sent a letter to potential clients of the plaintiffs, falsely implying that the plaintiff aerospace engineers had been fired for incompetence by their former employer (who wrote and distributed the letter). The court concluded that false light invasion of privacy did not lie upon these facts because the letter “did not disclose any fact about the plaintiffs that they hoped to keep secret.” Although the statements in the letter were false and defamatory, “there was no ‘statement of fact relative to [the plaintiffs’] private lives or any other secret matter . . . they reflected exclusively upon the professional standing of the plaintiffs in the public view. [T]hus, there was no invasion of the rights of privacy.”32

Similarly, the Montana Supreme Court found that statements concerning the plaintiff’s discharge of professional conduct of the professional sports franchise.*30

Endnotes
1. Jensen v. Sawyers, 130 P.3d 325 (Utah 2005). The author and his firm represented the defendants in *Jensen.*
14. Although discussing the tort of "publicity given to private life," the Restatement acknowledges that one's privacy is not "invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public." Restatement (Second) Torts § 652D cmt. b at 386 (1977). This sentiment was cogently summarized by Professor Melville B. Nimmer in 1968: "If a particular speech does not deal with private matters, then however one might characterize the interest which competes with the right of free speech, it seems obvious that it is not an interest in privacy," Melville B. Nimmer, The Right to Speak from Time to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Cal. L. Rev. 935, 960 (1968).

Bad Faith
(Continued from page 10)

outlets for market share and the premium associated with providing fresh and innovative content in an expedited manner in the Internet age, the question of defendants’ bad faith conduct in using copyrighted material is likely to arise again and again in the context of fair use challenges.

If additional cases get litigated and the courts refine their analysis, the future may offer a greater understanding of precisely how a client’s conduct will impact a claimed fair use defense. The trend appears to be heading toward giving less weight to a defendant’s bad faith conduct. But it remains to be seen whether the well-reasoned view of Judge Jacobs—that such conduct should have no relevance at all—will prevail in the end.

Endnotes
7. Id. at 562.
8. Id. at 562–63 (internal citations omitted).
9. Id.
11. Id. at 843.
12. Id.
14. Id. at 585 n.18 (internal citations omitted).
15. Id.
17. Id. at 1244–45.
18. Id.
19. Id. at 1244 n.14.
20. Id.
21. Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997).
22. Id. at 1120.
23. Id. at 1122.
26. Id. at 475.
27. Id. at 476.
28. Id.
29. Id. at 478.
30. Id.
31. Id.
32. Id.
33. Id.
34. Id. at 479.
35. Id. at 479 n.2.
36. Id.
37. Id.
38. Id. at 479.
39. Id.
40. Id. at 483.
41. Id.
42. Id. at 484.
43. Id. at 483.
44. Id. at 483–84 (citing Pierre N. Leval, Toward a Fair Use Standard, 103 HARV. L. REV. 1105, 1126–27 (1990)).
45. Id. at 485.
46. Id.
47. Id.
48. Id. at 486.
49. Id.
50. Id.
51. Id.
54. Id.
55. NXIVM Corp. v. Ross Inst., 364 F.3d 471, 478 (2d Cir. 2004).
57. Id. at *17.
58. Id. at *18.
59. Id.
60. Id.
62. Id.
63. Id.
64. Id.
66. Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1121 (9th Cir. 1997).
68. Id. at 482.
69. Id. at 478 n.1.
70. Id.
The following is a selective bibliography of books and legal periodical articles in communications law that have appeared from January through May 2006. This bibliography was prepared by Patrick Petit, Associate Law Librarian at the Judge Kathryn J. DuFour Law Library of The Catholic University of America’s Columbus School of Law.

**MASS MEDIA—BOOKS**


**MASS MEDIA—ARTICLES**


**TELECOMMUNICATIONS—BOOKS**


**TELECOMMUNICATIONS—ARTICLES**


CONSTITUTIONAL ISSUES—ARTICLES


CONSTITUTIONAL ISSUES—BOOKS


(Continued on page 26)
Online Forums
(Continued from page 1)

Americans, with a minimum of government regulation,” and that “[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.” Congress further noted that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation,” and “to encourage the development of technologies which maximize user control over what information is received by individuals . . . who use the Internet.”

The CDA provides in relevant part:

(c)(1) No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(c)(2) The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . .

(c)(3) The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

Interactive Computer Services

Under the CDA, a website host that fits the definition of an interactive computer service is immune from liability for content posted on its website by third parties. “[R]eviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of ‘interactive computer service’ and a relatively restrictive definition of ‘information content provider.’” There is no question that large commercial ISPs, such as America Online, fit the definition of interactive computer services. Additionally, other passive providers of Internet services fit within the definition. Further, interactive computer services have been held to include other types of Internet websites, including dating service sites,7 sites with stock quotation information,8 and online discussion group sites.9

Involvement with Content

Furthermore, courts have interpreted narrowly the requirement that an Internet publisher create or develop content to be considered an information content provider. As the U.S District Court for the District of Columbia stated in Blumenthal v. Drudge,

Congress has . . . provid[ed] immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-policing the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.10

In Zeran v. America Online, Inc., the Fourth Circuit noted that online service providers may still exercise “a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content” and remain within the CDA’s scope of immunity.11 Thus, to be immune under the CDA, Internet publishers are not required to be mere passive conduits; rather, they can perform many functions without being considered to be information content providers, including:

• Exercising editorial functions with respect to third party content, including removing and correcting posted content.12
• Selecting particular content for publication.13
• Entering into contracts to publish content and actively promoting acquired content.14
• Declining to review posted content for errors or offensiveness.15
• Declining to remove potentially offensive content.16
• Providing forms for the entry of information by third parties that will automatically be published on a website.17
• Creating or developing other content on a website apart from the particular content at issue.18
• Publishing third party statements that are anonymous or made under false names, even if this prevents a viewer from identifying the creator or developer of the material at issue.19

Scope of Immunity Afforded to Website Hosts

Immunity under the CDA explicitly preempts all state law causes of action.20 Thus, pursuant to the CDA, all state law claims against interactive service providers based upon statements posted on websites by third parties are barred. This includes claims for defamation based on online content as well as claims for intentional infliction of emotional distress and other injuries caused by the unauthorized publications of third parties.

Use of Online Comments for Other Purposes

Although, pursuant to the CDA, state law claims against website hosts and ISPs for statements posted on the Internet by third parties are typically barred, plaintiffs still may seek to admit such online statements in support of their defamation actions against a media defendant. For example, Internet users may post their reactions to the defendant’s allegedly defamatory publication in an online forum, including the publisher’s own online forum. A plaintiff may attempt to introduce such online comments by third parties to demonstrate the effect of the defendant’s statement on the plaintiff’s reputation, and seek to have the online comments admitted into evidence in support of this claim. Because such comments are typically unrestrained or even intemperate, they can magnify the apparent impact of a media defendant’s own statements. In addition, it is rarely possible to cross-examine the authors of such comments, who frequently use pseudonyms online.

Finally, because the online comments are being used as evidence of damages rather than as a separate basis
for liability, the CDA is arguably not implicated. Defamation defendants nev-
ertheless should object to the admission of such comments on hearsay, authen-
ticity, best evidence, relevance and/or undue prejudice grounds. Indeed, even
if a portion of an online post is found to be admissible on certain grounds, it
may ultimately be inadmissible based on other evidentiary concerns.

Evidentiary Concerns
Where plaintiffs seek to introduce state-
ments made in chat rooms, bulletin
boards, posts, or other online forums into evidence, they must be able to:
(1) satisfy hearsay concerns, (2) authen-
ticate the evidence by verifying its trustworthiness, (3) demonstrate that
they are the best evidence of the infor-
mation, and (4) demonstrate that they meet the necessary standards of rele-
vence and are not unfairly prejudicial.

Hearsay
Statements posted on websites are out-of-
court statements, and, if they are offered
for their truth, they must satisfy a hearsay
exception or exemption to be admissible. On the other hand, if printouts of a web-
site are merely being admitted to show
the appearance of the text and images
found on the website (rather than for the
truth of those text and images), they fall
outside the ambit of the hearsay exclu-
sionary rule.21 Where a libel plaintiff
seeks to introduce such website postings
under the hearsay exception, they are
considered to be statements of the web-
site host but rather statements of the third
parties who post the content.

Admissions of a Party Opponent
Pursuant to Fed. R. Evid. 801(d)(2), a
statement made by a party or its agent,
when offered against that party, is not
considered hearsay, even if admitted for
its truth. Thus, where a party seeks to
admit statements or comments taken
from the opposing party’s website (and
made by the opposing party or its agent,
rather than by a third party), courts have
admitted those online statements as
falling outside the hearsay rule.22

Many media outlets now maintain
their own websites on which users can
browse both current and archived articles
and broadcasts. Many of these websites
also contain chat rooms or other online
discussion forums where users can post
their comments and reactions to articles
and broadcasts. Thus, a plaintiff may seek
to introduce statements made by third parties
in an online discussion forum on a media
defendant’s website, particularly where
such reactions are particularly vehement,
to demonstrate readers’ reactions to an
allegedly defamatory article and to prove
harm to the defendant’s reputation or
defamatory meaning of the challenged
statements as understood by readers.

Where a media defendant merely
maintains a chat room or other online dis-
cussion forum on its website in which
third parties post information, the media,
as the website’s host, is immune from lia-
ability for statements posted by third par-
ties on the website, pursuant to the CDA.
If a defamation plaintiff attempts to intro-
duce statements made by a third party on
the defendant’s website as an admission of
the defendant, the defendant should
argue that the statements do not fit within
the exception because, under the CDA,
statements made by third parties are not
considered to be statements of the web-
site host but rather statements of the third
parties who post the content.

In other words, even though the
CDA provides immunity from liability,
media defendants should point to the
statute as a basis to defeat the assertions
that statements posted on the defend-
ant’s website by third parties are actu-
ally the defendant’s own statements.
Thus, it would be inappropriate for a
court to admit these third party state-
ments under this hearsay exception.

Business Records Exception
A defamation plaintiff may also seek to
introduce such website postings under
the business records exception in Fed.
R. Evid. 803(6). However, to the extent
that the postings were made by anony-
mous third parties on an ISP’s website,
the postings are not business records of
the ISP.24 In United States v. Jackson,
the Seventh Circuit held that where the
ISP does not itself post the comments
that a party seeks to admit into evi-
dence, it is merely a conduit, and the
fact that it may be able to retrieve the
information that its customers posted or
sent via e-mail does not turn that mate-
rial into a business record of the ISP.25

To be immune under the CDA,
Internet publishers can perform
many functions without being
considered to be information
content providers.

Thus, the business record exception
will not apply where a party seeks to
admit web postings made by third par-
ties on a media defendant’s website.26

Reputation Exception
If plaintiffs seek to admit online com-
ments in a defamation action to demon-
strate that their reputations were dam-
gaged as a result of the defendant’s
publication, they might argue that the
online statements fall into the reputa-
tion exception to the hearsay rule.27
Federal Rule of Evidence 803(21)
provides an exception to the hearsay
rule for statements of “[r]eputation of
a person’s character among associates
or in the community.” This hearsay
exception may, at first blush, appear
to dissolve hearsay obstacles standing
in the way of the plaintiff’s admitting
statements made in online discussion
forums. However, this exception is
more limited than it first appears, and
in fact should not apply to the majority
of online statements that a plaintiff
could seek to offer.

Consider the following example of a
post by an anonymous participant in an
online discussion forum:

ANONPOSTER001: I read the article in
today’s Bulletin about John Doe, and I
think that he’s a no-good lying cheat.

John Doe might attempt to offer
such a statement in a libel action
against the Bulletin to establish that the article in the Bulletin injured his reputation. However, this statement of AnonPoster001’s opinion of John Doe should not be admitted under Fed. R. Evid. 803(21). It is unlikely that the plaintiff will be able to establish that AnonPoster001 is an associate of the plaintiff. Moreover, the reputation exception to the hearsay rule is concerned with the attitude of a group of associates or the community as a whole toward an individual rather than a single person’s opinion of the plaintiff.28 It is the formation of group sentiment through the interaction and inquiry of many people that gives a statement of reputation the reliability required to overcome a hearsay objection.29 Therefore, because the statement of AnonPoster001’s personal opinion is not a statement of John Doe’s general reputation “among associates or in the community,” it should not be admitted under Fed. R. Evid. 803(21).30

If AnonPoster001’s post instead read:

AnonPoster001: I read the article in today’s Bulletin about John Doe, and everybody knows that he’s a no-good lying cheat,

it might qualify as a statement of reputation under the exception. However, even in this circumstance, Fed. R. Evid. 803(21) does not cure the hearsay issue. The reputation exception allows witnesses to testify about their perceptions of an individual’s reputation because, as discussed above, the formation of reputation is considered to have some inherent reliability, and because witnesses may be cross-examined as to how they learned of the alleged reputation.31

But in the case of the statement above, AnonPoster001 is unavailable to testify as to how he or she learned of John Doe’s alleged reputation. Thus, although AnonPoster001’s comment addresses the community’s opinion of John Doe, the entire statement is still hearsay and should not be admitted under Fed. R. Evid. 803(21), because AnonPoster001 is not available to testify and be cross-examined as to the basis for this comment.

State of Mind Exception

Although AnonPoster001’s comments may not be admissible under the reputation exception, John Doe may still argue for their admission under the state of mind exception, Fed. R. Evid. 803(3), as statements of AnonPoster001’s “then existing mental, emotional or physical condition.”32 For example, initially, the first example discussed above (“I read the article in today’s Bulletin about John Doe, and I think that he’s a no-good lying cheat.”) appears to satisfy the requirements of the state of mind exception. Nevertheless, there remains both a hearsay problem and a relevancy issue with admitting this online post.

AnonPoster001’s statement is not limited to his state of mind; rather, it includes his statement as to how and why he formed that state of mind, namely, the phrase, “I read the article in today’s Bulletin about John Doe.” This is critical to John Doe’s demonstrating the relevancy of AnonPoster001’s post because it links AnonPoster001’s comment to the article that John Doe claims libeled him. However, this part of the statement is not within the scope of Fed. R. Evid. 803(3)’s hearsay exception and therefore is not admissible. The state of mind exception is limited to AnonPoster001’s statement that he thinks John Doe is “a no-good lying cheat,” because the statement itself is direct evidence of AnonPoster001’s state of mind (provided that John Doe can establish the authenticity of the statement). In contrast, the portion of AnonPoster001’s post concerning how his state of mind was formed amounts to an out-of-court statement, submitted for its truth, that AnonPoster001 in fact read the Bulletin article in question. That portion of the post is hearsay that does not fall within the state of mind exception and is therefore inadmissible.33

Thus, even if AnonPoster001’s post that he thinks that John Doe is “a no-good lying cheat” is admissible under Fed. R. Evid. 803(3), the portion of the post indicating that AnonPoster001 read the Bulletin article should be redacted and not submitted to the jury. With such a redaction from the content of the post, the defamation defendant will be in a position to argue that the remaining portion of the post is irrelevant because it lacks a connection to the article that is the subject of the defamation action. Relevancy objections are discussed more fully below.

Authenticity

Online statements must be properly authenticated to be admitted into evidence. The authentication standard for website data is no different than for any other form of evidence. The authentication standard for website data is no different than for any other form of evidence. Courts have held that websites are not self-authenticating pursuant to Fed. R. Evid. 902 because they do not bear the indicia of reliability required under the rule. Thus, comments printed from the Internet must meet the standard of authentication under Fed. R. Evid. 901(a), which requires “evidence sufficient to support a finding that the matter in question is what its proponent claims.”

The difficulties inherent in authenticating online evidence were aptly illustrated by the U.S. District Court for the Southern District of Texas in St. Clair v. Johnny’s Oyster & Shrimp, Inc.: While some look to the Internet as an innovative vehicle for communication, the Court continues to wary and warily view it largely as one large catalyst for rumor, innuendo, and misinformation. So as not to mince words, the Court reiterates that this so-called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon . . . There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet. No website is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time. For these rea-
sons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in Fed. R. Civ. P. 807.36

In St. Clair, the plaintiff attempted to cite data he found on the Internet in support of his contention that the defendant owned a particular vessel.37 The court refused to admit this information based on its inherent distrust of information gleaned from online sources, holding that “[i]nstead of relying on the voodoo information taken from the Internet, Plaintiff must hunt for hard copy back-up documentation in admissible form . . . or discover alternative information verifying what Plaintiff alleges.”38 Various courts have cited to St. Clair in refusing to admit information from the Internet due to trustworthiness concerns.39

An additional ground for objecting to authentication arises where the online material in question is posted by an anonymous third party rather than the website host. In such instances, the content needs to be authenticated by the individual who posted the content, rather than the website host or online archival company. Even if a printout accurately reflects what a witness can testify he or she viewed on a website, only the party who posted the information on the website can verify that the information the witness viewed online is the information that the poster actually posted on the site. Statements posted online by anonymous third parties are particularly difficult to authenticate, because the posters of those statements cannot be identified to attest that they posted the statements attributed to them.

The reported cases in which courts have admitted postings from online discussion forums have typically involved testimony concerning the identity of the person who posted the information. This situation has arisen primarily in criminal actions where government agents secretly participated in online chat room discussions and recorded their conversations with defendants concerning the defendants’ allegedly illegal online activities.40 In these cases, the creators of the chat room printouts were the agents who participated in the online conversations, and those agents could testify that the printouts of those conversations were true and accurate representations of their actual conversations with the defendants.

In defamation actions, plaintiffs are unlikely to learn the identity of persons posting anonymous information in online discussion forums. The plaintiff could attempt to subpoena the ISP hosting the website where the information was posted and request the ISP to produce information concerning the identity of a particular subscriber. However, courts have generally held that the right to communicate anonymously on the Internet falls within the ambit of the First Amendment’s protections and have enforced such subpoenas only where they were satisfied that the party requesting the subpoena had a legitimate good faith basis to contend that it was the victim of actionable conduct, and the user’s identity was centrally needed to advance that claim.41

Thus, if a plaintiff were to subpoena an ISP to reveal the identity of an anonymous user whose online post is relevant to the plaintiff’s defamation claim only because it provides additional evidence of reputational harm, a court would be unlikely to enforce that subpoena on the basis that user’s identity would not be “centrally needed” to advance the plaintiff’s defamation claim. Accordingly, plaintiffs are unlikely to be able to verify that an anonymous online statement accurately represents the information that the user actually posted.

Furthermore, where anonymously posted comments contain information helpful to a libel plaintiff’s arguments, the defendant has no means of verifying that the plaintiff, or parties aligned with the plaintiff, did not post that information online himself or herself under a pseudonym. Although not in the defamation context, in United States v. Jackson, the Seventh Circuit upheld the exclusion of certain website postings found on white supremacist groups’ websites, based on insufficient authentication and lack of trustworthiness.42 The court noted that the criminal defendant, who was seeking to introduce the postings into evidence to prove that the crimes with which she was charged were committed by others, needed to demonstrate that the online comments were posted by the persons who actually committed the crime, as opposed to being “slipped onto” websites by the defendant herself, who was a skilled computer user.43 Because the defendant could not demonstrate that the website postings were authentic, the court excluded them from evidence.

In light of these concerns regarding authenticity and trustworthiness, defamation defendants have a strong argument that online postings should be excluded from evidence on authenticity grounds, particularly where (1) the comments were posted anonymously and cannot be verified by the individual who posted them and (2) the plaintiff, or someone working on the plaintiff’s behalf, could have posted the comments under a pseudonym to assist the plaintiff in his or her defamation action. However, where the party seeking to admit the evidence can provide circumstantial indicia of authenticity, courts may still opt to admit the evidence, and to leave the weight to be assigned to such evidence up to the jury.44

Best Evidence

Any written, recorded, or photographic evidence that a party seeks to admit into evidence is also subject to the “best evidence” rule, Fed. R. Evid. 1001, et seq. Under this rule, a party seeking to admit a writing, recording, or photograph must submit the “original” to prove its content. The definition of an original states: “If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data...”
accurately, is an ‘original.’” Further, duplicates are admissible to the same extent as originals unless there is a genuine question as to the authenticity of the original, or, under the circumstances, it would be unfair to admit the duplicate in lieu of the original.46

Where a plaintiff presents a printout of exactly what appeared on a webpage, in the form in which it appeared, the court is likely to find that it constitutes an original in accordance with the definition in Rule 1001(c). However, where a plaintiff seeks to admit evidence of comments made in chat rooms and other online forums by presenting the text of the online discussions copied into a new document, the court should scrutinize the evidence more closely because of its susceptibility to tampering.

In Laughner v. State of Indiana, the defendant argued that a printout of a message chat should have been excluded under the best evidence rule because the printout that the prosecutor sought to admit was copied into a word processing program, which may have enabled editing and tampering.47 Notwithstanding the fact that the document had been copied from a website and pasted into a new document, the Indiana Court of Appeals affirmed the trial court’s decision, finding sufficient indicia of reliability and admitting the printout. The state trooper involved in the conversation testified that he had saved the online conversation in a word processing program immediately after it concluded and that the printout accurately reflected the content of that conversation.48

In Laughner, the state trooper was available to testify as to the accuracy of the printout of that conversation. However, in defamation actions, as discussed above, the party seeking to admit the evidence is unlikely to have participated in the online discussion, and may be unable to verify the accuracy of printouts of these conversations. Thus, if a plaintiff who was not present during an online conversation seeks to admit a printout of that conversation copied into a new document, the defendant should argue that the conversation should be excluded under the best evidence rule because of the possibility of editing or tampering. Similarly, the best evidence rule would bar oral testimony about the contents of a website, where the plaintiff lacks a reasonable explanation for failing to preserve a direct printout or computer record of that website.49

Lack of Relevance/Unfair Prejudice

In situations where a plaintiff seeks to admit into evidence anonymous comments posted online concerning his or her reputation, but cannot demonstrate that those comments specifically were based on the allegedly actionable statements published by the defendant, the defendant also should seek to exclude the online comments on the basis that they are irrelevant and therefore inadmissible pursuant to Fed. R. Evid. 402. In the alternative, if the court finds that the online comments are potentially relevant, the defendant should argue that the comments still should be excluded, pursuant to Fed. R. Evid. 403, because their probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

The plaintiff has the burden of proving that any claimed injury was substantially and proximately caused by the defendant’s allegedly defamatory publication. Without the ability to cross-examine the individual who posted the comments about the basis for those comments, it may be impossible to prove that such comments were based on actionable statements published by the defendant. The individual who posted the comments about the plaintiff may have never seen or read the defendant’s allegedly defamatory publication, and his or her opinions of the plaintiff may have preceded the defendant’s publication or have been based on other sources. Further, as discussed above, the plaintiff is precluded from introducing any portions of a declarant’s online statement that do not specifically fit within a hearsay exception; thus, the plaintiff may not use online statements to establish a connection between a publication and the declarant’s opinion of the plaintiff (for example, that the declarant read the defendant’s publication about the plaintiff).

In addition, particularly where the online comments that the plaintiff seeks to admit are of questionable relevance, the defendant should argue that the danger of unfairly prejudicing the jury outweighs the potential probative value of the online comments. Anonymous Internet posts frequently use inflammatory language, and defamation plaintiffs may seek to admit online statements with provocative language to stir the jury’s sympathies. For this reason, such posts can be irreparably damaging to defamation defendants once they are presented to the jury. Thus, in these situations, media defendants should argue that the admission of anonymously posted online comments raises serious relevance concerns and poses a danger of unfairly misleading or prejudicing the jury against the defendant.

Litigation Tactics

Despite a defamation defendant’s best efforts to exclude online statements from evidence on various evidentiary grounds, a court may still decide to admit the evidence over the defendant’s objections. In such instances, only the portions of the online statements that satisfy the various concerns described above should be admitted. All other portions of a website or online posting should be redacted or otherwise excluded from the jury.

In situations where online statements are admitted, the defendant will have an opportunity to cross-examine the party introducing the evidence and later to argue to the jury the numerous weaknesses inherent in the online evidence. Questions posed on cross-examination should highlight the plaintiff’s lack of knowledge about the person who posted the comment and raise concerns about authenticity, trustworthiness, best evidence, reliability, and relevance. Where there is a basis to do so, cross-examination should additionally raise the possibility that the plaintiff or persons acting on his or her behalf were the actual source of the posting. Even where a court decides to admit such evidence, the jury has the role of deciding the weight to assign to the evidence and raising these concerns to the jury may diminish its potential negative impact.
Additionally, defendants should request a limiting jury instruction based on the CDA that explicitly states to the jury that a media defendant cannot be held responsible for content posted on its website by third parties, e.g., “If a party maintains or hosts a website on which unrelated parties can post content of their own creation, the host of the website is not responsible for such content and is not the publisher of such content for purposes of a defamation claim.” In addition, the defendant should submit a jury instruction explaining the limited purposes for which any evidence from an online discussion forum that was admitted may be considered. Suggested wording appears below:

The plaintiff may not recover for any portion of his (or her) injury caused by statements that were not written by the defendant or its agents or employees, including by statements that were posted by independent persons on the Internet. Therefore, you may not hold the defendant responsible for the statements reflected on Exhibit X, or punish the defendant for the publication of those statements. Such online statements may be considered only as evidence of the condition of the plaintiff’s reputation, and not as a separate cause of injury.

The defendant should also submit limiting instructions that further impress upon the jury the importance of considering reliability, trustworthiness, and relevance concerns in determining the weight to give to the online statements.

Conclusion

The emergence of blogs, chat rooms, and online discussion groups as popular forums for communication has given rise to a variety of new issues for courts to address, particularly in the First Amendment arena. Because Internet users can post comments online anonymously, users frequently feel emboldened (if not compelled) to spice up their postings with vituperative and inflammatory language. As one court noted, the near universal use of pseudonyms in e-mail and instant messages has fostered a culture in which users are freed to say and do things they never would by offline means. By using a screen name, an anonymous user is able to create an entirely new persona for his Internet communications, based on the distinction that unlike real space, cyberspace reveals no self-authenticating facts about identity.

For this reason, anonymous Internet posts are an extremely attractive means for defamation plaintiffs to demonstrate reputational harm in the community because the color and intensity of the language is likely to make the jury sympathize with the plaintiff. By the same token, the extreme language used in anonymous Internet posts can be highly damaging to defamation defendants, who lack the opportunity to cross-examine the declarants as to the basis for their comments; furthermore, it can be difficult for defendants to mitigate the prejudicial impact of such online statements once they are presented to the jury. Thus, media defendants should anticipate arguments to preclude such online statements from evidence and argue for the exclusion of such comments based on the numerous evidentiary grounds discussed above. In so doing, they can minimize their exposure to this potential minefield of detrimental evidence.

Endnotes

5. See, e.g., PatentWizard, Inc. v. Kinko’s, Inc., 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001) (Kinko’s was “interactive computer service” where it provided access to the Internet by renting computers to individual users).
17. Id.
19. See 47 U.S.C. § 230(e)(3) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”).
20. See 47 U.S.C. § 203(e)(3). The sweep of the CDA’s presumption has been held to include common law causes of action such as defamation and intentional infliction of emotional distress. See, e.g., Donato, 865 A.2d at 718.
22. Parties seeking to admit online statements for their truth also may attempt to address hearsay concerns by invoking other hearsay exemptions and exceptions set forth in the Federal Rules of Evidence.
23. See, e.g., Van Westrienen v. Americontinent Collection Corp., 94 F. Supp. 2d 1087, 1109 (D. Or. 2000) (statements posted by defendant on its website, which contained a “wealth of misinformation,” were admissible as “admissions of [a] party-opponent”); Telewizja Polska USA, 2004 U.S. Dist. LEXIS 20845, at *16–17 (statements on plaintiff’s website, in which plaintiff advertised its contractual relationship with the defendant after the contract period had expired, were admissions of a party opponent and not barred by the hearsay rule).
25. Id. The court further noted that even if the information sought to be admitted were to qualify for the business records exception with the defendant after the contract period had expired, were admissions of a party opponent and not barred by the hearsay rule.
26. But see Adam Wolfson, “Electronic Fingerprints’ Doing Away with the Conception of Computer-Generated Records as Hearsay,” 104 Mich. L. Rev. 151 (Oct. 2005) (arguing that an Internet host’s electronically created records of when and how online activity on its website occurred might satisfy the business records exception, although records concerning the substance of third party activity on the website would not fall within the exception).
27. See Fed. R. Evid. 803(21).
28. Id.
29. See Fed. R. Evid. 803, Advisory Committee Note to paragraphs (19), (20), and (21) (“Trustworthiness in reputation evidence is found ‘when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have...”)}
thus been discussed in the community; and thus the community’s conclusion, if any has been formed, is likely to be a trustworthy one.”).

30. A plaintiff might submit several such posts in an attempt to show that there was a “consensus opinion” about the plaintiff. However, even the opinion of several individuals would not demonstrate a unified, tested “reputation” as contemplated by the rule. In any event, such evidence would still face the second-level hearsay issue discussed in the main text.

31. See Fed. R. Evid. 803, Advisory Committee Note to Paragraphs (19), (20), and (21) (noting that trustworthiness in reputation evidence is found where “persons having personal knowledge” disclose facts that were discussed in the community); see also Blackburn v. United Parcel Service, Inc., 179 F.3d 81, 101 (3d Cir. 1999) (“A witness who wishes to testify about someone’s reputation within a community must demonstrate that he or she knows of the person and is truly familiar with the ‘community’ in which the reputation has been formed, and that the basis for the reputation is one that is likely to be reliable. Where the alleged reputation is based on nothing more than rumors of unknown origins, or a single instance of ‘someone told me so,’ a proper foundation has not been laid for admitting such evidence . . .”) (discussing the hearsay exception under Rule 803(19) for “reputation concerning personal or family history,” but noting that both 803(19) and 803(21) involve exceptions for evidence of one’s reputation “among associates” or “in the community.”).

32. See Fed. R. Evid. 803(3) (exception for “[a] statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . .”).

33. See United States v. Emmert, 829 F.2d 805, 810 (9th Cir. 1987) (“The state-of-mind exception does not permit the witness to relate any of the [out-of-court] declarant’s statements as to why he held the particular state-of-mind. . ..”); See also United States v. Sarnaniego, 345 F.3d 1280, 1283 (11th Cir. 2003); United States v. Tome, 61 F.3d 1446, 1454 (10th Cir. 1995); United States v. Liou, 960 F.2d 449, 452 (9th Cir. 1992).

34. See, e.g., Sun Protection Factory, Inc. v. Tender Corp., No. 04-CV-732, 2005 U.S. Dist. LEXIS 28873, at *2–6 (M.D. Fla. May 12, 2006). Additionally, given the interactive nature of online discussion forums, the manner in which they are maintained and operated, and the fact that they are constantly updating to include new posts, the Internet Archive might not include a given chat room or similar website among the sites preserved in its archives, or might not have an accurate record of such websites as of particular dates. Moreover, testimony as to the appearance of a particular website as of a specific date would not necessarily be sufficient to authenticate third party statements posted on a website, because representatives at Internet Archive have no personal knowledge as to whether messages posted on a website accurately represent the statements actually made by the third parties who posted the messages.


37. Id. at 775.

38. Id.

39. See, e.g., Monotype Imaging, Inc. v. Bitstream, Inc., 376 F. Supp. 2d 877, 885 n.6 (N.D. Ill. 2005) (refusing to consider a tutorial and article taken from the Internet as lacking authentication to the extent they were offered to show anything more than what was present on the websites on those dates, where the proponents of the evidence offered only the testimony of the person who printed the documents from the Internet, but not the testimony from the creators of those websites, and noting that “[c]ourts have recognized that printouts from websites should be closely scrutinized for reliability.”); Tolliver v. Federal Republic of Nigeria, 265 F. Supp. 2d 873, 876 (W.D. Mich. 2003) (refusing to consider new postings taken from the Internet as evidence in support of summary judgment because the documents were “ripe with hearsay and were not properly authenticated by persons with knowledge”); Costa v. Keppel Singmarine Dockyard Pte, Ltd., 2003 U.S. Dist. LEXIS 16295, at *29 n.74 (C.D. Cal. Apr. 25, 2003) (refusing to consider evidence regarding defendant’s corporate structure from a website purportedly maintained by defendant, where plaintiff attested that he personally downloaded the web pages, but did not proffer the testimony of defendant’s representative to demonstrate that the information on the website was placed there by the corporation); Wady v. Provident Life & Accident Ins. Co. of Am., 216 F. Supp. 2d 1060, 1064–65 (C.D. Cal. 2006).
2002) (refusing to admit website printouts for lack of authentication, where party seeking to admit them had no personal knowledge of who maintained the websites, who authored the documents, or the accuracy of their contents). See also Paulini, Using the Internet in Discovery and Investigation, MA-CLE S-7–1, § 7.6 (noting that hackers have tampered with the most protected websites, including Microsoft’s own website). 40. See, e.g., United States v. Tank, 200 F.3d 627, 630 (9th Cir. 2000).

41. See, e.g., In re Subpoena Duces Tecum to America Online, Inc., 2000 WL 1210372, at *6, *8 (Va. Cir. Ct. Jan. 31, 2001), rev’d on other grounds, 542 S.E.2d 377 (2001); see also Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1095, 1097 (W.D. Wash. 2001) (requiring proof that the user’s identity is directly and materially relevant to a core claim or defense, and that information sufficient to establish or disprove that claim or defense is unavailable from any other source); Dendrite Int’l, Inc. v. Doe, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001) (balancing the anonymous declarant’s “First Amendment right of anonymity” to allow the plain-tiff to properly proceed,” and affording the anonymous declarant an opportunity to oppose the application for a subpoena); La Societe Metro Cash & Carry France v. Time Warner Cable, No. CV-0301974005, 2003 WL 22962857, at *7 (Conn. Super. Ct. Dec. 2, 2003) (requiring that the information sought be limited in scope and that the plaintiff demonstrate it has no other adequate means of obtaining such information); Polito v. AOL Time Warner, Inc., No. 03-CV-3218, 2004 WL 3768897, at *7 (Pa. Comm. Pl. Jan. 28, 2004) (requiring that the identifying information be “fundamentally necessary” to secure relief and not for the purpose of “harassing, intimidating, or silencing critics” and that the ISP first notify the anonymous users to afford them an opportunity to petition the court to vacate the subpoena).

42. Jackson, 208 F.3d at 637–38. 43. Id. at 638. 44. See, e.g., Telewizja Polska USA, 2004 U.S. Dist. LEXIS 20845, at *17 (“Federal Rule of Evidence 901 ‘requires only a prima facie showing of genuineness and leaves it to the jury to decide the true authenticity and probative value of the evidence’”), quoting United States v. Harvey, 117 F.3d 1044, 1049 (7th Cir. 1997). See also Fed. R. Evid. 104(a) and 104(b); FED. R. EVID. 1003.


48. Id. 49. See, e.g., Harrington v. United States, 504 F.2d 1306, 1313 (1st Cir. 1974) (secondary evidence is only admissible in place of an unavailable original where the proponent of the evidence can show that “a reasonable and diligent search has been made for the original without success.”). 50. Polito, 2004 WL 3768897, at *3 (internal quotations and citations omitted).
From the Chair
(Continued from page 2)

this past March in Washington, D.C. (hosted by Covington and Burling, courtesy of Kurt Wimmer). The seminar promises to be a great new activity for the Forum.

Other Ventures
The Forum launched two other new ventures over the past two years. The Forum’s Journal of International Media & Entertainment Law, a mere gleam in Dave Kohler’s eye two years ago, recently published its first issue. David has been assisted by Kevin Goering, Nathan Siegel, and Kurt Wimmer, and as you will soon see, they have created a keeper.

And a suggestion made by Barbara Morgenstern shows how a good idea can become a valuable function. Barbara thought that Forum members who teach media law at all levels should be able to help each other and created the Forum’s Teaching Media Law Committee, which has generated significant interest and will hopefully benefit all Forum members who teach.

One of the Forum’s most important, ongoing priorities and activities has been the effort to diversify the media bar. Our efforts have been headed by Paulette Dodson with the assistance of, among others, Jon Avila, Tom Kelley, and Andrew Mar. They have a sometimes frustrating but always worthy task, and have greatly increased all of our awareness of an issue that needs resolving and of potential ways to do it, if we have the will. They have also demonstrated great, forward-looking thinking in their latest activity, the pipeline project for getting minority students interested in journalism and media law at a younger age.

This journal, Communications Lawyer, is a great resource for Forum members. It consistently carries excellent, thorough, and very readable articles on timely topics of interest to media lawyers. Editors Jonathan Anschell, Amy Neuhardt, and Steven Zansberg (and earlier Kurt Wimmer) have their hands full not only editing the publication, but also generating ideas for articles and soliciting writers to write them. The wine at our annual Editorial Board dinner helps, of course, but as you can imagine, it is a huge undertaking. Amy has just ended her time as an editor, and Stephanie Abrutyn will be taking her place and will undoubtedly continue the tradition of excellence. This journal has also been a source of great satisfaction to me personally by allowing me an outlet to express my views on various topics that matter to me (including one, in the most recent issue, that has bugged me since law school). I mostly thank Wendy Smith, the ABA’s Periodicals Editor, for that, because when I asked her what I should write about in the “From the Chair” column, she told me that the best and most interesting writing comes when one writes about what he or she cares about.

The Women in Communications Law group continues as one of the Forum’s success stories. Currently headed by Stephanie Abrutyn and Patricia Clark (and earlier in my term by Natalie Spears and Elizabeth Ritvo), it continues to attract impressive numbers of women to its gatherings and to sponsor meaningful discussions that touch on topics of real significance to its members.

Some other persons who are deserving of public thanks are Jim Borelli, who overseas our finances; Chip Babcock, who tires endlessly to get us new members (and who will publish that brochure one day); Julia Springsteen (no relation), Forum’s Law Student Division Liaison, who was the most creative and thoughtful liaison that I have observed in my nearly ten years as a member of the Forum’s leadership team; Ken Kraus, who has learned first hand the frustrations of trying to deal with the ABA machinery in building our website; and Bruce Johnson and Seth Berlin, who helped start and continue to run the Forum’s CommLawAlert service.

Teresa Ucok, the Forum’s administrator, has been the Forum’s backbone, and, as clichéd as it may sound, the Forum could not operate without her. Teresa makes things work, gets people where they need to be, makes problems disappear, and in so many ways makes the jobs of the rest of us possible and smooth. Thank you so much, Teresa, for all that you have done.

Dick Goehler is the new Chair. I envy Dick and all that he will discover, and all of the satisfactions he will experience in this position. Dick’s energy is legendary, the hours he keeps unfathomable, his encouragement and enthusiasm endearing, and his knowledge and skill superb. We are in for more good times ahead.

Recent Publications
(Continued from page 17)

CONSTITUTIONAL ISSUES—ARTICLES cont.


Compliance for Communications & Media Companies

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Among the topics covered were:

- Various state and federal laws and regulations affecting the business operations, regulatory compliance, and marketing efforts of communications and media companies.

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