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U.S. Media Law Update

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United States Media Law Update

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Introduction

In June 2015 the United States Supreme Court completed what was hailed as its most 'liberal term of the ages',[1] issuing major decisions on controversial issues, such as same-sex marriage, affirmative action and the *Affordable Care Act*.[2] The Court's free press jurisprudence, however, remained largely unchanged after its last term. The Court did not decide any significant press cases. Instead, the Court sidestepped the opportunity to resolve important questions about the constitutional limits on the prosecution of threats made via social media in one notable case, and set a new, more speech-protective standard for determining when a law is content-based and thus subject to the highest level of constitutional scrutiny. Meanwhile, lower courts began addressing other important topics ranging from the surveillance practices of the Department of Justice to the proper balance between privacy interests and the free flow of public information.

Threats in social media

Many media advocates expected that the Supreme Court's opinion in *Elonis v United States*,[3] known as the 'Facebook threats' case, might give guidance to law enforcement officials on how to prosecute 'true threats' while still protecting free speech in the social media age. The Court, however, addressed only a narrow statutory question regarding a federal threats statute, 18 USC § 875(c), that bans the transmission of a threat in interstate or foreign commerce.

A federal grand jury indicted avid Facebook user Anthony Elonis under the federal threats statute on the basis of social media posts that called for his ex-wife's death, alluded to a desire to kill certain employees at the amusement park where he worked, and seemingly threatened to shoot students at an elementary school and slit the throats of law enforcement agents. Elonis stated that his 'rap-style' posts were lyrics similar to those of famous rap star Eminem; he claimed he did not actually intend to threaten anyone in his posts. However, a federal district court denied his motion to dismiss and refused to grant his request for a jury instruction stating that the government must prove

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1 NPR, 'Was This Past Supreme Court Session a "Liberal term for the Ages"?', *Fresh Air*, 2 July 2015 <http://www.npr.org/2015/07/02/419468563/was-the-most-current-supreme-court-session-a-liberal-term-for-the-ages>.
2 See *The Patient Protection and Affordable Care Act*, Pub L No 111–148, 124 Stat 119.
3 575 US __ (2015).

that he intended to communicate a true threat.[4] The jury convicted Elonis, sentencing him to three years and eight months in prison. Elonis appealed on the basis that the Constitution required proof of subjective intent to communicate a true threat in order to maintain the conviction. The United States Court of Appeals for the Third Circuit affirmed Elonis's conviction, holding that the trial judge properly instructed the jury that Elonis's knowing and willful communication of the threatening statements sufficed to establish intent.[5] Elonis appealed to the Supreme Court of the United States.

The Supreme Court found that the federal threats statute did not specify the requisite mens rea for conviction.[6] The Court noted that Elonis knew the content of what he was posting. However, as the Court pointed out, the lower court upheld Elonis's conviction based on an instruction that told the jury to evaluate how the statements were perceived by a reasonable person. Therefore, the conviction could not stand.[7] The Court held that the statute did not authorise punishment of such threats merely upon a showing that a reasonable person in the speaker's position would foresee that his statement would cause his target to be put in fear. In other words, a speaker cannot be convicted upon a showing that a reasonable person would foresee that his words would be interpreted as a threat. Rather, the statute requires more — perhaps recklessness, knowledge, or purpose. The Court remanded the case to the lower court to determine which of these mental states would suffice for the government to impose criminal liability under the statute.

The Court's decision disappointed many observers by refusing to specify what mental state the First Amendment might require for prosecution and conviction based on the making of so-called true threats. In sidestepping the First Amendment issue, the Court failed to establish a clear constitutional floor for imposing liability. Justice Alito, dissenting in part, argued that the Court should have determined that the statute set recklessness as the mens rea. Justice Thomas, dissenting, contended that negligence was sufficient both under the statute and the First Amendment.

Controversial expansion of the reach of content-based speech

Although not a media case, the Supreme Court's decision in *Reed v Town of Gilbert Arizona* signifies its continued commitment to a formalistic jurisprudence of free expression.[8] *Reed* involved a city ordinance regulating the placement of signs, including temporary signs, on public property. The ordinance regulated both the size of such signs and the amount of time they

4 See *United States v Elonis*, 897 F Supp 2d 335, 339 (ED Penn, 2012).

5 *United States v Elonis*, 730 F 3d 321 (3rd Cir, 2013).

6 Under 18 USC § 875(c), an individual is guilty of a felony when he or she 'transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another'. The statute refers to the communication, not the mental state of the individual speaking. Because the statute was silent regarding mental state, the Court read 'only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct"': *Elonis v United States*, 575 US __ (2015).

7 *Elonis v United States*, 575 US __ (2015).

8 135 S Ct 2218 (2015) ('*Reed*').

could be placed on public property. The ordinance, however, treated some signs more favourably than others. If a sign qualified as an 'ideological' sign or a 'political' sign, the ordinance allowed it both to be larger and remain on public property longer than if the sign qualified as a 'temporary directional sign' designed to inform the public about a 'qualifying event'. Under the ordinance, these 'temporary directional signs' were only allowed to be on public property 12 hours prior to the event and 1 hour afterward.

The city cited a small church with no permanent address for violating the sign ordinance by not including the date of each church service on its signs and allowing them to remain on public property more than an hour after the service, prompting the church's pastor to challenge the constitutionality of the ordinance.[9] A federal district court and federal appeals court both rejected the challenge, largely on the basis that the sign ordinance was a reasonable, content-neutral restriction on the time, place and manner of speaking rather than a restriction on the content of signs. The appellate court affirmed the trial court's grant of summary judgment in favour of the city,[10] but the US Supreme Court reversed this.

The Supreme Court held that by applying different rules to different types of speech based on whether the speech could be labelled 'political', 'ideological', or 'directional',[11] the ordinance on its face regulated speech on the basis of its content. As a result, the Court applied the most exacting level of constitutional scrutiny to the ordinance, even though there was no evidence that the city passed the law to suppress or censor speech. According to the Court, if a law benefits or burdens speech based on its content, the law cannot be upheld unless it is narrowly tailored to serve a compelling governmental interest, even if the drafters of the regulation can establish that their motivations for drawing content-based restrictions are benign. Although the Court has long held that the First Amendment forbids governments from restricting speech based on communicative content,[12] the Court's decision in *Reed* applies this doctrine formalistically even in a situation where it seems clear there was no danger of censorship. In doing so, the decision casts into doubt the constitutionality of hundreds if not thousands of sign ordinances whose drafters sought merely to preserve the aesthetics of their communities.

Net neutrality

Net neutrality is the principle that internet service providers should treat all network traffic the same, no matter the source. In the US the federal agency that regulates telecommunications has passed, and continues to pass, rules to ensure net neutrality, and the internet service providers have challenged, and continue to challenge, the FCC's regulatory authority as well as the constitutionality of its rules mandating net neutrality. Important new developments in this tug of war took place in 2015. After the US Court of Appeals for the District of Columbia Circuit struck down the Federal Communications Commission's ('FCC') 2011 rules attempting to mandate net

9 Ibid 2225.
10 Ibid.
11 Ibid 2231.
12 Ibid.

neutrality in 2014,[13] the FCC began new rulemaking proceedings that resulted in its 2015 Open Internet rules.[14] The 2015 Open Internet rules went into effect on 12 June 2015. In a press release, the FCC asserted that the Open Internet rules will 'protect and maintain open, uninhibited access to legal online content without broadband Internet access providers being allowed to block, impair, or establish fast/slow lanes to lawful content'.[15] The FCC grounded its authority to promulgate the rules on Title II of the *Communications Act of 1934* and § 706 of the *Telecommunications Act of 1996*.[16] In other words, the FCC voted to treat broadband internet like telecommunications services rather than information services but agreed to refrain from enforcing certain common carrier obligations on broadband providers, such as price-setting. The FCC asserted that broadband providers are 'conduits, not speakers, with respect to broadband Internet access services'.[17] The FCC further asserted that the rules 'are tailored to the important government interest in maintaining an open Internet as a platform for expression', among other things. In June 2015, the DC Circuit dismissed a request filed by a wireless industry trade group to stay the Open Internet rules. The court did, however, grant a request for an expedited hearing.[18]

Prohibition on the publication of truthful information

The US Court of Appeals for the Seventh Circuit decided a noteworthy yet troubling case regarding the definition of 'unlawfully obtained' information in *Dahlstrom v Sun-Times Media, LLC*.[19] The case involved a newspaper's publication of information provided to it by the Illinois Secretary of State. Five police officers sued the newspaper, claiming it violated the *Drivers Privacy Protection Act* ('DPPA')[20] by obtaining and publishing information about their heights, weights, eye colours, hair colours and birth dates.[21] The newspaper published the information in an article questioning the validity of a homicide suspect lineup in which the police officers participated.[22] The newspaper also published photos of the lineup that it had obtained from the Chicago Police Department pursuant to an Illinois *Freedom of Information Act* request.[23] In response to a privacy action filed by the police officers, the newspaper moved to dismiss on two grounds: first, the newspaper asserted that it had not published 'personal information' as defined by the DPPA; second, and alternatively, the newspaper asserted that the DPPA was unconstitutional to the extent it barred the newspaper from publishing truthful

13 *Verizon v Federal Communications Commission*, 740 F 3d 623 (DC Cir, 2014).
14 See *Protecting and Promoting the Open Internet*, 80 Fed Reg 19 738 (13 April 2015) ('Open Internet rules').
15 Federal Communications Commission, *Open Internet* <https://www.fcc.gov/openinternet>.
16 *Communications Act of 1934*, 47 USC §§ 151–621; *Telecommunications Act of 1996*, Pub L No 104–104, 110 Stat 56.
17 *Protecting and Promoting the Open Internet*, above n 13.
18 *United States Telecom Association v FCC* (DC Cir, No 15-1063, 11 June 2015).
19 777 F 3d 937 (7th Cir, 2015).
20 18 USC §§ 2721–5.
21 *Dahlstrom v Sun-Times Media, LLC*, 777 F 3d 937, 939 (7th Cir, 2015).
22 Ibid.
23 5 ILCS § 140.

information of public concern.[24] The Seventh Circuit rejected both arguments. According to the Court, personal information included any information that might identify the individual. The DPPA's prohibition on the *acquisition* of such personal information did not violate the First Amendment because the statute's prohibition was rationally related to the government's interest in protecting public safety. Application of the lowest level of constitutional scrutiny (rational basis scrutiny) was appropriate because the Supreme Court has never recognised a right of access to information in government hands.[25]

The Court also upheld the application of the DPPA's prohibition on the *publication* of personal information. The Court determined that the newspaper had unlawfully obtained the information about the police officers that it later published, despite the fact that the newspaper evidently acquired the information from the Illinois Secretary of State.[26] The court also determined that the prohibition on publication of personal information was content-neutral, basing this conclusion on the fact that the statute's prohibition was unrelated to governmental agreement or disagreement with the speaker's message and the fact that the statute allowed publication of the same information from other sources. Therefore, the Court found that intermediate scrutiny was the appropriate standard for judging the constitutionality of the statutory prohibition. Applying this standard, the Court upheld the constitutionality of the statute. The Court subsequently denied motions for rehearing and rehearing en banc.

Resisting the 'right to be forgotten'

Although the Court of Justice of the European Union has recognised a so-called 'right to be forgotten' — ie, a right to have inaccurate, inadequate, irrelevant or excessive personal information about them de-indexed from search engines — US courts continue to be skeptical of such a right, based on the evidence of recent cases.

In January 2015 the United States Court of Appeals for the Second Circuit held that a woman who had been arrested in 2010 and whose arrest had later been nullified could not order the arrest removed from websites.[27] Despite her arguments that, under Connecticut state law, the arrest would be erased after a nullifying prosecutorial decision and that the information was now false and defamatory, the court found that no 'amount of wishing can undo [the] historical truth' of the arrest.[28]

In contrast the US Court of Appeals for the Sixth Circuit called for a reexamination of the principles supporting a rule that criminal defendants may forfeit their right to control certain information or image despite availability to the public.[29] In *Detroit Free Press, Inc v United States Department of Justice*, the Free Press sought the booking photographs of four police officers

24 *Dahlstrom v Sun-Times Media, LLC*, 777 F 3d 937, 939 (7th Cir, 2015).
25 Ibid 950.
26 Ibid 952.
27 *Martin v Hearst Corporation*, 777 F 3d 546 (2nd Cir, 2015).
28 Ibid.
29 796 F 3d 649 (6th Cir, 2015).

indicted for federal drug and public corruption charges.[30] The US Marshal Service denied the request based on exemption 7(C) of the *Freedom of Information Act* ('FOIA').[31] However, Sixth Circuit precedent held that exemption 7(C) does not apply to booking photographs because the release of such photographs does not violate the privacy of those involved in public criminal proceedings.[32] Despite this precedent, the Sixth Circuit discussed the privacy interests of the officers. The Sixth Circuit admitted that booking photographs convey potentially embarrassing images of those in a vulnerable state and may remain available on the internet after any following litigation ends.[33] The Court further opined that '[a] criminal defendant's privacy interest in his booking photographs persists even if the public can access other information pertaining to his arrest and prosecution'.[34] Nonetheless, the Court affirmed the decision to release the photos to the Free Press based on Sixth Circuit precedent.

The analysis of the Second and Sixth Circuits demonstrates that the United States is not completely tone-deaf to the privacy issues at issue in the debate over the right to be forgotten. However, it is clear that the balance between individual privacy and the free flow of information continues to tip more strongly in favour of the latter in the US than in most other countries around the world.

Department of Justice sued for media surveillance practices

In 2013, in the wake of public controversy over its surveillance of journalists, the US Department of Justice ('DOJ') issued new guidelines governing the issuance of subpoenas to journalists.[35] Under the guidelines, the DOJ cannot obtain a search warrant for a journalist's records or emails unless the journalist is subject to a criminal investigation.[36] This DOJ *Report on Review of News Media Policies* recently came under fire, however, when it was revealed that the DOJ does not apply this standard to information sought by the FBI through National Security Letters ('NSLs').[37] These NSLs allow 'subpoena-like legal orders that the FBI can unilaterally issue to service providers without any court sign off'.[38] Thus information that is required through NSLs is exempt from the DOJ's new guidelines. This has been hailed as an 'extensive

30 Ibid.
31 5 USC § 552(b)(7)(C).
32 *Detroit Free Press, Inc v United States Department of Justice*, 796 F 3d 649, 651 (6th Cir, 2015).
33 Ibid 652.
34 Ibid.
35 Department of Justice, *Report on Review of New Media Policies* (12 July 2013) <http://www.justice.gov/sites/default/files/ag/legacy/2013/07/15/news-media.pdf>.
36 See ibid.
37 Trevor Trimm, *We Just Sued the Justice Department Over the FBI's Secret Rules for Using National Security Letters on Journalists* (30 July 2015) Freedom of the Press Foundation <https://freedom.press/blog/2015/07/we-just-sued-justice-department-over-fbis-secret-rules-using-national-security-letters>.
38 Ibid.

oversight';[39] essentially, this creates a loophole for the FBI to issue subpoenas in order to obtain information on certain sources. However, information on the procedures the FBI takes to issue NSLs has been noticeably withheld. This arguably constitutes a serious threat to press freedom.[40]

The Freedom of the Press Foundation, a nonprofit organisation, sought information from the DOJ regarding these NSLs, but was met with statements filled with redactions.[41] The information provided did, however, demonstrate that the FBI might be disregarding the policy put forward by the Inspector General of the DOJ. In response, the Freedom of the Press Foundation filed a request under the FOIA[42] to acquire the documents uncensored in their entirety.[43] When the DOJ failed to respond, the Foundation filed suit in federal court.[44]

The complaint, filed in July of 2015, seeks the expedited injunctive relief through the release of the records regarding the FBI's use of NSLs to obtain information.[45] The Foundation argued that it has exhausted all administrative remedies and that the DOJ has wrongfully withheld the requested information.[46] Further, the Foundation states that it is entitled to these records under the FOIA because the records involve '[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence'.[47] The request demands the information regarding the methods utilised by the FBI to obtain information from journalists without violating the First Amendment. While the DOJ could use this complaint and request as an opportunity to redeem itself in the eyes of journalists for past practices, most likely, the DOJ will not provide the desired information. Granted, the DOJ will provide a response, but predictably may limit the amount of information provided in the name of protecting national security interests.[48] Regardless, the complaint is sure to keep DOJ practices in the spotlight.

Fair use for digital libraries

On October 16, 2015, the United States Court of Appeals for the Second Circuit held that the digitising of copyright-protected books for use on Google's book search platform 'Google Books Library Project' constituted

39 Charlie Savage, 'Holder Tightens Rules on Getting Reporter's Data', *NY Times*, 12 July 2013, <http://www.nytimes.com/2013/07/13/us/holder-to-tighten-rules-for-obtaining-reporters-data.html?pagewanted=all&_r=1>.

40 Mike Masnick, *Freedom of the Press Foundation Sues DOJ Over Its Secret Rules for Spying On Journalists* (31 July 2015) TechDirt <https://www.techdirt.com/articles/20150730/15501231803/freedom-press-foundation-sues-doj-over-secret-rules-spying-journalists.shtml>.

41 Ibid.

42 5 USC § 552.

43 Ibid.

44 Complaint for Injunctive Relief, *Freedom of the Press Foundation v United States Department of Justice* (ND Cal, 15-cv-03503, 30 July 2015).

45 Ibid.

46 Ibid.

47 5 USC § 552(a)(6)(E)(v)(II); 28 CFR § 16.5(d)(1)(iv).

48 See Masnick, above n 33.

non-infringing fair use.[49] Google Print, a search feature, allows users to digitally search through a virtual library comprised of scanned books. The site provides short, viewable 'snippets' of books that allow users to evaluate the text for their individual purposes, and provides bibliographic information. The Authors Guild filed suit against defendant Google alleging that the company was conducting mass copyright infringement by scanning the text of books and providing the 'snippets' of the texts to users without permission or charge, which ultimately infringed upon the derivative rights of the authors. Further, the plaintiff argued that the 'snippet' function did not constitute a transformative use of the material. The United States District Court for the Southern District of New York granted a summary judgment motion in favour of Google, stating that Google's actions did not pose any copyright infringement.[50] The lower court found that the portions of the books displayed met the statutory requirements of 17 USC § 107, holding that the material was properly limited and did not serve as a marketable substitute for the original works.[51]

The Second Circuit, upholding precedent that considered the making of digital copies of print materials for search purposes fair use,[52] stated that Google's copying of the material was done to promote information about the books themselves.[53] Thus the material was used for a transformative purpose.[54] Additionally, the court found that, while Google is a commercial entity, the site's general profit motivation did not carry enough weight to deny fair use over the transformative purpose of the digital copies.[55] The Second Circuit reiterated that the copying of the books was necessary to achieve the transformative purpose desired: to allow users to locate certain texts based on specific search terms.[56] The Court pointed out that Google does not reveal the full text to the public, and specifically limited the available content to prevent any competing substitution.[57] Further, the Court disregarded the plaintiff's claim on derivative rights, finding that nothing within the statutes affords an author of an original work an exclusive, derivative right to information about a work.[58] The mere existence of potential licensing schemes does not preclude a site such as Google from providing information about copyrighted books to the public in a non-infringing manner.[59] Therefore the Second Circuit upheld the summary judgment in favour of Google, holding that the site's action did indeed qualify for fair use under the factors listed in 17 USC § 107 and the site could not be considered a 'contributory infringer'.[60]

49 *Authors Guild v Google, Inc* (2nd Cir, 13-4829-cv, 16 October 2015) *20.
50 Ibid *4.
51 Ibid.
52 See *Authors Guild v HathiTrust*, 755 F 3d 87 (2nd Cir, 2014).
53 *Authors Guild v Google, Inc* (2nd Cir, 13-4829-cv, 16 October 2015) *9.
54 Ibid.
55 Ibid *11.
56 Ibid *13.
57 Ibid.
58 Ibid *16.
59 Ibid *17.
60 Ibid *20.

Gawker Media hit with $100 million privacy suit

In 2015 an ongoing lawsuit based on the online publication of a sex tape (video) involving a D-list celebrity continued to test the limits of press freedom in the US. The publisher of the video was Gawker Media, a blog-based online media company. Gawker Media published a video of pro-wrestler Terry Bollea, better known as Hulk Hogan, engaged in sex with a woman who, at the time, was married to one of Bollea's friends. The video was leaked to Gawker in 2012. Although Gawker later removed the video from the site, Bollea sued for invasion of privacy, public disclosure of private facts, intentional infliction of emotional distress, and negligent infliction of emotional distress,[61] arguing that the publication led to the downfall of his career.

As the case proceeds to trial, it doubtless will continue to spark debate regarding the scope of celebrities' privacy rights under US law. Prior to the video's publication, Bollea had been very open about his private life, including his sex life; however Bollea's complaint asserts that he did not know he was being filmed having sex and that even celebrities should have reasonable expectation of privacy in this setting, regardless of whether the public might have a prurient interest in seeing the video.[62] The case is set to go before the Second District Court of Appeal for the State of Florida in March of 2016.[63]

61 First Amended Complaint and Demand for Jury Trial, *Bollea v Gawker Media, LLC* (6th Cir, No 12012447-CI-011, 28 December 2012).

62 Sam Thielman, 'Gawker's Latest Privacy Scandal Poses Dilemma in $100m Hulk Hogan Lawsuit', *The Guardian* (online), 22 July 2015 <http://www.theguardian.com/media/2015/jul/22/gawker-media-hulk-hogan-privacy>.

63 Mark Mooney, *Hulk Hogan v Gawker Showdown Put Off Until March* (30 July 2015) CNN Money <http://money.cnn.com/2015/07/30/media/hulk-hogan-gawker-trial-date/>.