BOUTIQUE SESSION A

Pre-Publication/Pre-Broadcast Review

Chairs:
Michael Cameron, News America
Carolyn Forrest, Fox Television Stations, Inc.

BOUTIQUE SESSION A

Pre-Publication/Pre-Broadcast Review

Chairs:
David S. Bralow, Tribune Company
TBA

BOUTIQUE SESSION B

Pre-Publication/Pre-Broadcast Review

Chairs:
Judy Margolin, Time Inc.
Andrew J. Siegel, CBS Broadcasting Inc.
I. LIBEL

A. Use of suggestive captions, juxtaposition of text and photography/video (libel by implication)

- What are the dangers of suggestive captions and headlines when attached to a photograph?
- Does special attention need to be given in pre-publication or pre-broadcasting vetting when the subject matter is of a lewd or suggestive nature?

*Knievel v. ESPN*, 393 F.3d 1068, 1077-1078 (9th Cir. 2005). Evel Knievel and his wife were photographed when they attended ESPN's Action Sports and Music Awards. The photograph depicted Evel, who was wearing a motorcycle jacket and rose-tinted sunglasses, with his right arm around his wife and his left arm around another young woman. ESPN published the photograph on its “extreme sports” website, EXPN.com, with a caption that read “Evel Knievel proves that you're never too old to be a pimp.” The Knievels brought suit contending that the photograph and caption were defamatory because they accused Evel of soliciting prostitution and implied that his wife was a prostitute. The court found the content of the ESPN.com main page is lighthearted, jocular, and intended for a youthful audience and the overwhelming presence of slang and non-literal language leads to the conclusion that the word “pimp” was not intended to be taken literally.

*Rejent v. Liberation Publications*, 197 A.D.2d 240 (1994). A photograph of the plaintiff, a male model, was used in an advertising campaign without his knowledge in a gay magazine to promote a book titled “Lust – The Body Politic.” The semi-nude photograph was published on a page with the words such as “Lust in the 90’s – tough, humorous, unrelenting and romantic…”. The plaintiff commenced an action against the publisher, alleging, among other things, that the advertisement implied that he was sexually lustful and promiscuous, and was therefore defamatory. The publisher moved to dismiss the defamation claim on the ground that the advertisement was not susceptible of the defamatory meaning the plaintiff ascribed to it. The court denied the motion, in part, on the basis that the publication of plaintiff's picture in a “sexually suggestive manner” could falsely imply that he is “sexually lustful and promiscuous…”

*Ava v. NYP Holdings, Inc*, 885 N.Y.S.2d 247 (1st Dept. 2009). Relying on *Rejent* to make the point that sometimes a suggestive statement is okay as long as it is not accompanied with a suggestive photo or placed in a suggestive context. Transgender plaintiff sued the *Post* for libel. Plaintiff alleged that *Post* implied that she is “a promiscuous slut” in the article, “GENDER-BEND SHOCKER, Kinky-sex suit gal is a man.” At issue was a statement based on information gleaned from several MySpace pages allegedly maintained by the plaintiff. The statement reads: “[o]n one [of the MySpace pages], [plaintiff] gives a graphic depiction of a ‘masturbatory fantasy’ she has of being with multiple men and then multiple women.” While the Appellate Division affirmed that a communication that states or implies that a person is promiscuous is defamatory, the court found that in the context of the previous article reporting on the unrelated suit filed by the plaintiff the information on the plaintiff's MySpace page “merely served to highlight the ambiguity regarding the sexual identity of the person who sued the billionaire, an ambiguity that lay at the heart of the [aforementioned] article.” Therefore, *Post*'s words were not “reasonably susceptible of a defamatory connotation.”
The court contrasts this case with Rejent by noting that unlike the Post article, Rejent’s sexually provocative photo was juxtaposed against sexually explicit materials in a sexually charged publication. In this case, “the allegedly defamatory statement in the Post’s article was ‘not accompanied by any sexually suggestive photographs of plaintiff’ and was ‘part of a newspaper article providing a follow-up report to a prior article discussing an unusual lawsuit.’”

B. Republishing A Third Party Libel

1. Republisher is generally liable absent privilege

2. Fair Report

   • The outcome of three cases before the Texas Supreme Court may change the landscape in Texas for liability for the republication of libelous third party allegations.

   **Neely v. Wilson**, 331 S.W.3d 900 (Tex. App. – Austin 2011, pet filed). A Texas Court of Appeals, in affirming summary judgment in favor of the media defendants, held that defendants’ broadcast of an investigative news report of third party allegations is substantially true where the underlying allegations have in fact been made and the report of those allegations is an accurate summation. In other words, the media defendants do not have to prove the truth of the underlying third party allegations for the report to be “substantially true.” Plaintiff-appellant Dr. Neely, a local neurosurgeon, sued a television station over a news report that reported on the State Medical Board’s investigation of several complaints against the doctor, an agreed order between the Board and Dr. Neely in which the doctor denied any wrongdoing, but was placed on three years’ probation, and two medical malpractice suits against the doctor, one of which was settled and the other dismissed.

   Dr. Neely argued that the appellate court should reaffirm the rule that a republisher of a defamatory statement of another is liable for his or her own act of publication of a defamation and that, under Texas law, media defendants do not have a privilege or a right to republish third party allegations – unless those third party allegations are true.

   In rejecting Dr. Neely’s argument, the appellate court relied on the Texas Supreme Court’s decision in **McIlvain v. Jacobs**, 794 S.W.2d 14 (Tex. 1990), as standing for the proposition that a media defendant’s report that a third party has made allegations is “substantially true” if the media defendant demonstrates that, in fact, those allegations have been made and that the report accurately represents those allegations. However, the appellate court also noted that, even though the Texas Supreme Court’s analysis in **McIlvain** was “oblique,” and Dr. Neely’s “arguments are ultimately complaints that **McIlvain** was wrongly decided” it was bound to follow it “until the Texas Supreme Court instructs us otherwise.” Dr. Neely petitioned the Texas Supreme Court to review the decision, and review was granted in June 2012.

   **Post-Newsweek Stations, Houston, Inc. v. Dugi, M.D.**, Case No. 13-10-00366-CV (Tex App. 13, Jun. 16, 2011, pet. filed). A different Texas Court of Appeals affirmed the denial of the media defendants’ motion for summary judgment where the defendants argued that the news report was a substantially true report on third party allegations. The court agreed that the media defendants did not have to prove the truth of the underlying third party allegations. Rather, defendants had to prove that the third party allegations, in fact, had been made and that defendants had accurately reported the
gist of the third party allegations. However, the court went a step farther. The court interpreted *McIlvain* and other Texas appellate court decisions as requiring defendants to prove further that an investigation of the third party allegations was ongoing when defendants reported on the third party allegations, which defendants were unable to do.

A television station relied on a source who was a former employee of a community hospital and claimed that a doctor at the hospital, plaintiff Dr. Dugi, tested an illegal drug on patients without their knowledge and consent. The television station claimed that the source said he had reported his allegations to the state nursing board, the FDA and other agencies. The source compared Dr. Dugi’s testing to the infamous “Tuskegee Project,” a government study that gave a group of African American men syphilis, without their consent, to test experimental drugs on some, while allowing others to remain sick to watch the progression of the disease. All of the source’s allegations were reported in a series of news reports.

In affirming the denial of defendants’ motion for summary judgment, the appellate court first determined that there was no public controversy involving Dr. Dugi and that Dr. Dugi was a private figure. The court further held that defendants failed to carry their burden of demonstrating that their source actually had reported his allegations about Dr. Dugi to any governmental entity or that their source specifically complained about Dr. Dugi and his testing to any government agency prior to the broadcast of the first news report. Dr. Dugi presented evidence that any investigations into the source’s allegations began after the first news report aired. The evidence also showed that the comparisons to the Tuskegee Project were unfounded because there were no allegations that Dr. Dugi’s testing targeted any minority group or that the drug he tested was experimental. The drug he tested was an over-the-counter drug that required no FDA approval. Defendants have filed a petition with the Texas Supreme Court for review.

*Freedom Communications, Inc. d/b/a The Brownsville Herald and Valley Morning Star v. Juan Antonio Coronado*, 296 SW3d 790 (Tex App. 2009 – pet. filed). Two of Freedom’s newspapers published an advertisement of a candidate for the District Attorney’s (“DA”) office. The ads criticized the incumbent DA for failing to prosecute over 100 child abuse arrests that had been made. Included in the ads was a chart summarizing the dispositions of 103 child abuse cases that the DA’s office did not prosecute, and identifying those arrested. To the right of the chart, the ads say the DA “stood against children who have been sexually abused” and that the incumbent “stood with those who would commit such heinous crimes.” The ads further stated that the candidate would “aggressively prosecute these cases and insist that the convicted be incarcerated.” Defendants assert that the information in the chart accurately summarizes information from a report prepared by the DA’s office that defendants lawfully obtained.

Plaintiffs are four of the individuals identified in the chart who had been arrested, but not prosecuted. Plaintiffs argue that the charts contain false and defamatory information about them and do not accurately summarize the DA’s report. For example, the report explains that the charges against plaintiffs were not prosecuted because of insufficient evidence. However, the chart omits any explanation for the lack of prosecution. The ads also omitted from the DA’s report the names of defendants who actually were
prosecuted and convicted of child sexual abuse. Plaintiffs also argue that the ads violated their privacy.

Defendants moved for summary judgment arguing that the information in the chart is protected by common law and statutory fair report privilege and is substantially true. In denying summary judgment, the court determined that it could not determine that a privilege applied as a matter of law because the language in the ads was not unambiguous. The ads omitted information contained in the DA's report and included additional statements adjacent to the chart, creating a factual issue from which a reasonable jury could determine the ads were not a “true, fair and impartial account” of the DA’s report. The court also found that the juxtaposition of the accusatory statements next to the chart create a factual issue whether the gist of the ads are “substantially true.”

As to plaintiffs’ privacy claim, the court held that, while the underlying facts of criminal activity may be a matter of legitimate public concern, it could not determine as a matter of law that the mere fact a person has been accused of a crime is a matter of legitimate public concern. Defendants appealed to the Texas Supreme Court.

In a strange turn of events, the Texas Supreme Court vacated the trial court’s decision denying summary judgment, invalidated the Court of Appeals’ decision for lack of authority to review the trial court’s decision and remanded the case to the trial court. Freedom Communications, Inc. D/B/A The Brownsville Herald et al. v. Coronado, et al. (Tex. Supr. June 23, 2012). The basis for the Supreme Court’s actions was the conviction of the trial court judge for accepting an $8,000 bribe to make rulings favorable to the plaintiff in this case on its libel and privacy claims. (The trial court judge also admitted to accepting bribes in other cases.)

3. Opinion

• When is a statement “opinion” and therefore non-actionable speech?

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) is the seminal U.S. Supreme Court case on the legal standard for statements of opinion in defamation cases.

Respondent J. Theodore Diadiun authored an article in an Ohio newspaper implying that Michael Milkovich, petitioner, a local high school wrestling coach, lied under oath in a judicial proceeding about an incident involving petitioner and his team which occurred at a wrestling match. Milkovich sued Diadiun and the newspaper for libel. The litigation spanned nearly 15 years before the Court rendered the opinion cited above.

Although the Court declined to find a separate constitutional privilege for “opinion” speech, the Court did describe two categories of opinion protected by the First Amendment from defamation claims. The first are statements that are not “provably false”, i.e. the statements cannot be proven true or false by objective evidence. In other words, the statement involves a statement of subjective belief based on disclosed true facts. As an example of this first category, the Court provided this example: “In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin.”
The second category are statements that “cannot reasonably [be] interpreted as stating actual facts’ about an individual.” (citing Hustler Magazine Inc. v. Falwell, 485 U.S. 46, 50 (1988)). In other words, defamation claims cannot be based upon “loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining” the disputed statement, or where the “general tenor of the article” negates the suggestion that actual facts are being stated. Statements must be considered in the context of the broader work at issue and the publication in which they are published.

There are numerous cases interpreting Milkovich. Some recent ones include:

**McNamee v. Clemens**, 762 F. Supp. 2d 584, 601 (E.D.N.Y. 2011). Roger Clemens, the baseball pitcher, was sued by his former trainer after Clemens and his agents made several statements accusing the trainer, McNamee, of lying about Clemens’ steroid use. A motion to dismiss was denied in part on the grounds that these statements were not pure opinion because they were capable of being proven true or false “by a determination of whether or not McNamee in fact injected Clemens with steroids.”

**Sandals Resorts International Limited v. Google, Inc.**, 86 A.D.3d 32, 925 N.Y.S.2d 407 (N.Y. App. 1st Dept. 2011). New York appellate court held that statements circulated about Sandals resorts via a widely distributed anonymous email message which implied that the resort used racist hiring policies, were non-actionable opinion. The court emphasized that the “culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a freewheeling, anything-goes writing style [and accordingly] the online recipients of statements do not necessarily attribute the same level of credence to the statement they would accord to statements made in other contexts.”

**Mar-Jac Poultry, Inc. v. Katz**, 773 F. Supp. 2d 103 (D.D.C. 2011). Court held that statements by an investigator in a 60 Minutes segment that a chicken processing company may have been used as conduit for terrorist money laundering were “clearly hyperbolic, speculative, and as surmise did not imply a verifiably false fact.” The investigator had asserted that chicken ‘is the best cover for money laundering’ because the number of chickens that died in a year could be hidden through a process that evades detection and renders proof of the misreported number unattainable. Nevertheless, the court held that “no reasonable jury could find that [defendant] Ms. Katz’s statements about laundering money through misreporting dead chickens were anything but rank speculation, surmise or hyperbole, engendered, perhaps, by her thrill at being involved in an uncover capacity.

Ms. Katz’s story was greeted with a fair amount of skepticism by [the interviewer] (asking whether Ms. Katz was “addicted” to hunting terrorists), and nothing suggested she could make knowing statements about slaughtering chickens. In fact, she said only, “Chicken—I see it as the best cover for money laundering” because “[I]f you say in one year that you lost 10 million chickens, no one can prove it.” The former statement was a personal one, indicating her belief, not based on any discernible fact, and the latter was phrased in the subjunctive mood, indicating something that was uncertain or contrary to fact. Ms. Katz did not say that Mar-Jac ever reported or announced that Mar-Jac had lost ten million chickens in any given year, only that “if you [were to] say that you lost 10 million chickens, no one [could] prove it.” (internal citations omitted).
Another recent case on the relevance of overall context is *Bentkowski v. Scene Magazine, Inc.*, 637 F.3d 689 (6th Cir. 2011). The former mayor of Seven Hills, Ohio sued Cleveland Scene magazine over an article which alleged that he “routinely tries to pull off stunts like limiting residents’ feedback at meetings and barring government employees from running for office” and implied that he sought personal information about constituents for illicit purposes. The Court held that despite the presence of sufficiently specific facts that could be actionable, on the totality of circumstances, the article was clearly an opinion piece protected by the Ohio Constitution. The court noted that “[t]he author makes no attempt to hide his bias, and it would be unreasonable for a reader to view his comments as impartial reporting.” The court examined “the type of article and its placement in the newspaper and how those factors would influence the reader’s viewpoint on the question of fact or opinion.” The column appeared in “First Punch,” a humor, comments and criticism section of the magazine. The court concluded that the article is protected opinion as a matter of law and affirmed the district court’s grant of summary judgment in defendant’s favor.

- Beware of any undisclosed facts.

See *DiFolco v. MSNBC Cable LLC*, 622 F.3d 104, 114 (2d. Cir. 2010) (Second Circuit reinstated defamation claim where statements at issue suggested that the author was “privy to facts about the person that are unknown to the general reader.”); see also *White v. Brommer*, 747 F. Supp. 2d 447 (E.D. Pa 2010) (defendant police officer’s statement to plaintiff’s boss that plaintiff was unfit for his job could be construed as opinion based on undisclosed facts).

- For consideration: Are statements concerning another person’s intention protected opinion or can they ever be considered a verifiable fact?

*Stoltz v. County of Lancaster*, 2011 U.S. Dist. LEXIS 23541 (E.D. Pa. 2011) (holding that a statement that plaintiff was faking an injury was an opinion not capable of defamatory meaning).

*Overhill Farms, Inc. v. Lopez*, 190 Cal. App. 4th 1248, 119 Cal. Rptr. 3d 127 (2010) (holding that statement accusing an employer of being “racist” were not actionable, but statement accusing the employer of engaging in racially motivated firings were. The court held that “a claim of racially motivated employment termination is a provably false fact.”)

II. NEWSGATHERING/PRIVACY TORTS

A. Perils of filming and gaining access to people in homes, private property, and online

1. Intrusion upon seclusion; misrepresenting yourself to gain access to private social media pages.

- Do people who post their life story on Facebook have any expectation of privacy?

- To what extent are private groups within public social media sites actually private?

*Moreno v. Hanford Sentinel* 172 Cal.App.4th 1125 (2009). Plaintiff wrote disparaging comments about her hometown in an “ode” on her MySpace page (“the older I get, the
more I realize how much I despise Coalinga”). Her old high school principal saw the rant and submitted it to the local newspaper for publication. Plaintiff brought a claim for invasion of privacy, claiming the newspaper publication damaged her family’s business and caused them to leave town. Court rejected the claim, finding *inter alia* that someone who posts to a social networking has no expectation of privacy.

*Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420 (D.N.J. 2009). Two employees were fired after their manager found comments on MySpace that were critical of the company. The manager had convinced a third employee to hand over the password to the private MySpace page. A jury returned a verdict in favor of the plaintiff, finding that the employer had violated state computer privacy laws and the federal Stored Communications Act. Jury also found the company liable for invasion of privacy.

*Romano v. Steelcase, Inc.* 907 N.Y.S.2d 650 (2010). Plaintiff brought personal injury suit against defendant who is seeking access to plaintiff’s social networks for discovery purposes. Plaintiff objects on the grounds that such information is private and privileged. The court, however, found otherwise. The court considered the warnings and terms of services from both Facebook and MySpace stating that users should be wary and remember that these are public forums. The court reasoned that when the plaintiff created her Facebook and MySpace accounts, “she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings.” The court found that such openness is “the very nature and purpose” of these sites.

- Federal courts in general appear to be more reluctant in accepting the public nature of social media sites.

*Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (E.D. Mich. 2012). Plaintiff objected to disclosure of private Facebook information. The court agreed with the rationale that material posted on a Facebook page that is limited to a select group of friends and not available to the public is “generally not privileged, nor is it protected by common law or civil law notions of privacy.” However, the court did note that the defendant “does not have a generalized right to rummage at will through information that plaintiff has limited from public view.”

*Ehling v. Monmouth-Ocean Hosp. Service Corp.*, 2012 WL 1949668 (D.N.J. 2012). Plaintiff was a nurse with a private Facebook account. While she was friends with some co-workers, she had not “friended” any of the hospital’s management or staff who therefore would not have access to her wall or photos. Plaintiff claimed that her supervisors gained access to her account by compelling her co-workers to log into their own Facebook accounts so management could review the plaintiff’s wall-posts. Plaintiff’s supervisors copied several posts including one where the plaintiff expressed shock and disapproval of EMTs saving the life of a man who opened fire in the National Holocaust Museum. Plaintiff alleged *inter alia* that the hospital committed a common law invasion of privacy tort. The court declined to dismiss plaintiff’s common law claim. The court noted that Facebook-type accounts fall between the spectrum of posting on publicly accessible sites where there is no reasonable expectation of privacy and password protected communication like email messages on a third party server. The plaintiff had a reasonable expectation of privacy in her Facebook posting since it was
shared with a limited number of friends whom she had individually invited to view a restricted access webpage.

2. Publication of private facts

*Prince v. Out Pub. Inc.*, 30 Media L. Rep. 1289, (Cal. Ct. App. Div. 4 2002). Plaintiff sued gay magazine for publishing a photo of him at a private L.A. dance party revealing to the public that the plaintiff is gay, which he had only disclosed to certain family members and close friends. The court barred the plaintiff's claim of publication of private facts on the grounds that there is a legitimate public interest in the reporting of "parties like the one the plaintiff was photographed attending and therefore the affirmative defense of "newsworthiness" applies here.

*Benz v. Washington Newspaper Pub. Co.*, CIV A 05-1760 EGS, 2006 WL 2844896 (D.D.C. Sept. 29, 2006). Plaintiff sued the Washington Examiner after it published a story on the unwanted sexual advances of a reporter on the plaintiff as well as the plaintiff’s previous sexual relationships with several partners. In addition to other claims, plaintiff alleged publication of private facts. Although the plaintiff claimed that much of the story was not true, she did admit that some of the sexual relationships mentioned were true, private and therefore actionable. To that end, the court found that “an unmarried, professional woman in her 30s” would not want her private life and sexual relationships published “in the gossip column of a widely distributed newspaper.”

3. Intentional infliction of emotional distress

- When is the line crossed between reporter and advocate or agent of a law enforcement agency? Do sting operations provide special challenges for television news crews?

*Tiwari v. NBC Universal, Inc.*, 2011 U.S. Dist. LEXIS 123362 (N.D. Cal. 2011). This case concerns “To Catch a Predator,” an investigational television program. For the piece, plaintiff was lured to a house in a sting operation set up by the producers and law enforcement agencies. The plaintiff was then confronted by a reporter. Plaintiff sued NBC *inter alia* for intentional infliction of emotional distress based in part on the sting and the “special intensity” request, and not for the broadcast itself. The court denied a motion to dismiss the claim, noting that the First Amendment would not shield a journalist from such a claim if the plaintiff is alleging emotional distress stemming from the *act of newsgathering* rather than the broadcast or publication of news.

4. Trespass

*Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 121, 596 N.Y.S.2d 350, 353 (1993). Court held that the conduct of a photographer who allegedly trespassed on the secluded grounds of a private psychiatric facility and took a picture of plaintiff next to a well-known patient was not sufficiently "atrocious, indecent [or] utterly despicable" to warrant a claim.

*Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995). A reporter conducted an undercover investigation in which it allegedly planted patients with fake symptoms to film the plaintiff’s medical clinic undercover. Plaintiff sued for trespass *inter alia*. The court began its analysis by noting that “there is no journalists' privilege to trespass.” Further, the court ruled that “there can be no implied consent in
any non-fictitious sense of the term when express consent is procured by a misrepresentation or a misleading omission.” However, because there was no “invasion… of the specific interests that the tort of trespass seeks to protect,” the plaintiff cannot support the claim. The clinic was open to anyone expressing a desire for medical services and reporters only videotaped physicians “engaged in professional, not personal, communications with strangers.”

**Mitchell v. Baltimore Sun Co.**, 164 Md.App. 497 (Md. Ct. Spec. App. 2005). Two reporters for *The Baltimore Sun* were working on a story about a former Congressman who fell into financial trouble. The reporters went to the Congressman’s nursing home. One reporter signed in with his own name and wrote that he was there to visit the Congressman. They then went to the Congressman’s room and walked through his open door, noting that there was no sign telling them not to enter. They conducted their interview and the Congressman answered questions in front of a nurse. At no point did the Congressman ask them to leave. Although the Congressman had answered the reporters’ question, the court found that there was enough uncertainty to support a triable issue on whether the act constituted implied consent for the reporters to enter and remain in the Congressman's room.

**Pitts Sales, Inc. v. King World Productions, Inc.** 34 Media L. Rep. 1636 (Bankr. S.D. Fla. 2005). A reporter for *Inside Edition* posed as a prospective employee to gain access to and interview a manager employed by plaintiff. Plaintiff brought a trespass claim against King World. Plaintiff argued that it did not truly consent to the reporter’s access to various property interests of the plaintiff since the reporter misrepresented himself as a (prospective?) employee. The court found that the reporter did not trespass since, like in *Desnick*, he did not gain access to special areas not meant for the public.

- Should there be a fair trespass doctrine for journalists?

A recent law review article suggests that there should be a journalist’s privilege to trespass. **Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1129 (2011).**

**B. Law enforcement “ride alongs” (Fourth Amendment and Section 1983 liability)**

**Best v. Berard**, C.A. No. 09 C 7749, mem. op. (N.D. Ill., E.D. November 15, 2011). The Biography Channel airs a program, “Female Forces,” for which a production company follows around and films various female police officers performing their duties and interacting with the public. In this case, the City of Naperville adopted a resolution allowing its police department to enter into a contract with the production company, giving the City the right to review the rough cut of each episode featuring its officers and direct the removal of unwanted scenes and material.

Plaintiff was pulled over for driving a car with an expired registration sticker. The officer called for a female officer to join him at the scene. The officer, defendant Berard was accompanied by the film crew. When Berard arrived, she directed plaintiff to get out of her car. Plaintiff complied and asked about the film crew. Berard explained that the crew was filming a documentary about her. The two officers then performed a field sobriety test on plaintiff, which she passed, and then arrested and handcuffed her and placed her in the back of the squad car because she was driving with a suspended driver’s license. The officers next searched plaintiff’s car and found a pipe and a small amount of marijuana. While Berard waited at the scene for the tow truck to impound plaintiff’s car, the other officer transported plaintiff to the station, he informed
her that, if she did not sign a consent form, the footage of her arrest would not be included as a part of the program. Plaintiff refused to give her consent and, when asked to sign by the film crew, she repeatedly refused.

Despite the fact that plaintiff refused to give consent, the footage surrounding her arrest was included in an episode of the program. The episode included footage of Berard talking about plaintiff’s expensive taste (she drove a Jaguar and carried a coach purse) and disclosing information such as plaintiff's birth date, height, weight and license number. The episode aired 31 times.

Plaintiff sued for violations of the Illinois Right of Publicity Act, her right of privacy and her Fourth Amendment right to be free from an unreasonable search and seizure. The court dismissed plaintiff’s claim under the Illinois Right of Publicity Act (776 F. Supp. 2d 752 (2011)) because the footage of her arrest was of legitimate public concern and its use was within the statute’s exemption for uses with a “non-commercial purpose, including news, public affairs....” The court rejected plaintiff’s arguments that the program “Female Forces” did not fall within the statute’s exemption because it is not a pure news broadcast, advertising was sold to air during the broadcast and episodes of the program were sold through iTunes. The court granted summary judgment to defendants on plaintiff’s claim that her Constitutional right of privacy was violated by the publications of her birthdate, height, weight and driver’s license number. Her license number already was publicly available and the court reasoned that the other information was not of such a personal nature that it warranted protection.

Plaintiff based her Fourth Amendment claim on the “unreasonable” delay in arresting her while the arresting officer waited for officer Berard to arrive with the film crew. She also complained that the sobriety tests were “staged” for the film crew, and therefore were unjustified, and caused an unreasonable delay. In granting defendants’ motion for summary judgment, the court noted that plaintiff’s total delay between being stopped and Berard arriving was less than 10 minutes, which included time for the first officer to check plaintiff’s license and registration and speak with plaintiff. The court reasoned that such a short delay is not unreasonable under the Fourth Amendment when police had reasonable cause to stop plaintiff (because of her expired tag) and plaintiff offered no evidence that the delay would have been shorter had the officer called dispatch for back-up, rather than calling Berard for back-up. The court rejected arguments that, simply because the first officer’s motivation for calling Berard was to accommodate the film crew, the delay should be unreasonable. The court noted that when police are “motivated not by genuine law enforcement need, but by [the desire of a television program filming them] for more sensational footage,” a plausible Fourth Amendment claim may be asserted. (Citing, Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 373 (S.D.N.Y. 2008). However, when there are no factors (such as an extended delay) supporting an unreasonableness finding, other than the officer’s motivation and sarcastic on-air remarks, the officers’ motivations do not violate the Fourth Amendment. The court similarly found that the administration of the sobriety tests did not unreasonably delay plaintiff’s arrest.

**Frederick v. The Biography Channel**, No. 09 C 6837 (N.D. Ill., E.D. February 4, 2010). This case arises from the same program, “Female Forces” discussed above. Plaintiff sued the media defendants (The Biography Channel and the program’s production company) under section 1983 for “acting under color of law” when it filmed her arrest because defendants detained her to allow the production company and the officer being filmed time to arrive and make the arrest. In denying defendants’ motion to dismiss, the court ruled there was a “symbiotic” relationship between the City of Naperville and the media defendants, which
included a written contract giving the city a right to review a rough cut of the program to request deletion of material the city did not want included, and required the production company to obtain officers’ consent before filing them, but did not require officers to obtain arrestee’s consent before filming them. The court found that the terms of the contract demonstrated that defendants were working in concert with law enforcement, which placed their conduct within the parameters of the Fourth Amendment.

The court found that plaintiffs’ allegations that police detained her “for no legitimate law enforcement purpose” were sufficient to support a claim that defendants violated her Fourth Amendment rights. Plaintiffs alleged that a male police officer came to Frederick’s home to execute an arrest warrant for her failure to appear in traffic court. The officer confronted Frederick as she and her sister were leaving their home, but delayed arresting her until a female officer with a film crew could arrive. Plaintiffs contend they told the film crew that they did not want to be filmed because they were embarrassed that they wearing pajamas and they refused to sign a release.

The court relied on Hanlon v. Berger and Wilson v. Layne, U.S. Supreme Court decisions that held an individual’s right to be free from an intrusion in their home was violated when the media accompanied law enforcement on the execution of a search warrant where the media is not there to assist law enforcement. The court then analogized defendants’ conduct to that of defendants in Lauro v. Charles, 219 F3d 202 (2d Cir. 2000) where the Second Circuit held that police officers stage a “perp walk” solely for the benefit of the media and not for a legitimate law enforcement purpose, which constituted a violation of the Fourth Amendment. Although the media was not as a defendant in Lauro, the court there noted that the media could have been jointly liable for “acting in concert” with law enforcement.

C. Eavesdropping/use of tape obtained by third party in violation of eavesdropping laws

Bartnicki v. Vopper, 532 U.S. 514 (2001). The defendant radio station received tapes of an illegally intercepted cell phone conversation between two teachers’ union negotiators. The call was illegally recorded by an unknown person and mailed to the radio station, which broadcast it as part of a radio show discussing the negotiations. The Supreme Court held that punishing the publication did not serve the two goals of the federal wiretap statutes—removing the incentive to intercept private calls and minimizing harm to persons whose calls were intercepted illegally. Although the defendants may have had reason to know that the interception was unlawful, they played no part in it; their access to the information was obtained lawfully, and the conversations pertained to a matter of public interest. “[A] stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”

The Federal Wiretap Statute prohibits the unauthorized interception of oral and wire conversations, and electronic communications. As applied to private individuals, the statute provides that a person may record a conversation only if he or she is a party to the conversation or has the prior consent of a party to the conversation.

- The majority of states follow the one-party consent rule.

- Under New York law, “a recorded conversation does not constitute the crime of eavesdropping where . . . it has been obtained with the consent of either the caller or receiver of the communication.” People v. Powers, 42 A.D.3d 816, 817 (N.Y. App. Div. 3d Dep't 2007). A person is guilty of eavesdropping when he or she unlawfully engages
in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing an electronic communication. See N.Y. Penal Law § 250.05 (Consol. 2012).

- “Wiretapping” is defined as “the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment.” N.Y. Penal Law § 250.00(1) (Consol. 2012).

- “Mechanical overhearing of a conversation” is defined as “the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.” N.Y. Penal Law § 250.00(2) (Consol. 2012).

- In California, on the other hand, a person may not record a confidential communication without the consent of all of the parties of the communication. Frio v. Superior Court, 203 Cal. App. 3d 1480, 250 Cal. Rptr. 819 (Cal. App. 2d Dist. 1988); Cal. Penal Code § 632 (a).

D. Confidential sources

1. Shield laws

Statutory shield law protections do not exist on a federal level. However many federal courts have found a qualified reporter’s privilege for confidential sources.

Branzburg v. Hayes, 408 U.S. 665 (1972). A reporter wrote an article about the drug hashish and had contacted two local citizens who produced and used the drug. Because their activity was illegal, the reporter promised the two individuals that he would not reveal their identities. After the article was published, the reporter was subpoenaed by a local grand jury and ordered to reveal the identity of his sources. He refused, citing the First Amendment as his defense. The Supreme Court held that the press did not have a constitutional right of protection from revealing confidential information in the criminal grand jury proceeding. The Court acknowledged, however, that the government must “convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.” Further Justice Stewart’s dissent stressed the importance of confidential sources and reasoned the only way to protect the vital concept of confidentiality was a requirement that the government show: (1) probable cause to believe the journalist has information clearly relevant to a probable crime; (2) that this information cannot be obtained through some other means that is less destructive to First Amendment rights; and (3) a compelling and overriding interest in the information.

Following Branzburg, with the exception of the Seventh Circuit Court of Appeals, every federal Court of Appeals to consider the issue has upheld a qualified federal reporter’s privilege for confidential sources, grounded either in the First Amendment or federal common law. See McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003) (citing cases recognizing privilege from First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits); see also Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977); Cervantes v. Time, Inc., 464 F.2d 986, 992 n.9 (8th Cir. 1972).

- The majority of states have adopted shield laws. These laws vary depending on how broad their provisions are in scope.

- How broad is the definition of “journalist”? Does he or she meet the standards laid out by the applicable state statute?
Too Much Media v. Hale, 206 N.J. 209 (N.J. 2011). A blogger, claiming to have insider information, allegedly posted defamatory comments about the plaintiff company on message boards. The company sued the blogger, who attempted to invoke New Jersey’s shield law in order to protect the identity of her source. New Jersey’s “Newspaperman’s privilege” protects “a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated.” N.J. Stat. § 2A:84A-21 (2012). The New Jersey Supreme Court rejected the blogger’s shield law defense, holding that “self-appointed journalists or entities with little track record who claim the privilege require more scrutiny . . . . [T]he popularity of the Internet has resulted in millions of bloggers who have no connection to traditional media. Any of them, as well as anyone with a Facebook account, could try to assert the privilege.” “[T]he three relevant standards in the statute identify what is at issue.” Thus, the court noted that a “single blogger might qualify for coverage under the Shield Law provided she met the statute’s criteria.”

Obsidian Fin. Grp. LLC v. Cox, No. CV-11-57-HZ, 2011 U.S. Dist. LEXIS 137548 (D. Or. Nov. 30, 2011). Similarly, an Oregon court did not afford an investigative blogger shield law protection because she did not meet the standards outlined in the statute. Oregon’s shield law statute covers any person “employed by or engaged in any medium of communication to the public.” O. Rev. Stat. § 44.520 (2012). “Medium of communication” is broadly defined as including, but not limited to, “any newspaper, magazine or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system.” O. Rev. Stat. 44.510(2) (2012). Because the blogger was not “affiliated with any newspaper, magazine, periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system,” she was not protected by Oregon’s shield law.

On the other hand, more recently passed shield laws explicitly include the Internet.

Kansas defines “journalist” as (1) A publisher, editor, reporter or other person employed by a newspaper, magazine, news wire service, television station or radio station who gathers, receives or processes information for communication to the public; or (2) an online journal in the regular business of newsgathering and disseminating news. Kan. Stat. Ann. § 60-480 (2012).

2. Promises of anonymity

Cohen v. Cowles Media Co., 501 U.S. 663 (1991). The plaintiff had extracted a promise of confidentiality from reporters before disclosing documents damaging to a candidate in an upcoming election. The Minneapolis Star Tribune still published the plaintiff’s name, causing him to lose his job. The Supreme Court ruled that the media is not entitled to any constitutional protection where a claim involves “generally applicable laws.” The law of promissory estoppel “simply requires those making promises to keep them.” Even if the enforcement of the law of promissory estoppel were to have a chilling effect on truthful reporting, this is simply an “incidental effect” and the First Amendment offers no protection.

• Is the promise reasonably specific and concrete?
Courts have typically found that promises of confidentiality are sufficiently concrete and specific to give right to a cause of action in promissory estoppel, fraud, misrepresentation, or other similar theory. *Doe v. Univision TV Group*, 717 So. 2d 63, 65 (Fla. 3d DCA 1998); *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491 (Ga. Ct. App. 1994); *Ruzicka v. Conde Nast*, 999 F.2d 1319, 1322 (8th Cir. 1993).

E. Ethical issues for reporters’ use of Facebook, social media

- Could recent “cyber bullying” cases have an impact on how far journalists can pry into a person’s social network page?

- Is there a risk that a future court may extend the notion of expansive liability for computer fraud under 18 U.S.C. § 1030(a)(2)(C)?

- If a court was to find that Facebook’s policy prohibits misrepresentation or otherwise overcoming another user’s privacy settings, could a journalist who engaged in such practices be charged with a crime under federal law.

Kristopher Accardi, *Is Violating an Internet Service Provider’s Terms of Service an Example of Computer Fraud and Abuse?: An Analytical Look at the Computer Fraud and Abuse Act, Lori Drew’s Conviction and Cyberbullying*, 37 W. St. U. L. Rev. 67 (2009)

Professor Powell outlines the history of the first wave of privacy law in America as a response to 19th century journalists using technology to dramatically increase their “ability to intrude upon the private lives of individuals.” She speculates as to how Brandies and Warren would react to Facebook and its use by journalists to investigate the private lives of citizens. *Connie Davis Powell, “You Already Have Zero Privacy. Get Over It!” Would Warren and Brandeis Argue for Privacy for Social Networking?*, 31 PACE L. REV. 180 (2011).

- Should reporters be allowed to “friend” strangers on Facebook in order to gain access to information only shared with a closed networks of friends?

In 2010, the New York City Bar Association provided lawyers guidance on the issue as it applies to attorneys. Lawyers are advised against concealing their name or using a fake name when “friending” a subject of an investigation. In the alternative, the NYC Bar finds nothing wrong with either following a public account or “friending” a subject so long as the lawyer uses her real name and does not actively engage in misrepresentation. *Committee on Professional Ethics, The Association of the Bar of the City of New York, Obtaining Evidence from Social Networking Sites, Formal Opinion (2010)* available at: http://www.nycbar.org/pdf/report/uploads/20071997-FormalOpinion2010-2.pdf.

III. INTELLECTUAL PROPERTY / BROADCAST REGULATIONS

A. Unauthorized use of video clips, music in material posted on YouTube, Facebook
What are the fair use standards applicable to republication of photos or other materials found on social media outlets? Are they the same as those applicable to materials published in print and other traditional media?

Section 107 of the Copyright Act (17 U.S.C. Section 107) applies to the unauthorized use of any third party copyrighted work, regardless of source. According to Section 107 “the fair use of a copyrighted work…for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(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.”

See Ruling or No, Always Ask Permission Before Re-Using Images on the Social Web, ZombieJournalism.com (Jan. 7, 2011), http://zombiejournalism.com/2011/01/ruling-or-no-always-ask-permission-before-re-using-images-on-the-social-web/# (advising journalists that there is no special right (other than traditional fair use analysis) to use photographs posted on social media outlets)

Is the broadcast/publication entire photographs, video or songs found on social media outlets likely to be construed as fair use under traditional analysis?

In Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), the Supreme Court established that the primary inquiry under the first fair use factor (i.e. the purpose and character of the use) is whether “the new work merely supersedes the objects” of the original creation or “whether and to what extent the new work is “transformative”. The case further held that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”

Can the inclusion of pre-existing materials into news stories be considered “transformative”? 

Los Angeles News Service v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997). The Ninth Circuit held that summary judgment was not warranted on grounds of fair use in a local television station’s airing of video footage of Reginald Denny being beaten in the context of covering the riots that ensued. The court declined to uphold the district court’s decision granting defendant summary judgment in part because KCAL “deprive[d plaintiff] of its….valuable right of licensing its original videotape which creatively captured the Denny beating in a way that no one else did.” The Ninth Circuit observes that “there is a forceful argument that the LANS tape of the Denny beating itself became a news item shortly after it was published because its view was so
extraordinary. To the extent that KCAL ran the tape as a news story, this would weigh in its favor. However, this factor does not weigh nearly so heavily as it might otherwise since there is no evidence that KCAL used the tape in this way. It did not attribute the tape to LANS, and so far as the record discloses, aired it as if it were KCAL’s own rather than, for example, indicating that the best tape of the beating had been made by a LANS helicopter crew. Instead, the tape was simply used as part of KCAL’s coverage of the riots. Although KCAL apparently ran its own voice-over, it does not appear to have added anything new or transformative to what made the LANS work valuable — a clear, visual recording of the beating itself.”

Fitzgerald v. CBS Broadcasting, Inc., 491 F. Supp. 2d 177 (D. Mass 2007). Fitzgerald, a freelance photographer, sued CBS for the unauthorized use of exclusive photographs he had shot of “well-known mobster Stephen Flemmi” at the time of his arrest. A CBS affiliate reused the photographs many years later in a story about the sentencing of an associate of Flemmi’s, the same associate whose testimony had led to Flemmi’s arrest. Despite the fact that the context was undisputedly news, and the photographs had been cropped to show only the relevant portion of the images, the court held that such a use was not transformative and commercial. The Court found that fair use did not apply and CBS had engaged in copyright infringement.


Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011) (on appeal) (finding that artist’s incorporation of third party’s photographs in “creative and new” artwork is “not transformative” and thus not fair use, where artist did not “intend to comment on [photographer], on [photographer's] photos, or on aspects of popular culture closely associated with [photographer] or the Photos when [artist] appropriated the Photos” ).

See also Daxton R. Stewart, “Can I Use This Photo I Found on Facebook? Applying Copyright Law and Fair Use Analysis to Photographs on Social Networking Sites Republished for News Reporting Purposes”, Journal on Telecommunications and High Technology Law 10.1 (2012): 93-121 (agreeing that there is no special right to use materials posted on social media outlets, and applying traditional four-part fair use analysis. The article concludes that fair use “likely will not provide a shield in most situations” for news outlets except where the photographs themselves are “the story”).

But see Nunez v. Caribbean International News Corp., 235 F.3d 18 (1st Cir. 2000) (republication of nude photographs of the reigning Miss Puerto Rico Universe by the newspaper El Vocero qualified as fair use where the existence of the photographs were themselves the news and reporting on the controversy would have been difficult without including the photos because “the pictures were the story”); Colleen Long, Call Girl Laments Use of Exotic Photos, USA Today (Mar. 15, 2008), http://www.usatoday.com/news/nation/2008-03-14-408953834_x.htm (Associated Press defended as fair use its copying and circulation of photographs from the MySpace page of Ashley Alexandra Dupre, the Emperor’s Club V.I.P. prostitute whose
relationship with then-New York Governor Eliot Spitzer became front page news around the world.

- Query: Is there a viable legal argument that the party posting the photographs (especially media savvy celebrities and other individuals) has granted an implied license?

- And one should also consider whether the party posting the materials has agreed to waive certain copyright rights in the materials pursuant to the terms of service of the applicable social media outlet.

_**Agence France Presse v. Morel**, 769 F. Supp. 2d 295 (S.D.N.Y. 2011)._ Morel, a freelance photojournalist, took photographs of the earthquake in Haiti and posted them on Twitpic, a photo-sharing utility of Twitter. Twitpic’s terms of service stated that “All content uploaded is copyright [of] the respective owners. The owners retain full rights to distribute their own work without prior consent from Twitpic. It is not acceptable to copy or save another user’s content from Twitpic and upload to other sites for redistribution and dissemination.” A third party copied Morel’s photos from Twitpic and sold rights in them to Agence France Press and Getty Images. Morel’s copyright infringement case was allowed to proceed.

### B. Broadcast Regulations Regarding Telephone Conversations

Notwithstanding any right a broadcaster may have to record a conversation to which the broadcaster is a party, FCC regulations prohibit a broadcaster from recording a telephone conversation for broadcast without the consent of all of the parties to the telephone conversation. _47 C.F.R. § 73.1206_

§ 73.1206 Broadcast of telephone conversations

Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee’s intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.

_In the Matter of Spanish Broadcasting System Holding Company, Inc._, Licensee of Station WZNT(FM), San Juan, Puerto Rico, Notice of Apparent Liability For Monetary Forfeiture (February 16, 2011). The FCC Enforcement Bureau assessed a $25,000 fine against a radio station for broadcasting live two telephone conversations with the consent of the person who was called. The station had a segment called, “You Fell For It,” where the host solicited listeners to call in to request that the host make a prank call to the listener’s family members or friends. In one call, the host pretended to be hiding under the bed of the person called and in the other, the host pretended to be a loan shark trying to collect. One of the people called filed a complaint with the FCC in 2006. Not until 4 years later, in 2010, did the Enforcement Bureau ask the station to respond to the complaint. The radio group’s response confirmed that the station had such a segment, but, because of the passage of time, the radio group could neither confirm nor deny the specific allegations of the complaint. The standard fine for violations of
Section 73.1206 is $4,000. However, because the program was simulcasted by two other stations owned by the radio group and because the radio group had other stations that had been fined on four previous occasions for violating the broadcast telephone rule, the Enforcement Bureau increased the fine six-fold.

**In the Matter of Nassau Broadcasting III, LLC**, Debtor-in-Possession, Licensee of Station WWEG(FM), Myrsville, Maryland, Notice of Apparent Liability For Monetary Forfeiture (May 17 2012). The FCC Enforcement Bureau assessed a $2,000 fine against a radio station that recorded two telephone conversations without obtaining the prior consent of the person called and with the admitted intention of broadcasting the calls, but did not broadcast either call. The hosts of a radio program called the complainant twice around 6:00 a.m. to discuss a dispute the complainant was having with a neighboring business. At the beginning of the call, the hosts identified themselves and their program. The complainant asked whether he was live on the air and the hosts acknowledged that he was not on the air, but was being recorded. The complainant responded that he would not give his permission for his voice to be broadcast. The hosts responded that they were disappointed, asked whether the complainant would discuss the dispute anyway and stopped recording moments later. The Enforcement Bureau made clear that it is not a defense to an allegation of violating the broadcast telephone rule to refrain from broadcasting the call. Section 73.1206 requires the broadcaster to obtain the consent of all parties to a telephone conversation before broadcasting or recording a telephone conversation for later broadcast. However, the fine was reduced in half because, by not broadcasting what had been recorded, the Bureau deemed that the station had taken “corrective actions sua sponte.” It is important to note that, if the broadcaster is in a one party consent state, the broadcaster may record a conversation to which it is a party for a purpose other than the future broadcasting of it. For example, the broadcaster may record a conversation for note-taking. Section 73.1206 also doesn’t apply if a third party records the conversation and gives it to the broadcaster – unless the broadcaster asked the third party to record it for the broadcaster, in which case, it would apply.

**In the Matter of WSKQ Licensing, Inc.,** Licensee of WSKQ-FM, New York, New York, Notice of Apparent Liability for Forfeiture (February 4, 2010). The FCC Enforcement Bureau assessed a $16,000 fine against a radio station that, as part of a regular segment, broadcast a recording of a prank call, where the consent of the person called was obtained after the conversation was recorded, but before the conversation was broadcast. A radio host called a woman whose husband had asked the host to call his wife and pretend the husband had died in a motorcycle accident. The host called the wife, pretended to be a hospital employee and informed the wife that the husband had been seriously injured in a motorcycle accident and was in surgery. The wife gave the phone to a friend who asked the host a few questions about the husband’s supposed condition and the wife could be heard crying in the background. The host told the wife’s friend that the husband had just died in surgery and asked for the telephone to be given back to the wife. The wife returned to the call whereupon the host reiterated that the husband had just died in surgery. The host then advised the wife that the call was a joke from his radio program. The Bureau held that it is a not a defense to a claim of a violation of Section 73.1206 that the station obtained the consent of the call recipient before the conversation was broadcast when permission was given after the telephone conversation had been recorded for broadcast. Because the conversation was a part of a regular segment on the station and had received another complaint around the same time, the standard fine was increased for the station’s “repeated and willful” violations of the telephone broadcast rule.
C. **FCC Retransmission: retransmitting programming recorded off-air of another broadcaster**

A broadcast station is prohibited from retransmitting any portion of another broadcaster’s transmission without the express, written consent of the originating broadcaster. 47 C.F.R. § 73.1207. Although there are FCC opinions on point, a broadcaster may be able to rebroadcast or retransmit programming from another broadcaster, without the consent of the originating broadcaster, if the program is recorded from the originating broadcaster’s website. (If the program is on a website, it is not being transmitted via radio waves and the section thus would not apply.)

§ 73.1207 Rebroadcasts.

(a) The term rebroadcast means reception by radio of the programs or other transmissions of a broadcast or any other type of radio station, and the simultaneous or subsequent retransmission of such programs or transmissions by a broadcast station.

(1) As used in this section, “program” includes any complete programs or part thereof.

(2) The transmission of a program from its point of origin to a broadcast station entirely by common carrier facilities, whether by wire line or radio, is not considered a rebroadcast.

(3) The broadcasting of a program relayed by a remote pickup broadcast station is not considered a rebroadcast.

(b) No broadcast station may retransmit the program, or any part thereof, of another U.S. broadcast station without the express authority of the originating station. A copy of the written consent of the licensee originating the program must be kept by the licensee of the station retransmitting such program and made available to the FCC upon request.

In the Matter of Concilio Mision Cristiana Fuente De Agua Viva, Inc., License of Station WQHA(TV), Aguada, Puerto Rico, Notice of Apparent Liability For Forfeiture (July 3, 2002). The FCC Enforcement Bureau assessed a $1,000 fine against a television station for rebroadcasting segments of radio station’s program on two occasions. The television station claimed that it had received oral permission from an “acting station officer” to record the program off-air and then retransmit portions of the program. The alleged “acting station officer” denied that he ever had such a conversation with the television station producer; denied that he was an officer of the radio station; and denied that he had given the television station permission to rebroadcast portions of the program. The Bureau found that the television station twice violated § 73.1207(b) of the rules (and 47 U.S.C. §325(a) of the Communications Act of 1934) by failing to obtain written consent from the originating licensee and that, even if the television station could prove it received oral consent, such consent is insufficient.

D. **Copyright issues in materials created/owned by news organization that “go viral”**

- See above discussion of fair use defense pertaining to unauthorized use of video clips, music in material posted on YouTube, Facebook.
A number of copyright infringement cases filed by Righthaven LLC in Nevada have resulted in numerous decisions pertaining to the republication of online materials, including the following:

**Righthaven, LLC v. Hoehn**, 792 F.Supp.2d 1138 (D. Nev. June 20, 2011). Plaintiff Righthaven LLC sued Defendant Wayne Hoehn ("Hoehn"), a registered user and content contributor to the website madjacksports.com, for copyright infringement after Hoehn posted a copyrighted article on the website. The Court found the republication of the article constituted a fair use and granted summary judgment for Hoehn. The Court focused on the noncommercial use of the article where Hoehn posted the article to foster an online discussion "regarding the recent budget shortfalls facing state governments." While the Court acknowledged that posting an entire work generally "militates against finding a fair use," it does not preclude a finding of fair use.

**Righthaven LLC v. Klerks**, No. 2:10–cv–00741, 2010 WL 3724897, at *4 (D. Nev. Sept. 17, 2010). In this similar copyright infringement case, the Court addressed the plausibility of various affirmative defenses asserted by the defendant to warrant setting aside a default judgment. The Court found that the defendant asserted a sufficiently meritorious affirmative defense of fair use. Perhaps more noteworthy, the Court also found that the defendant asserted a meritorious affirmative defense of an implied license because the copyright holder engaged in conduct from which the defendant properly inferred that the plaintiff consented to his use. The defendant argued that "the original copyright holder offered the article to the world for free, encouraged people to save and share the article with others without restrictions, and permitted users to "right-click" and copy the article from its website." Plaintiff disputed this assertion and argued "that allowing users to hyperlink to its page is demonstratively different than allowing users to copy the entire article." The Court held that the defendant "reasonably asserted that the Plaintiff's conduct may have constituted an implied license and that the Defendant may have properly inferred that the owner consented to the use, especially in light of the established and accepted custom of users freely and openly sharing certain information posted on the internet."