



Committee News

Winter 2013

Media, Privacy and Defamation Law Committee



MEDIA'S QUOTE APPROVAL PRACTICE RAISES ETHICAL AND LEGAL CONCERNS

By: Jane Kirtley¹ & Holly Miller²

Earlier this year, *New York Times* reporter Jeremy Peters revealed the growing trend of journalists allowing sources to read and approve quotations before a story is published in order to secure interviews with them.³ Although the practice appears to have involved many types of sources, quote approval became virtually “standard practice” during this year’s election cycle. According to journalism think-tank Poynter, news outlets including Bloomberg, *The Washington Post*, *Vanity Fair*, Reuters, *The Huffington Post*, and *The New York Times* have all participated in some form of quote approval.⁴

The news sparked an ethical debate within the industry about whether quote approval might ever be an acceptable part of the newsgathering process. Some journalists quickly denounced the use of quote approval as a prerequisite to obtaining interviews. In a July commentary special to CNN, former CBS Evening News Anchor Dan Rather called on journalists to “do better,” acknowledging he had been far from perfect in covering political campaigns. “‘Quote approval’ nullifies, or at least seriously dilutes, reporters’ ability and duty to be honest brokers of information,” Rather said. “When the quotes are sanitized, then delivered intact with full

Continued on page 10

¹ Jane Kirtley is the Silha Professor of Media Ethics and Law at the School of Journalism and Mass Communication at the University of Minnesota and director of the Silha Center for the Study of Media Ethics and Law. She is a former executive director of the Reporters Committee for Freedom of the Press and a member of the New York, Virginia, and District of Columbia bars.

² Holly Miller is a JD/MA candidate of the University of Minnesota’s dual degree program through the School of Journalism and Mass Communication and the Law School. She will join Faegre Baker Daniels LLP as an associate in September 2013.

³ Jeremy Peters, *Latest Word on the Trail? I Take It Back*, N.Y. TIMES, July 15, 2012, http://www.nytimes.com/2012/07/16/us/politics/latest-word-on-the-campaign-trail-i-take-it-back.html?pagewanted=all&_r=0.

⁴ Mallary Jean Tenore, *What’s the deal with quote approval?*, POYNTER, July 18, 2012, <http://www.poynter.org/latest-news/top-stories/181519/live-chat-today-whats-the-deal-with-quote-approval/>.

IN THIS ISSUE:

Media’s Quote Approval Practice Raises Ethical And Legal Concerns	1
Message from the Chair	3
Privacy Year in Review.	5
Metaphysics of the Law—<i>Monge v. Maya</i>, News Reporting and Fair Use . .	6
2013 TIPS Calendar.	16

Uniting Plaintiff, Defense, Insurance, and Corporate Counsel to Advance the Civil Justice System

Chair

Joseph Robert Larsen
Sedgwick LLP
1111 Bagby St, Ste 2300
Houston, TX 77002-2556
(832) 426-7020
joseph.larsen@sedgwicklaw.com

Chair-Elect

Leita Walker
Faegre Baker Daniels LLP
90 S 7th St, Ste 2200
Minneapolis, MN 55402-3924
(612) 766-8347
Fax: (612) 766-1600
leita.walker@faegrebd.com

Council Representative

Nathaly J Vermette
Andrews-Robichaud Inc
450 Rue Saint-Pierre, Ste 105
Montreal QC H2Y 2M9
Canada
(514) 499-7444
Fax: (514) 499-7444
njv@vermettelaw.com

Last Retiring Chair

Bryan Clark
Lathrop & Gage LLP
100 N Riverside Plz, Ste 2100
Chicago, IL 60606-1547
(312) 920-3300
Fax: (312) 920-3301
bclark@lathropgage.com

Law Student Vice-Chair

Alyssa Lasharnn Locus
Loyola Univ Sch of Law Chicago
25 E Pearson St, Philip H Corboy Law Center
Chicago, IL 60611-2046
(813) 361-1111
alocus@luc.edu

Membership Vice-Chair

Bryan Clark
Lathrop & Gage LLP
100 N Riverside Plz, Ste 2100
Chicago, IL 60606-1547
(312) 920-3300
Fax: (312) 920-3301
bclark@lathropgage.com

Newsletter Vice-Chair

Leita Walker
Faegre Baker Daniels LLP
90 S 7th St, Ste 2200
Minneapolis, MN 55402-3924
(612) 766-8347
Fax: (612) 766-1600
leita.walker@faegrebd.com

Scope Liaison

Louise Dove Bjorkman
Minnesota Court of Appeals
25 Rev Dr, Martin Luther King Jr
Saint Paul, MN 55155-0001
(651) 297-1001
Fax: (651) 205-4699
louise.bjorkman@courts.state.mn.us

Technology Vice-Chair

Katherine Mast
Sedgwick LLP
801 S Figueroa St, Ste 1800
Los Angeles, CA 90017-5509
(213) 426-6900
Fax: (213) 426-6921
katherine.mast@sedgwicklaw.com

Vice-Chairs

Dana Jane McElroy
Thomas & LoCicero PL
401 SE 12th St, Ste 300
Fort Lauderdale, FL 33316-1901
(954) 703-3417
Fax: (954) 400-5415
dmcelroy@tlolawfirm.com

Michelle Worrall-Tilton
Media Risk Consultants LLC
4835 W 87th St
Shawnee Mission, KS 66207-1847
(913) 909-9419
mwtilton@mediariskconsultants.com

Catherine Lewis Robb
Haynes & Boone LLP
600 Congress Ave, Ste 1300
Austin, TX 78701
(512) 867-8421
Fax: (512) 867-8611
catherine.robb@haynesboone.com

James T Borelli

CNA
5901 College Blvd, Ste 400
Overland Park, KS 66211-1861
(913) 661-3150
Fax: (913) 661-2853

Charles L Babcock IV

Jackson Walker LLP
1401 McKinney St, Ste 1900
Houston, TX 77010-1900
(713) 308-4110
Fax: (713) 752-4221
cbabcock@jw.com

John Philip Borger

Faegre Baker Daniels
90 S 7th St, Ste 2200
Minneapolis, MN 55402-3901
(612) 766-7501
Fax: (612) 766-1600
john.borger@faegrebd.com

Robert John Borrello

Russomanno & Borrello
150 W Flagler St, Ste 2101
Miami, FL 33130-1558
(305) 373-2101
Fax: (305) 373-2103
rborrello@russomanno.com

Blaine Christopher Kimrey

Lathrop & Gage LLP
100 N Riverside Plz, Ste 2100
Chicago, IL 60606-1547
(312) 920-3300
Fax: (312) 920-3301
bkimrey@lathropgage.com

Steven P Mandell

Mandell Menkes LLC
1 N Franklin St, Ste 3600
Chicago, IL 60606-3493
(312) 251-1001
Fax: (312) 251-1010
smandell@mandellmenkes.com

David Furlow

Thompson & Knight LLP
333 Clay St, Ste 3300
Houston, TX 77002-4499
(713) 202-3931
Fax: (832) 397-8253
david.furlow@tklaw.com

James J S Holmes

Sedgwick LLP
801 S Figueroa St, Ste 1800
Los Angeles, CA 90017-5509
(213) 426-6900
Fax: (213) 426-6921
james.holmes@sedgwicklaw.com

Jay Ward Brown

Levine Sullivan Koch & Schulz LLP
1899 L St NW, Ste 200
Washington, DC 20036-3821
(202) 508-1136
jbrown@lkslaw.com

Rachel E Matteo-Boehm

Bryan Cave LLP
560 Mission St, Fl 25
San Francisco, CA 94105-2994
(415) 268-2000
Fax: (415) 268-1999
rachel.matteo-boehm@bryancave.com

Paul R McAdoo

Thomas & LoCicero PL
400 N Ashley Dr, Ste 1100
Tampa, FL 33602-4324
(813) 984-3060
Fax: (813) 984-3070
pmcadoo@tlolawfirm.com

John F Stephens

Sedgwick LLP
801 S Figueroa St, Ste 1900
Los Angeles, CA 90017-2575
(213) 615-8061
Fax: (213) 426-6921
john.stephens@sedgwicklaw.com

Patrick Groshong

Axis Pro
2300 Main St, Ste 800
Kansas City, MO 64108-2432
(816) 471-6118
Fax: (816) 471-6119
pat.groshong@mediaprof.com

MESSAGE FROM THE CHAIR



Our committee is well into its new season, with new leadership. My thanks to past chair Bryan Clark (Lathrop & Gage) for his leadership last year and his hard work. We are lucky to be going forward with strong future leadership in place in the persons of Leita Walker (Faegre Baker Daniels) as Chair-Elect and next year's Chair-Elect of Shannon Zmud Teicher (Jackson Walker).

We held a very productive committee meeting in October at La Quinta. Thanks to all for attending.

I would encourage all of our committee members to consider attending the Kansas City Media and the Law Seminar scheduled this year for April 18, 2013. Our committee will once again be a sponsor of the seminar, including a free one-hour CLE with a superb panel on April 18 entitled The New Media Economy—Legal and Insurance Perspectives on New Business Models and Evolving Exposure. As in years past, the committee will issue a newsletter in conjunction with the seminar.

In addition, the Committee has organized a top-flight CLE for the spring ABA meeting in Washington, D.C. on April 25 entitled The Influence of Media Coverage on the Justice System: Is “No Comment” in the Best Interest of Your Client?, where panelists with deep experience in high profile cases will discuss issues related to use of media by trial participants, impact of extensive coverage on rights of prosecutors and defendants to get a fair trial and the role and propriety of court orders limiting speech of trial participants. We are looking forward to a great year, and I hope to see you in Kansas City, Washington D.C., and other venues!

Joseph Larsen, Chair
Media Privacy and Defamation Law Committee

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Help TIPS Support the Tarrant Area Food Bank!



During the ABA TIPS Midyear Meeting, held February 8-10th, 2013 at Hilton Anatole in Dallas, TX; TIPS is sponsoring a food/cash donation drive for the Tarrant Area Food Bank.

Cash and food donations will be accepted at the registration desk by ABA TIPS staff.

TAFB is the distribution hub of a 13-county network of hunger-relief charities located in Fort Worth, TX. The Food Bank serves an estimated 45,000 households and provides over 500,000 meals per month. Additional information can be found at <http://www.tafb.org>.

Donate online at <https://secure.acceptiva.com/?cst=c44290>.

A \$10 dollar donation will purchase 50 meals!

This project is sponsored by the TIPS Law in Public Service Committee, Automobile Law Committee and Excess Surplus Lines and Reinsurance Committee.

Questions? Contact Jennifer LaChance at jennifer.lachance@americanbar.org.



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PRIVACY YEAR IN REVIEW

By: [Leita Walker](#)¹ and [David Merritt](#)²

Privacy continued to be big news in 2012, starting with the release

Congress consider enacting general privacy legislation, as well as data security, breach notification, and data broker legislation.

The best practices recommended in the FTC's report were organized in a three-part framework:

of privacy reports by both the White House and the Federal Trade Commission, followed by a state-led crackdown on asking employees for social media passwords, and ending with the first enforcement action under California's Online Privacy Protection Act and amendments to the COPPA rule. In addition, the year was marked by a number of interesting bill proposals and court decisions. We discuss the highlights below.³

White House, FTC release privacy reports.

In late February 2012, the White House released its "Consumer Privacy Bill of Rights," aimed at protecting consumers' private information. The document set forth the following globally recognized fair information practice principles as "baseline" protections: individual control, transparency, respect for context, security, access and accuracy, focused collection, and accountability.

The Obama Administration called on Congress to enact the Bill of Rights through federal legislation and to provide the FTC and state Attorneys General with authority to enforce its principles. The Administration also called for creation of a multi-stakeholder process to specify how the principles apply in particular business contexts and for greater interoperability with international privacy frameworks.

A few weeks later, in March, the FTC released its final report outlining best practices for businesses to protect the privacy of American consumers and to give them greater control over the collection and use of their personal data. Like the White House framework, the FTC's report—titled "Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers"—recommended that

The March 2012 FTC privacy report emphasized privacy by design, simplified choice, and greater transparency, and identified five action items: Do-Not-Track, mobile, data brokers, large platform providers, and promoting enforceable self-regulatory codes.

- **Privacy by Design:** Companies should build in consumers' privacy protections at every stage in developing their products. These include reasonable security for consumer data, limited collection and retention of such data, and reasonable procedures to promote data accuracy;
- **Simplified Choice for Businesses and Consumers:** Companies should give consumers the option to decide what information is shared about them, and with whom. This should include a Do-Not-Track mechanism that would provide a simple, easy way for consumers to control the tracking of their online activities.
- **Greater Transparency:** Companies should disclose details about their collection and use of consumers' information, and provide consumers access to the data collected about them.

The report also identified the FTC's five main action items: Do-Not-Track, mobile, data brokers, large platform providers, and promoting enforceable self-regulatory codes. While the new report does not itself establish any new laws or regulations, in a

dissenting opinion Commissioner Thomas Rosch wrote that companies that fail to comply with the "best practices" may "face the wrath of 'the Commission' or its staff."

States Prohibit Employers From Demanding Social Media Passwords, Otherwise Increase Privacy Protections

In April, Maryland became the first state to ban employers from requesting access to the social media

Continued on page 13

¹ [Leita Walker](#) is chair-elect of the Media, Privacy and Defamation Committee and editor of the committee's newsletter. She is an associate in the intellectual property group in the Minneapolis Office of [Faegre Baker Daniels LLP](#).

² [David Merritt](#) is an associate in the intellectual property group in the Minneapolis Office of [Faegre Baker Daniels LLP](#).

³ Given the audience of this publication, we have omitted healthcare-related developments from our summary.



METAPHYSICS OF THE LAW—*MONGE V. MAYA*, NEWS REPORTING AND FAIR USE

By: Joseph R. Larsen¹

Emerson once said that, through the abstraction of ideals, choice may come without consequence. And so, in many instances, publication of a found photograph by news media will come without consequence. However, in the 2012 decision in *Monge v. Maya Magazines, Inc.*, the Ninth Circuit held that the unauthorized use of unquestionably newsworthy photographs to prove a disputed fact, in and of itself, did not show “fair use” of the photos.² The opinion, which came with a sharply written dissent, is a reminder to newsrooms that a found photo, even one bearing on a matter in controversy, may not be found to be sufficiently “transformative” to prove fair use. As Justice Story put it back in 1841 in *Folsom v. Marsh*, and as noted by the *Monge* court, applying fair use approximates the “metaphysics of the law,” where the distinctions are sometimes “almost evanescent.”³ While this analysis may take place in the abstract, Maya’s choice to publish came with real-world consequences.

The facts of this case are perhaps not the run-of-the-mill newsroom situation. Nevertheless, *Monge* sets out argument and authority by which publication of many a found photo might result in liability. Pop singer and model Noelia Lorenzo Monge married her manager Jorge Reynoso at the “Little White Wedding Chapel” in Las Vegas on January 3, 2007, witnessed only by the minister and two chapel employees. Using Monge’s camera, chapel employees took three photos of the wedding; later that night at least three more photos of Monge and Reynoso in their nuptial garb were also taken. For two years Monge and Reynoso succeeded in keeping their wedding a secret, even from their families. After loaning

his SUV to Reynoso, however, a paparazzo who worked for Monge and Reynoso found a memory chip in the ashtray with photos of the couple’s secret wedding along with an assortment of other photos and videos. After failing to obtain money from the couple for return of the photos, the paparazzo sold them to Maya Magazine, who featured them with “Apparently, the couple married in Las Vegas in January 2007!” written on the top of the spread, and “First and exclusive photos of the secret wedding of Noelia and Jorge Reynoso” printed in large font.⁴ Shortly after publication, Monge and Reynoso registered copyrights in five of the six photos.⁵

The majority then concluded that Maya did not transform the photos into a new work or incorporate the photos as part of a broader work, but rather left the inherent character of the images unchanged.

By way of a footnote, the court of appeals “assume[d] the legitimacy” of the couple’s copyrights in the five photos they registered so that the only matter on appeal was fair use, on

which the district court had granted Maya’s motion for summary judgment.⁶ The court determined Maya’s use was not fair on the basis of the non-exclusive factors incorporated from the common law into the Copyright Act of 1976:

- (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.⁷

¹ Joe Larsen is chair of the Media, Privacy and Defamation Committee. He is Special Counsel for *Sedgwick LLP* in its Houston Office and the 2010 recipient of The Freedom of Information Foundation of Texas’ James Madison award for long service in defense of the First Amendment.

² 688 F.3d 1164 (9th Cir. 2012).

³ *Id.* at 1171.

⁴ *Id.* at 1168–69.

⁵ *Id.* at 1170.

⁶ There is virtually no discussion in the opinion regarding the legal impact of the fact that neither Monge nor Reynoso actually took the photographs at issue.

⁷ 17 U.S.C. § 107.

The court prefaced its analysis of these factors with a discussion of two Supreme Court cases that are “key” to its analysis: *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁸ and *Campbell v. Acuff-Rose Music, Inc.*⁹ These involved, respectively, Nation’s publication of lengthy excerpts from the memoirs of President Ford (about to be published by Harper & Row), which the Supreme Court found not to be fair use, and 2 Live Crew’s parody of Roy Orbison’s “Oh, Pretty Woman,” which the Court held could qualify as fair use even though a commercial parody.

The *Monge* court noted that the first fair use factor, purpose and character of the use, included three principles in the case that “simultaneously complement and yet are in tension” with one another: news reporting, transformation, and commercial use.¹⁰ Although news reporting is specifically listed in the preamble to the copyright statute as an example of fair use, it is not sufficient itself to sustain a *per se* finding of fair use.¹¹ The court therefore analyzed the degree of transformation occasioned by Maya’s use and the commercial nature of its use.

Transformation is a judicially created consideration that does not appear in the text of the statute. The *Monge* opinion cites to *Campbell*:

The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supercede[s] the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.”¹²

Applying this analysis in the news reporting context, the *Monge* court first noted that in *L.A. News Service v. Reuters Television Int’l*,¹³ despite the newsworthiness of the videos at issue (which

documented the Rodney King beating during a riot in Los Angeles), their mere rebroadcast was not in itself transformative. Even though the news station in that case “apparently ran its own voice-over, it does not appear to have added anything new or transformative to what made the [] work valuable—a clear, visual recording of the beating itself.”¹⁴

The court acknowledged that arrangement of a work in a photo montage can be transformative where copyrighted material is incorporated into other material. For example, the use of a brief segment of a riot clip by Court TV in a promotional video was deemed to be fair use.¹⁵ “Merely plucking the most visually arresting excerpt from [] nine minutes of footage cannot be said” to be transformative, but

inclusion of the clip in the video montage that introduced the Prime Time Justice program, following editing for dramatic effect, has a better claim to be within the scope of “transformation.” The development of the montage at least plausibly incorporates the element of creativity beyond mere republication, and it serves some purpose beyond newsworthiness.¹⁶

The *Monge* majority opinion held, however, that Maya had reproduced each of the individual images essentially in their entirety. According to the court, “neither minor cropping nor the inclusion of headlines or captions transformed the copyrighted works.”¹⁷

Maya had argued, relying on *Nuñez v. Caribbean Int’l News Corp.*,¹⁸ that publication of the photos as an exposé transformed the photos from images of a wedding night into evidence of a clandestine marriage. *Nuñez* involved a photographer’s suit against a newspaper that published risqué photographs of a woman that had won the title of “Miss Universe Puerto Rico.” In at least one photo, the woman appeared naked or nearly naked. After the risqué photographs were broadcast,

8 471 U.S. 539 (1985).

9 510 U.S. 569 (1994).

10 688 F.3d at 1168–69.

11 *Id.* at 1173 (citing *Harper & Row*, 471 U.S. at 557).

12 510 U.S. at 579.

13 149 F.3d 987 (9th Cir. 1998).

14 *Monge*, 688 F.3d at 1174.

15 *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002), as amended, 313 F.3d 1093.

16 *Id.* at 939.

17 *Monge*, 688 F.3d at 1175.

18 235 F.3d 18 (1st Cir. 2000).

the model was interviewed about “her fitness to retain the Miss Universe Puerto Rico crown.” The newspaper published the photographs without the photographer/copyright holder’s permission, along with several articles about the controversy. However, the *Monge* opinion held that the controversy in *Núñez* was whether the salacious photos themselves were befitting a Miss Universe Puerto Rico, and whether she should retain her title, whereas here the “photos were not even necessary to prove that controverted fact—the marriage certificate, which is a matter of public record, may have sufficed to inform the public that the couple kept their marriage a secret for two years.”¹⁹

The *Monge* opinion is therefore apparently taking the position that the wedding itself is the story, not the photos that document it. In this respect, it must be noted that the majority spends some type-space refuting that the record showed *Monge* and *Reynoso* denied the marriage even while it concedes that the couple was concealing the fact that the wedding happened.²⁰ The distinction between denying the existence of a fact and attempting to conceal it is a fine one and worthy of a metaphysical discussion in itself. The perceived need for this footnote would seem to show that the majority concedes the applicability of fair use to exposés of facts denied by a public figure. Indeed, the majority concedes that *Maya* used the photos for a “different purpose” than *Monge* and *Reynoso*. However, the court here cites *Infinity Broadcast Corp. v. Kirkwood*,²¹ for the proposition that “a difference in purpose is not quite the same thing as transformation.”²²

The majority then concluded that *Maya* did not transform the photos into a new work or incorporate the photos as part of a broader work, but rather left the inherent character of the images unchanged. Further, the court found that *Maya*’s “minimal transformation” of the photos was “substantially undercut” by its undisputed commercial use. Thus, the court concluded that “at best” the first factor was neutral regarding fair use.²³

Under the second fair use factor, the nature of the copyrighted work, the opinion addressed two aspects of the work: the extent to which it was creative and whether it was unpublished.²⁴ With virtually no analysis, and no reference to the fact the photos were all taken by bystanders to the event, the Court stated that “[s] imply because a photo documents an event does not turn a pictorial representation into a factual recitation.”²⁵ Notably, none of the discussion touched upon the distinction between the level of creativity necessary for a photo to meet the threshold of copyrightability and creativity for the purpose of determining fair use.²⁶ Given that what made these photos newsworthy was that they documented facts in controversy, the thinness of this analysis might give pause to a newsroom editor. The court then focused on the very fact the photos were secret: “the unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use.”²⁷

The court found that *Maya*’s “publication undoubtedly supplanted Plaintiffs’ right to control the first public appearance of the photographs” and balanced the copyright protection received “by marginally creative works” with the Supreme Court’s clear recognition that the unpublished status of the work is a “critical element.”²⁸ Among other issues, the court’s analysis on this factor has significance to the newsroom for the purpose of distinguishing between a photograph found in an ashtray of an SUV and one found on Facebook in terms of applicability of fair use. Indeed, the release of Tiger Woods’ “sexts” and Anthony Wiener’s twittered photograph were distinguished by the majority on the basis that they “distributed their ‘masterpieces’ to others.”²⁹ However, it may also be said that Woods’ sexts and Wiener’s photo were the stories, as much as was the photo in *Nunez*. Under this analysis, would the posting of a photograph on Facebook be sufficient distribution where such photograph is “not the story itself” to undercut the emphasis the majority gives to the fact

19 *Monge*, 688 F.3d at 1175.

20 *Id.* at 1175 n.7.

21 150 F.3d 104, 108 (2d Cir. 1998).

22 *Monge*, 688 F.3d at 1176. One might contrast this reasoning to the Ninth Circuit’s ruling that Google’s use of “thumbnail copies” of copyrighted photos “transformed” the images from a use of entertainment and artistic expression to one of retrieving information. *Perfect 10, Inc. v. Amazon.com Inc.*, 508 F.3d 1146 (9th Cir. 2007) (emphasis added). The majority invokes *Perfect 10*, but only for the proposition that *Maya* did not act in bad faith by failing to seek permission. *Monge*, 688 F.3d at 1173 n.6.

23 *Id.* at 1177.

24 *Id.*

25 *Id.*

26 See, e.g., *Fitzgerald v. CBC Broad., Inc.*, 491 F.Supp.2d 177, 188 (D. Mass. 2007).

27 *Monge*, 688 F.3d at 1177 (citing *Harper & Row*, 471 U.S. at 554).

28 *Id.* at 1177.

29 *Id.* at 1176 n. 8.

the wedding photos were unpublished? It should also be noted that, according to Reynoso's testimony in the case, the primary reason the wedding (and photos) were not published was to preserve Monge's status as a sex symbol.³⁰

The court held under the third statutory factor in the fair use analysis, that, quantitatively, every single photo of the wedding and almost every photo of the wedding night were published and, qualitatively, that the "heart" of each individual copyrighted picture was published. While the court did not "discredit Maya's legitimate role as a news gatherer," the court again noted that Maya's reporting purpose could have been served through publication of the couple's marriage certificate or other sources rather than copyrighted photos and that even "absent official documentation, one clear portrait depicting the newly married couple in wedding garb with the priest would certainly have sufficed to verify the clandestine wedding." The court therefore found that this factor weighed *against* fair use. In this regard, the court appears to be getting deep into the editorial process. While a marriage certificate might well have provided evidence of the wedding, publication of the photographs would show its location and circumstances which arguably enhances the credibility of the news report.

The dissent would have granted fair use to all three wedding photos and remanded on the others. It argued that Maya did not, in fact, publish all the photos, but focused on those regarding the wedding.³¹ This is similar to the argument that Maya made under factor one regarding transformation according to which the point of the article was an exposé, therefore only those photos revealing and proving the wedding could be said to be transformative. One might note here, in passing, a tension between copyright law and the First Amendment that has long been recognized in the cases. Indeed, the fair use doctrine has been referred to as a substantial rule of copyright law that can on occasion reduce the inherent tension between free speech and property rights in expression.³²

The final fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work."³³ The opinion cites *Harper & Row* for its holding that "[t]his last factor is undoubtedly the single most important element of fair use." Maya had argued, and the district court had agreed, that no potential market for the pictures existed because the couple did not intend to sell publication rights to the photos.

The appellate court, however, held that the impact on the potential market for unpublished works is best illustrated by the court's analysis in *Harper & Row*: "The right of first publication implicates a threshold decision by the author *whether and in what form* to release his work."³⁴ In other words, "[p]ublication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works."³⁵ The court then held that Maya's use, even if credited as mildly transformative, nonetheless functioned as a market replacement for the photos.

However, the majority opinion does not address the doctrine of "market failure," except insofar as it asserts that Monge and Maya did not deny the marriage, but only "concealed" it.³⁶ The majority relied on the prior Ninth Circuit case of *Worldwide Church of God v. Philadelphia Church of God, Inc.*,³⁷ for the proposition that even if an author completely "disavowed any intention to publish his work during his lifetime" that unauthorized publication by another could still harm potential and future markets. However, as the dissent points out, *Worldwide Church* exempted from this reasoning publications involving "market failure," that is, when an author keeps a work from being published for the purposes of *concealing information*.³⁸ This "market failure" analysis is also frequently applied where the copyright holder is not interested in seeing a parody of work in the public domain. Indeed, in *Campbell*, the case regarding the parody of "Oh Pretty Woman," the copyright holder had refused to license the song after review of the lyrics of the parody.³⁹ It should be

30 *Id.* at 1191–92.

31 *Id.* at 1191 (Smith, J., dissenting).

32 See, e.g., *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1181 (5th Cir. 1980) (Brown, J., concurring).

33 17 U.S.C. § 107(4).

34 471 U.S. at 553 (emphasis added).

35 *Id.* at 551; see also *id.* at 564 ("right of first publication encompasses ... the choice whether to publish at all").

36 *Monge*, 688 F.3d at 1175–77.

37 227 F.3d 1110 (9th Cir. 2000).

38 *Monge*, 688 F.3d at 1191 (Smith, J., dissenting) (emphasis added).

39 *Campbell*, 510 U.S. at 572–73.

central to the analysis that Monge and Reynoso were not withholding publication not based upon a Salingerian desire to control the destiny of their creative output, but to foreclose publication of photos definitively proving a disputed fact.

The court concluded that Maya's use negatively affected both the potential and actual markets for the couple's photos. Revealingly, the court concluded by stating that: "Simply because the works were yet unpublished did not give Maya a license to pull the trigger and *blow the couple's cover*."⁴⁰ However,

Maya did not *need* a license to blow their cover. The majority concedes this much when it holds that Maya could have published the marriage certificate as an alternative to using the wedding photographs. Rather, the issue is whether the target of a news story can control the publishing of evidence of a fact by copyrighting the evidence.

It's "fair" to say that the holding in *Monge* provides argument and authority for a copyright claim on virtually any "found" photograph. As with many metaphysical disquisitions, however, it has low predictive value. ⚖️

⁴⁰ *Id.* at 1183–84 (emphasis added).

MEDIA'S QUOTE APPROVAL...

Continued from page 1

attribution, the public has no way of knowing what the concealed deal was."⁵

Kevin Drum, a liberal blogger and columnist, argued in a July *Mother Jones* commentary that the quality of campaign reporting would improve if reporters were forbidden to allow sources to approve quotes in advance, adding that news organizations are the ones at fault: "I'd really like to blame the campaigns for this, but how can I? Their job is to sell a candidate. If reporters agree to this madness, they really have no one to blame but themselves. Are they really *this* desperate for interviews with campaign flacks?"⁶

But other journalists were hesitant to denounce quote approval categorically, suggesting that there may be times when it is both necessary and inevitable to get the story and get it right. In a September 2012 blog post, *New York Times* Media and Culture Columnist David Carr argued that although quote approval is not ideal, it can help achieve accuracy, because even the best reporters "will at least get the small things wrong—unless they

have time to tape and transcribe, which is a rarity in this rapid-fire age."⁷ David Westin, former president of ABC News, agreed in a September *Huffington Post* column, opining that although it is important to keep the practice "down to a dull roar," organizations should not "rule it out altogether either."⁸

After Peters's story broke, *The New York Times* and the Associated Press (AP) were among news organizations that "banned" the quote approval practice. In a September memorandum, *Times* Executive Editor Jill Abramson wrote, "The practice risks giving readers a mistaken impression that we are ceding too much control over a story to our sources. In its most extreme form, it invites meddling by the press aides and others that goes far beyond the traditional negotiations between reporter and source over the terms of an interview."⁹ Under the *Times*' new policy, reporters are required to say "no" if a source demands that quotes be submitted for review as a precondition to the interview. However, the policy still allows reporters to negotiate what is on and off the record during the reporting process. The policy has drawn praise from some, like David Westin, who said it achieves a balance without creating a "sweeping policy"

⁵ Dan Rather, *Dan Rather: 'Quote approval' a media sellout*, CNN, July 19, 2012, <http://www.cnn.com/2012/07/19/opinion/rather-quote-approval-reporting/index.html>.

⁶ Kevin Drum, *The Evolution of Reporters Into Stenographers Is Nearly Complete*, MOTHER JONES, July 16, 2012, <http://www.motherjones.com/kevin-drum/2012/07/evolution-reporters-stenographers-nearly-complete>.

⁷ David Carr, *What's Up With Quote Approval? A Call for Reporters and Sources to Weigh In*, N.Y. TIMES, Sept. 17, 2012, <http://mediadecoder.blogs.nytimes.com/2012/09/17/whats-up-with-quote-approval-a-call-for-reporters-and-sources-to-weigh-in/>. But see David Carr, *The Puppetry of Quotation Approval*, N.Y. TIMES, Sept. 16, 2012, <http://www.nytimes.com/2012/09/17/business/media/the-puppetry-of-quotation-approval.html>.

⁸ David Westin, *Don't Quote Me*, HUFFINGTON POST, Sept. 22, 2012, http://www.huffingtonpost.com/david-westin/dont-quote-me_b_1906036.html.

⁹ Margaret Sullivan, *In New Policy, The Times Forbids After-the-Fact 'Quote Approval'*, N.Y. TIMES, Sept. 20, 2012, <http://publiceditor.blogs.nytimes.com/2012/09/20/in-new-policy-the-times-forbids-after-the-fact-quote-approval/>.

that keeps information from readers.¹⁰ But others have criticized the policy's flexibility, including Christopher Ullman, who handles global communications for the Carlyle Group in Washington, and who has worked as a government spokesman. Ullman called the *Times*' policy "comical" and predicted sources will still get to decide what version of quotes ultimately appear by making adjustments to quotes before the interview is over, rather than just prior to publication.¹¹

In addition to raising ethical concerns, the practice of quote approval raises various legal questions. The remainder of this article discusses several.

Journalists Who Face Access Restrictions After Refusing Quote Approval May Have a Claim Under § 1983

One of the reasons reporters cited for engaging in quote approval was the possibility that sources, often government officials, would refuse to grant interviews without it. Media clients may ask whether there are ways to compel government sources to give interviews without acceding to these demands.

Theoretically, news organizations could bring a retaliation claim under 42 U.S.C. § 1983, the federal Civil Rights Act, against government officials who refuse to give subsequent interviews once barred from reviewing or massaging their quotes. A plaintiff bringing such a claim must establish that the government responded to plaintiff's constitutionally protected activity (i.e., news reporting) with conduct or speech that would chill or adversely affect the protected activity (i.e., refusing interviews).¹² A court's determination of whether government conduct had a chilling or adverse impact is an objective one.¹³ Courts determine whether a similarly situated person of ordinary firmness reasonably would be chilled by the

government conduct in light of circumstances of the particular case.¹⁴ This standard has proven difficult for the press to meet, and retaliation claims often are not successful. Most courts have held that public officials have no obligation to talk to the press.¹⁵

In 2004, Maryland Governor Robert L. Erlich, Jr. issued a directive that blacklisted a *Baltimore Sun* reporter and a columnist in response to critical articles the journalists had written. They were excluded from press briefings, and Maryland government officials did not return their calls or emails.¹⁶ The newspaper and the reporters involved brought a claim against Erlich in federal court alleging violation of their First and Fourteenth Amendment rights. The district court denied the *Sun*'s request for a preliminary injunction and granted the Governor's motion to dismiss for failure to state a claim. "Although the Constitution establishes the contest between the holders of government information and those seeking access to that information, it does not resolve it," the court said.¹⁷

On appeal, the Fourth Circuit held that the *Baltimore Sun* and the journalists had no actionable retaliation claim against the governor because it was commonplace for some journalists to have less access to government sources than others. The court further said that allowing newspapers to proceed on retaliation claims of this nature would "'plant the seed' of a constitutional case in 'virtually every' interchange between public official and press."¹⁸

Although retaliation claims brought by news organizations often fail, there have been a few cases where the media has been successful in proving the requisite level of harm. For example, a federal court in Illinois held that a sheriff and other public officials violated a newspaper's First Amendment rights by refusing a reporter access to the jail in retaliation for a previous negative story.¹⁹

Whether a "similarly situated person of ordinary firmness reasonably would be chilled by the government conduct" has proven a difficult standard for the press to meet, and retaliation claims often are not successful. Most courts have held that public officials have no obligation to talk to the press.

10 Westin, *supra* note 8.

11 Margaret Sullivan, *Who Controls the Story?*, N.Y. TIMES, Sept. 29, 2012, <http://www.nytimes.com/2012/09/30/public-editor/30pubed.html>.

12 See *Baltimore Sun Co. v. Erlich*, 437 F.3d 410, 416 (4th Cir. 2006).

13 *Id.*

14 *Id.*

15 See *Baltimore Sun*, 437 F.3d 410; *Raycom v. Campbell*, 361 F.Supp.2d 679 (N.D. Ohio 2004).

16 *Baltimore Sun*, 437 F.3d at 413-14.

17 *Baltimore Sun Co. v. Erlich*, 356 F. Supp. 2d 577 (D. Md. 2005), *aff'd* 437 F.3d 410.

18 *Baltimore Sun*, 437 F.3d at 418 (citing *Connick v. Myers*, 461 U.S. 138 (1983) (holding an assistant district attorney's discharge for distributing a questionnaire to fellow employees concerning the office transfer policy in response to her own unwanted position transfer did not violate the attorney's free speech rights)).

Likewise, a federal court in Louisiana held that “A policy that discriminates against particular news reporters or news organizations by public officials who are dissatisfied with the contents of news coverage is unconstitutional unless the policy furthers a compelling state interest and is the least restrictive means available to achieve the asserted purpose.”²⁰ And a federal court in Hawaii entered an injunction prohibiting a mayor from excluding a reporter from a general news conferences, finding that the reporter had demonstrated probability of success on the merits of a §1983 claim.²¹

News organizations are more likely to succeed if they can provide evidence of specific discrimination against the publication and its journalists. Notably, however, even that was not enough for the Fourth Circuit in the *Baltimore Sun* case, suggesting that it would be an uphill battle for a news organization to argue that a government official or spokesperson who refused to grant interviews without the prior review guarantee would constitute “retaliation.” As the court noted in *Baltimore Sun*, it is “commonplace” for some reporters to have less access to information than other reporters when covering stories. At a minimum, a media entity would need to show the government action discriminates against it for unconstitutional reasons and that this constituted a denial of complete access to otherwise publicly available information.

News Organizations Could Be Liable if a Reporter Breaks a Promise of Quote Approval

If a reporter agreed to allow quote review and approval as a precondition to an interview and then did not honor that promise, the reporter or the news organization could be subject to legal liability under *Cohen v. Cowles Media Co.*,²² especially if the source was damaged as a result. In *Cohen*, the U.S. Supreme Court held that the First Amendment did not bar a source from recovering damages under a promissory estoppel theory if a newspaper breached its reporter’s promise of confidentiality made in exchange for information.

Under this precedent, sources who are promised an opportunity to review quotes and make changes prior to publication could sue the media entity, making a similar promissory estoppel argument in those states that recognize

it. In general, the elements of a promissory estoppel claim are (1) a promise reasonably expected by the promisor to induce action or forbearance, (2) detrimental reliance by the promisee, and (3) injustice can be avoided only through enforcement of the promise.²³

It is probably unlikely that a government official or source would pursue such a claim, which would invite potentially negative press coverage — unless the source suffered significant damages. Nevertheless, reporters and media organizations should be aware of the potential consequences of backing out of agreements made with sources as preconditions to an interview. Legal education of clients on this point is essential, and reporters should clearly understand the limits on their ability to make such promises.

News Organizations that Refuse Quote Approval May Increase Risk of Liability for Misquoting

As proponents of the quote approval process point out, it has at least the potential virtue of ensuring that sources are quoted correctly. Journalists who decide not to engage in the practice may lay claim to a high level of independence, but they risk error, and fabricated and altered quotations can lead to litigation where the reputation of the “source” is harmed. Quotations have the potential to injure a source in at least two ways (1) attributing an untrue factual assertion to the speaker or (2) attributing a negative personal trait or attitude that the source does not possess.²⁴

In *Masson v. New Yorker Magazine, Inc.*,²⁵ Jeffrey Masson, a psychoanalyst who “became disillusioned with Freudian psychology” while serving as projects director of the Sigmund Freud Archives, was fired for advancing his own theories. Afterward, Janet Malcom, an author and *New Yorker* contributor, interviewed Masson, sometimes taping and sometimes not, and published in-depth articles containing lengthy passages in quotation marks attributed to Masson. Masson brought a libel suit alleging that six of the quotations were inaccurate and defamatory. In addressing how much liberty journalists have in altering quotations, the U.S. Supreme Court held that a “reasonable reader would understand quotations in published work to

19 *Chicago Reader v. Sheahan*, 141 F. Supp. 2d 1142 (N.D. Ill. 2001).

20 *Times-Picayune Pub. Corp. v. Lee*, No. 8-1325, 1988 WL 36491 (E.D. La. 1988).

21 *Borrea v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974).

22 501 U.S. 663 (1999).

23 Restatement (Second) of Contracts § 90.

24 See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), see also *Price v. Stossel*, 620 F.3d 992 (9th Cir. 2010) (stating news organizations “risk a defamation action when they put words in a public figure’s mouth”).

be nearly verbatim reports of statements made by [a source],” but stated that “not every alteration of a quote beyond correcting grammar or syntax by itself proves falsity.” Instead, the altered quotation must convey what the source “meant.”²⁶

This standard does provide some breathing room for journalists who do not quote sources verbatim, but it may also serve as an incentive to participate in some kind of pre-publication review of quotations by sources to ensure that the source’s intention was conveyed accurately.

A Source’s Withdrawal of Consent to Use Quotes Containing Private Facts Eliminates Consent as a Defense to an Invasion of Privacy Claim

If reporters agree to allow quote approval and revision as a condition of obtaining an interview, they should consider the content of the information conveyed by the source. If the quotes contain “private facts” about the source that could be considered highly offensive and not newsworthy, the source’s initial consent to the publication of that information would serve as a defense if the news organization were later sued for the publication. Consent

can be express or implied. However, if at any point in the negotiation process between the reporter and the source, the source withdraws consent, it can no longer be used as a defense. Media organizations could also be liable for any private information published beyond the scope of the consent granted by the source.²⁷

Takeaways for News Organizations and Their Lawyers

Although the decision to permit quote approval prior to publication is primarily one of journalism ethics, news organizations should nevertheless understand the possible legal ramifications, particularly if a promise is made by a reporter and then overridden by editors, as occurred in *Cohen*. Accordingly, it is advisable that the news organization develop a policy on quote approval, including whether it is permitted at all, under what circumstances, who has authority to make a promise, and whether prior approval from an editor must be obtained before the promise is made. Once adopted, it is essential that all editorial and reporting staff be aware of the policy, and apply it consistently. ⚖️

²⁵ 501 U.S. 496.

²⁶ *Masson*, 501 U.S. at 513.

²⁷ See Richard E. Kaye, *Invasion of Privacy by Public Disclosure of Private Facts*, 103 Am. Jur. Proof of Facts 3d 159 (Originally published in 2008).

PRIVACY YEAR IN REVIEW

Continued from page 5

accounts of employees and job applicants, followed by adoption of similar laws in California, Delaware, Illinois, Michigan, and New Jersey. Bills proposing such laws remain pending in a number of other states, and in May, numerous Senators and Congresspersons introduced a federal version titled The Password Protection Act of 2012. The state laws have some exceptions. The California law, for example, permits employers to ask an employee to divulge personal social media content that the employer “reasonably believes to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations.”

Meanwhile, Vermont and Connecticut joined a growing trend of states by amending their data breach notification laws to encompass reporting to the state Attorneys General or other state authorities. The Connecticut amendments were effective October 1; the Vermont amendments were effective May 8.

And as of March 1, Massachusetts law now requires that organizations sharing personal information about Massachusetts residents with vendors have contracts in place with those vendors that comply with state data privacy and security regulations. Importantly, it does not matter whether a company has a physical presence in Massachusetts: the law requires any company that “owns or licenses” personal information belonging to Massachusetts residents to comply with the new Massachusetts law. Among other things, the law requires companies to (1) encrypt all electronic personal information stored on laptops or portable devices or transmitted wirelessly or across public networks, (2) develop and implement a written information security plan, and (3) ensure that third party service providers that receive personal information agree, in writing, to safeguard the personal information.

California Attorney General Files First Suit Under State’s Privacy Law

In early December, a month after notifying scores of mobile application developers and companies

that they were not compliant with the state's Online Privacy Protection Act, the California attorney general announced that she had filed the first legal action under that law, against Delta Airlines.

California's Online Privacy Protection Act—the de facto national law—requires “an operator of a commercial Web site or online service that collects personally identifiable information through the Internet about individual consumers residing in California who use or visit its commercial Web site or online service”—such as a mobile application—to post a privacy policy that contains the elements set out in the act. App owners may be penalized for violating this subdivision if they fail to post a privacy policy within 30 days after being notified of the noncompliance.

Delta was among the companies notified in October that its app, “Fly Delta,” needed a privacy policy. According to the complaint, Delta failed to post a policy despite receipt of the notice. The complaint alleged that since 2010 Delta had collected app users' names, telephone numbers, email addresses, frequent flyer numbers and pin codes, photographs, and geo-locations, yet did not have a privacy policy in the app itself, in the platform stores from which the app may be downloaded or on Delta's website. The suit seeks to enjoin Delta from distributing its app without a privacy policy and to apply penalties of up to \$2,500 for each violation.

FTC Updates COPPA Rule

In mid-December the FTC adopted final amendments to the Children's Online Privacy Protection Rule that strengthen kids' privacy protections and give parents greater control over the personal information that websites and online services may collect from children under 13.

Among other things, the amendments:

- modify the list of “personal information” that cannot be collected without parental consent (it now includes “geolocation information, as well as photos, videos, and audio files that contain a child's image or voice);
- offer companies a new, voluntary approval process for ways of gaining parental consent;
- close a loophole that allowed kid-directed applications and websites to permit third-parties to collect personal information;
- extend coverage so that in some cases the third-parties collecting information have to comply with COPPA;

- extend coverage to “persistent identifiers” that recognize users across different websites or online services;
- strengthen data security protections by requiring covered websites to release children's personal information only to companies that can keep it secure and confidential;
- require covered website operators adopt procedures for data retention and deletion; and
- strengthen the FTC's oversight of self-regulatory safe harbor programs.

Meanwhile, in early December, the FTC issued a new staff report titled “Mobile Apps for Kids: Disclosures Still Not Making the Grade,” which examines the privacy disclosures and practices of apps offered for children in the Google Play and Apple App stores. The report found little progress since 2011 toward giving parents the information they need to determine what data is being collected from their children and who will have access to it. The report urges all entities in the mobile app industry to accelerate transparency, to incorporate privacy “by design,” and to give parents easy-to-understand choices about data collection and sharing through kids' apps.

Federal Legislators Introduce Privacy Legislation on Various Topics

On the federal legislative front, a number of lawmakers introduced bills to protect consumers' privacy. In early September, Rep. Ed Markey proposed the Mobile Device Privacy Act. Among other things, this bill would require mobile phone makers, network providers, and mobile app developers to disclose to customers any monitoring software installed on their devices, would require companies that collect personal information through mobile devices to adopt policies to ensure the security of that information, and would allow the FTC, Federal Communications Commission, and state attorneys general to bring enforcement actions.

Along similar lines, An Act Regarding the Protection of Geolocation Information, introduced in October, would codify standard practice of obtaining opt-in consent before collecting precise, real-time location information by making it illegal to collect, disclose, or use geolocation information unless, among other things, the user gains prior consent. The bill does make exceptions for use by law enforcement for an emergency situation or when a warrant has been issued or national security is threatened.

And earlier in the year, in another effort to create a national data breach notification standard, Sen. Pat Toomey introduced the Data Security and Breach Notification Act of 2012. Under the Toomey Bill, if a covered entity “reasonably believes [a security breach] has caused or will cause identity theft or other financial harm” then it must notify all affected individuals “as expeditiously as practicable and without unreasonable delay.” The FTC would be charged with enforcing compliance with the Toomey Bill, but in instances where a breach affects 10,000 individuals or more, a covered entity would also be required to report the breach to the Secret Service or the FBI.

Supreme Court Decides Privacy-Related Cases

On January 23, the Supreme Court decided *United States v. Jones*, 132 S.Ct. 945 (2012), holding that the government’s use of a GPS device to track the movements of an individual’s vehicle constitutes a search within the meaning of the Fourth Amendment. The government had installed a GPS tracking device on Jones’s vehicle and consequently used evidence gained from the GPS to prosecute Jones for conspiracy to distribute cocaine.

The Court reasoned that because an automobile is indisputably an “effect” protected under the Fourth Amendment, and the installation was an intrusion into that effect, a “search” within the meaning of the Fourth Amendment had occurred. The Court added that the well-known “reasonable expectation of privacy” test derived from *Katz v. United States*, 389 U.S. 347 (1967), added to, but did not substitute for, the common-law trespassory test. In two separate concurrences, however, five Justices seemed to suggest that GPS usage under the facts of this case violated an individual’s reasonable expectation of privacy.

A couple of months later, on March 28 the Supreme Court decided *Federal Aviation Administration v. Cooper*, 132 S.Ct. 1441 (2012), holding that the Privacy Act of 1974 does not waive the federal government’s immunity from liability for claims of mental or emotional distress arising from violations of the Privacy Act.

Cooper, a private pilot, withheld information about his diagnosis of HIV from the FAA. When the FAA learned of his diagnosis and shared it with the DOT and SSA, Cooper brought a claim for violation of the Privacy Act for exchanging his records. The Court concluded that the Privacy Act “does not unequivocally authorize an award of damages for mental or emotional distress. Accordingly, the Act does not waive the Federal Government’s sovereign immunity from liability for such harms.

A Sneak Peak at 2013...Anticipating a Supreme Court FOIA decision

Journalists and companies that sell public records are hopeful that the U.S. Supreme Court will find the residents-only restriction of Virginia’s Freedom of Information Act unconstitutional. The Supreme Court agreed to hear the case, *McBurney v. Young*, in early October.

Virginia is among at least seven states with a law that limits FOIA access to state residents. While the Virginia law has exceptions for “representatives of newspapers and magazines with circulation” in Virginia and television and radio broadcasts that reach Virginia’s airwaves, it excludes media outlets that have an Internet-only presence. Proponents of greater governmental transparency are hopeful that the Court will deem the residents-only restrictions unconstitutional, leaving state records open wide to FOIA requests regardless where they originate.

Conclusion

The sensitivity of consumers, legislators, and regulators to privacy concerns shows no sign of waning. Thus, although federal privacy legislation has proven difficult to enact, savvy companies will stay abreast of the ever-evolving field of privacy law in 2013. This is especially true for those expanding their social and mobile presences and for those engaging in online tracking and interest-based advertising. Although the White House and FTC privacy reports are not currently binding, failure to follow the principles they espouse may have real consequences in the future and companies would be well-served by adopting those principles sooner rather than later. ☞

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Dallas, TX
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