



# First Amendment Law COMMENT

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## LIBEL

### Attorney not necessarily public figure

by Brent Mayo

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An appellate court in Texas refused to dismiss a libel suit after finding a San Antonio newspaper failed to establish the lawyer bringing suit was a public figure. The suit arose from an article published in the newspaper which characterized the lawyer as skimming profits from a tribal casino.

The party alleging libel was a lawyer who represented a Native American Tribe. There had been much controversy regarding how the tribe was governed, and certain members set out to challenge those who had long led the tribe.

Through the years, the lawyer had often been in the media regarding this matter, but always responding to questions or commenting on issues related to the Tribe. After many years of struggle, the challenging members held a “vote of confidence” in the “traditional way” and voted the holders of power out of office. The new members created a court to hear all Tribal issues from that point forward. A few years later, the past holders of power held their own “vote of confidence” and challenged the new order in the Tribal Court.

### "Skimming" is upsetting

At a Tribal Court hearing, the lawyer testified as a fact witness about the events surrounding the first “vote of confidence.” At this hearing, the lawyer testified that she makes “roughly about ten percent of [her] income from the tribe.” The following day, the newspaper published an article subtitled, “[Lawyer] admits she’s skimming 10% of casino profits off the top.” The article goes on to state that the lawyer intended to defraud the federal government and was clearly violating the National Indian Gaming Commission rules and regulations. After reading this article, the lawyer sued the newspaper for libel.

The newspaper argued the lawyer was a “limited-purpose public figure” thus not afforded the same protections as a private figure. A limited-purpose public figure is a person who puts themselves to the forefront of a public controversy to influence the resolution of the issues, thereby inviting attention and comment to herself. The controversy at issue must be public and the party must have more than a trivial

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## COPYRIGHT

### Using a tweet can make you a twit

by Patrick Ogilvy

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A U.S. District Court in New York has determined news media entities may be liable for copyright infringement for using images posted on Twitpic, a third-party application of Twitter allowing users to post pictures, without first obtaining permission of the poster.

A professional photojournalist who had lived and worked in Haiti for over twenty-five years was in Port-au-Prince on January 12, 2010, during the massive earthquake that devastated the city. Due to his unique vantage point in the city, the photojournalist was able to capture unparalleled photographs of the immediate aftermath of the earthquake. The photojournalist was also able to access the internet in the afternoon, and opened accounts on Twitter, a social-networking website, and Twitpic, a third-party application of Twitter allowing users to upload and share photographs with other Twitter users.

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## LIBEL

### Terms of Service are important

by Danny Moskowitz

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According to the U.S. Court of Appeals in Chicago, a website’s host and manager were not bound by an injunction that ordered the removal of a user’s defamatory comments because they were not “in active concert or participation” with those who posted the comments.

In June 2009, a couple sued two internet patrons over defamatory statements they posted on several websites, including various social media outlets and one site, where “users post comments about bad business practices.” A federal trial court in Illinois granted the couple an injunction requiring the two internet patrons to remove the comments. Yet, the internet patrons had never made a formal appearance in the case to defend the suit.

In light of the internet patron’s failure to defend against the lawsuit, the couple had to seek relief directly from the websites where the defamatory comments appeared. The couple asked each of these websites to remove the defa-

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## ACCESS TO RECORDS

# Watchdogs beware

by Matthew Grosland

Federal watchdog groups may run into obstacles when seeking records from the government under the Freedom of Information Act. The FOIA, enacted in 1966, allows members of the public broad access to federal government records. However, an agency can withhold or redact records falling within one of ten statutory exceptions. A case brought before the U.S. District Court in the District of Columbia examined one such exception.



Matthew Grosland

The Electronic Privacy Information Center, a federal watchdog group focusing on civil rights issues, filed a FOIA request with the Department of Homeland Security, seeking all records associated with the body imaging scanners used at airports by the Transportation Security Administration. DHS supplied over 1700 documents but withheld approximately 2000 test images under the FOIA's "2-high" exception. EPIC disputed the exemptions and sued to force their disclosure. At the end of the day, the court sided with DHS.

Exemption two of the FOIA allows agencies to withhold public access to records if they "relate solely to the internal personnel rules and practices of an agency." In the federal courts of the District of Columbia, this provision has been interpreted to exempt two categories of records. The first category involves trivial material unrelated to the public interest. The second category involves non-trivial material within the public interest, often called the "2-high" exception.

The "2-high" exception applies to more than just a record containing a rule or practice. It also applies to materials merely *relating* to those rules and practices. For example, courts have denied disclosure of the FBI's secret symbols denoting secret informant communications, instructions detailing the FBI's internal routing and distribution practices, and structural blueprints of federal buildings.

Qualifying records under the "2-high" exception involves two steps. First, the records must be "used for predominantly internal purposes." Second, the federal agency must

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or tangential role in the controversy. In determining the lawyer's role in this controversy, the court looked to whether the lawyer actually sought publicity, whether the lawyer had access to the media and whether the lawyer "voluntarily engaged in activities that necessarily involved the risk of increased exposure and injury to reputation."

The court also stated a lawyer does not become a public figure "merely because he undertakes to represent clients in difficult, unpopular, high profile, or sensation types of cases." The court closely analyzed the lawyer's role throughout the process. The lawyer simply accompanied her clients to meet with elected officials and agencies when

show that releasing the records significantly increases the risk of violation or circumvention of the law.

### Internal documents, that is the question

TSA routinely scans test subjects equipped with a wide range of potentially dangerous objects stored on various locations of the body. The test images help determine the range and effectiveness of the scanners, which in turn aids in creating security policy, educating TSA staff and making technological changes to the security systems.

DHS argued exposing the images to the public "would reveal certain security vulnerabilities of the machines themselves, as well as searching and screening techniques employed by the TSA." The court agreed, noting TSA used the images for training and assessing compliance with their internal detection standards, thus constituting predominantly internal documents.

For step two, the DHS offered no specific examples of statutes or regulations at risk of violation. Rather, they argued releasing the images would enable terrorists to violate the law. Potential terrorists and criminals could take advantage of the TSA's vulnerabilities, limits and capabilities, creating a national security risk equivalent to circumvention of criminal statutes.

The court agreed. National security, because of its "uniquely executive purview," pushes courts to give leeway on exemption despite the public interest. Courts may also rely on the government's claims when their interest lies mainly in preventing violations of the law, despite a record's tenuous connection to rules and practice. Therefore, the government may forego identifying specific statutes at risk for violation when national security is at stake.

Disputing claims of national security may be fruitless. The government need only meet the requirements of the FOIA to qualify for exemption, and once met a court may refrain from further investigation in most circumstances. Thus, while EPIC disputed the images' national security implications, the court allowed the government to withhold them without further inquiry by the court. ■

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seeking an avenue to oust the old leadership. Also, she responded to press inquiries regarding legal matters affecting the Tribe in news articles, an investigation regarding a Tribal girl that was buried without an autopsy, and a legislative proposal that affected the Tribe's casino.

Analyzing the massive amount of evidence, the court held there was *insufficient* evidence to show: 1) the lawyer became involved in the controversy regarding the Tribe beyond a legal advocate, 2) that she put herself in public eye by engaging the media, 3) had any special access to the media nor, 4) attempted to use the media to influence the outcome. As a result, the lawyer was not a limited-purpose public figure and the case was not dismissed. ■

## INTERNET

# Anonymous speakers identity not protected by first amendment

by Brent Baxley

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A multi-level marketing company sued a small-business development company in Federal Court in Nevada alleging that the development company “orchestrated an Internet smear campaign” against the marketing company with anonymous message board postings and video. The development company sought testimony from five of the anonymous speakers, and asked the court to compel the five anonymous individuals to testify. While preserving their anonymity, these five argued that compelled testimony would destroy their anonymity, thus violating their First Amendment right of free speech. The court held that three of the five speakers could be compelled to testify, but denied the motion to compel testimony from the remaining two. The development company asked the appellate court to reverse the lower court’s holding, but the U.S. Court of Appeals in San Francisco affirmed the ruling.

The dispute centered around the marketing company’s allegation that members of the development company were making message board posts and uploading videos that portrayed the marketing company in a negative light and hurt their business. For example, one of the postings at issue stated that the marketing company “suffered from systemic dishonesty.” Another accused the marketing company of acknowledging that “its products are overpriced and not sellable.” Finally, the most negative post stated that the marketing company “approves, promotes, and facilitates the systematic noncompliance with the FTC’s Amway rules.”

The marketing company took the deposition of the Online Content Manager for the development company. The manager refused to reveal the identities of the five speakers. The marketing company sought to compel the development company to reveal the anonymous speakers identity.

## Online, offline, no difference

In reviewing the lower court’s decision to compel testimony of three of the speakers, the appellate court articulated the long-established principle of first amendment law that anonymous speech is protected under the first amendment. The court then noted that protection for anonymous speech also extends to speech on the internet and is treated no differently than other kinds of speech. Next, the court recognized that while commercial speech does not get as much first amendment protection as political speech, it nevertheless, receives first amendment protection as long as it is “neither misleading nor related to unlawful activity.”

The appellate court then found that the expression at issue in the dispute between the marketing company and the

development company was commercial speech because it “related solely to the economic interests of the speaker and its audience.”


Acknowledging that it had no binding precedent on the issue in its jurisdiction, the appellate court then reviewed several decisions from other jurisdictions on whether an anonymous speaker’s identity can be revealed and whether the speaker can be compelled to testify. The appellate court reviewed these courts’ attempts to ascertain when the protection of the first amendment does not extend to anonymous, online, commercial speech, but declined to adopt the reasoning of any one of them.

## No new test for anonymous, online speech

Instead, the appellate court first stated that the district court used the most stringent possible test—requiring the seeker of the testimony to show that it had a strong claim, and also to give or attempt to give the speaker notice of the litigation before discovering the speaker’s identity. Next, the appellate court held that if it were to adopt a test that it would not be as stringent as the one the district court applied.

Then the appellate court affirmed the lower court’s final ruling that the Online Content manager for the development company must reveal the identity of three of the five speakers. The appellate court reasoned that because the district court found that the marketing company satisfied the most stringent standard, then it would certainly satisfy a less stringent standard. Thus, the appellate court concluded that even though they were not adopting a test for revealing anonymous internet speakers, if it did, the marketing company would certainly pass it. ■

*One posting said the company "suffered from systematic dishonesty."*

**"I Didn't Know That"**  
(Why We Say The Things We Say) by Karlen Evins 

*"Drumming Up Trade" - Once in town, the early traveling salesman had to play the role of PR man, advertising man, and musician all in one. In order to stir up business, he was often known to beat a drum or ring a bell. The former action gave us our catchphrase, "drumming up trade," while the latter lent itself to "now, that rings a bell!"*

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He then uploaded his photographs of the devastation to Twitpic and posted on Twitter that he had “exclusive earthquake photos,” with a link to his Twitpic page. Minutes after the photojournalist posted his photographs to Twitpic, a resident of the Dominican Republic copied and reposted them to his own Twitpic page. He then tweeted that he had “exclusive photographs of the catastrophe for credit and copyright.”

Because the photojournalist’s photographs were some of the first transmitted from Haiti, several media outlets contacted him to purchase them for publication. A photo editor for a French news agency contacted the photojournalist to inquire about the photos, but minutes later and before the photojournalist responded, downloaded several of the images from the Dominican Republic resident’s Twitpic page. The news agency then transmitted the photographs to an image licensing company, who began licensing the photographs to several third-party news agencies, attributing the photographs to the Dominican Republic resident.

Soon thereafter, the photographs began appearing on news outlets everywhere. After the news agency learned the photographs belonged to the photojournalist, it issued a wire instruction to change the photographer credit, but the image licensing company continued to sell licenses without the photojournalist’s permission.

### **Copyright infringement**

The photojournalist sued the news agency and image li-

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copyrighting company, among others, for direct, contributory, and vicarious infringement of his copyrights in the photographs. The news agency and image licensing company argued the Twitter terms of service, which extended to Twitpic, created an express license for them to use the photographs. However, the court found the terms provided by Twitter and Twitpic only conveyed licenses to those companies and their partners or affiliated sites, which did not include either the news agency or the image licensing company. Accordingly, the court determined those companies did not have a license to use the photographs.

### **This wasn't our fight**

The court further found the companies may be liable to the photojournalist for contributory and vicarious infringement of his copyrights. First, the court found potential contributory infringement because the photojournalist had asserted the news agency and image licensing company knew he owned the images but licensed them to third parties any way.

Second, the companies were potentially liable for vicarious infringement because they chose not to enforce the “kill” order once they knew of the photojournalist’s ownership of the photographs and they financially benefited from licensing fees. Finally, the court found the companies were liable for falsifying copyright management information due to the incorrect credit lines knowing the photojournalist was the true owner of the photographs, and for removing copyright management information due to the attributions contained on the photojournalist’s Twitpic page. ■

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