

Alert

Intellectual Property/Media

Department of Justice Issues Revised News Media Subpoena Policies

By Jonathan Bloom

On July 12, 2013, the U.S. Department of Justice released a report announcing new guidelines relating to obtaining records or information from the news media. The report came in response to President Obama's request in May 2013 that the Attorney General revisit the Department's policies after it was revealed that the Department had secretly subpoenaed two months' worth of phone records for some 20 phone lines used by Associated Press journalists. In its Report on Review of News Media Policies (the Report), the Department announced significant changes in its policies relating to search warrants, subpoenas, and court orders aimed at gathering information from the news media and also expressed strong support for a federal shield law that would provide additional protection for the news media.

Without conceding deviation from its existing guidelines in its pursuit of the AP phone records – indeed, it has publicly insisted otherwise¹ – the Department appears to have considered, among other things, objections made by the Reporters Committee for Freedom of the Press in a May 14, 2013 letter, signed by 51 other media companies and trade associations. The letter identified a number of respects in which the Department appeared to have departed from the current DOJ guidelines for subpoenas of the news media (found at 28 C.F.R. § 50.10), including a requirement to provide advance notice of the intent to seek a subpoena and to negotiate with the news media in all cases involving telephone records. The Report also drew upon some seven meetings held by Attorney General Eric Holder with approximately 30 news media organizations as well as with First Amendment groups, media industry associations, and academic experts.²

At a broad policy level, the Report declares that it “has been and remains the Department's policy that members of the news media will not be subject to prosecution based solely on newsgathering activities” and that the Department views seeking evidence from or involving the news media “an extraordinary measure” to be used “only as a last resort” after “all reasonable alternative steps have been taken, and when the information sought is essential to a successful investigation or prosecution.” Along these lines, the Department states that it will undertake to work with the Administration to identify ways the intelligence agencies “can address information leaks internally through administrative means, such as the withdrawal of security clearances and imposition of other sanctions.” The Report also

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states the Department's commitment to striking an appropriate balance between protecting against the unlawful disclosure of classified information and "safeguarding the essential role of a free press in fostering government accountability and an open society." In addition, the Report reiterates the Obama Administration's support for a federal shield law that would "provide a new mechanism for advance judicial review of the use of investigative tools such as subpoenas when they involve the news media."

In terms of specific revisions to the Department's media policies, the most significant is a new presumption that advance notice to, and negotiations with, the news media will apply "in all but the most exceptional cases." Current policy provides that such negotiations should occur only where the responsible Assistant Attorney General determines that negotiations *would not* pose a substantial threat to the integrity of the investigation, a finding that is then reviewed by the Attorney General. The new policy, by contrast, requires advance notice and negotiation except where the Attorney General finds a compelling basis – other than mere delay of an investigation – for finding that notice and negotiation *would* pose a "clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or ... an imminent risk of death or serious bodily harm." Any delay in notification is to be limited to 45 days unless the Attorney General authorizes an additional delay of up to 45 days based on a finding of a "clear and substantial" threat of harm.

Other policy changes announced in the Report include:

- The "suspect exception" to the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, which generally prohibits the search or seizure of materials held by individuals who have a purpose to disseminate information to the public, would apply to the news media only when a member of the news media is the focus of a criminal investigation *for conduct not connected to ordinary newsgathering activities*. Thus, merely reporting leaked information would not implicate the exception.
- The approval of the Attorney General will be required for all search warrants and court orders issued pursuant to 18 U.S.C. § 2703(d) and

directed at members of the news media. Consistent with what the current guidelines provide with respect to news media subpoenas, the Attorney General will consider whether the information sought is essential to a successful investigation, other reasonable alternative investigative steps to obtain the information have been exhausted, and the request is narrowly tailored. The new presumption of notice and the standards for delayed notice applicable to subpoenas (discussed above) also will apply to search warrants and section 2703(d) orders directed to the news media.

- A News Media Review Committee will advise the Attorney General and Deputy Attorney General when Department attorneys request authorization to seek media-related records: in leak investigations, in any criminal investigation without providing advance notice, and when Department attorneys seek testimony from a member of the media that would disclose a confidential source.
- Department attorneys involved in the issuance of subpoenas, search warrants or court orders to the news media will be required to report on the status of such efforts to the Criminal Division's Office of Enforcement Operations, and the Department will collect, and make public on an annual basis, statistical data relating to use of media-related process.
- The Department will establish an Attorney General's News Media Dialogue Group to "assess the impact of the Department's revised news media policies" and "maintain a dialogue with the news media." The Group will meet six months after the new policies become effective and annually thereafter.

The changes described in the report are to be formalized in guidance to the Department's law enforcement officials and attorneys, and the policy changes will be incorporated into the United States Attorney's Manual and in revisions to 28 C.F.R. § 50.10, as appropriate.

The Department's new media policies represent an important and constructive response by the Administration to the AP controversy, and the Administration's renewed declaration of support for a media shield law – an effort that was derailed in 2009 by the Wikileaks controversy – should help advance

the prospects for passage of such legislation, which is widely (but not uniformly) supported by the news media.³

- 1 See Carol Cratty, *Justice says it followed rules in leak probe, but key question unanswered*, CNN.COM, June 5, 2013, at <http://www.cnn.com/2013/06/04/politics/holder-ap-leak>.
- 2 See Press Release, Department of Justice, Statement of Attorney General Eric Holder on the Justice Department Report on Revised Media Guidelines, at <http://www.justice.gov/opa/pr/2013/July/13-ag-783.html>.
- 3 S. 987, the Free Flow of Information Act of 2013, introduced by Senator Charles Schumer on May 16, 2013, reflects the input of a large coalition of media companies and trade associations dating back to the 2009 shield-law push. Notably, the bill's definition of "covered persons," which is among the bill's most debated and controversial provisions, would apply to bloggers who meet the bill's functional definition of journalistic activity. See <http://thomas.loc.gov/cgi-bin/query/z?c113:S.987>.

Second Circuit Holds Controverted Scientific Article Is Non-Actionable Opinion

By Randi Singer and Jonathan Bloom

Introduction

In a decision with implications for litigation over the promotional use of scientific or other technical studies of products or services, the Second Circuit held recently that published scientific conclusions concerning matters of legitimate dispute, using a disclosed methodology and non-fraudulent, accurately described data, are opinions that are not subject to liability under federal or state false advertising laws. *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, No. 12-2414-cv, 2013 WL 3198153 (2d Cir. June 26, 2013). In affirming the dismissal of Lanham Act and other claims based on a comparative study of competing surfactants, the court found that because it is "the essence of the scientific method that the conclusions of empirical research are tentative and subject to revision," it was more appropriate to treat the

challenged statements as constitutionally protected opinion.¹

The *ONY* ruling does not break new ground in Lanham Act jurisprudence; the claim that an academic article is, by itself, potentially actionable under the Lanham Act was rejected back in 1994 in *Gordon and Breach Science Pubs. S.A. v. Am. Inst. of Physics*.² The Second Circuit's limited holding in *ONY* leaves intact Lanham Act claims based on false or misleading descriptions of research results or accurate descriptions of fraudulent research results (provided the "use in commerce" requirement is met). However, without addressing the "use in commerce" or "commercial speech" issues that were explored at length in *Gordon and Breach*, the Second Circuit instead focused on the merits, drawing upon libel and First Amendment law to underscore the constitutional limits on liability for commercially motivated scientific studies. In doing so, the court emphasized the importance of not injecting the chilling effect of potential liability into an arena in which, as one commentator put it recently with respect to clinical drug trials, uncertainty is "the norm, not the exception."³

Background

The case arose out of a dispute between ONY, Inc. (ONY) and Chiesi Farmaceutici, S.p.A. (Chiesi), two of the largest manufacturers of surfactants. Surfactants are biological substances that line the surface of human lungs and facilitate the transfer of oxygen from the air into the bloodstream. Although surfactants are naturally occurring, ONY and Chiesi produce surfactants that are used to treat infants with insufficient surfactant levels (RDS), who are at risk of respiratory failure and death. ONY makes a surfactant derived from bovine lung surfactant that is sold as "Infasurf." Chiesi's competing product, derived from porcine lung mince, is sold as "Curosurf." Curosurf is distributed and marketed in the United States by Cornerstone Therapeutics, Inc. The two most significant variables relevant to the effectiveness of the surfactants are mortality rate and length of stay, the latter of which refers to the amount of time an infant remains in the hospital for treatment.

In 2006, Chiesi hired Premier, Inc. to compile a database to study the relative effectiveness of different surfactants. Chiesi also hired several medical doctors to present findings at medical conferences based on the Premier database. At a May 2007 conference the doctors presented findings that Curosurf had a 20 percent lower mortality rate than either Infasurf or a third surfactant, and they presented findings at an October 2007 conference that Curosurf was associated with a 15 percent shorter length of stay. In September 2011, the doctors published an article containing findings from the same data set in the peer-reviewed *Journal of Perinatology*, the leading journal in the field of neonatology, the study of newborn infants. The article was published in a publicly accessible “open access” format, with the publication fees paid by Chiesi and Cornerstone.

The article acknowledged that its findings might be due to differences in the doses of the respective drugs administered (Curosurf generally is prescribed in higher doses), and it disclosed that the study was sponsored by Chiesi; that Chiesi hired Premier to conduct the study; and that the physician-authors served as consultants to Chiesi.

After the article was published, Chiesi and Cornerstone issued a press release and distributed promotional materials touting the article’s conclusions. In response, ONY officers wrote letters – several of which were published, although after the complaint had been dismissed – to the *Journal of Perinatology* rebutting the article and requesting a retraction. The article’s authors, in turn, published responsive letters.

In December 2011 ONY sued Chiesi and Cornerstone in the Western District of New York for violations of the Lanham Act and New York General Business Law § 349 and for tortious interference with prospective economic advantage, and it sued all defendants, including the article authors, for injurious falsehood (i.e., trade libel). ONY’s theory was that the article was intentionally deceptive and misleading and therefore that its publication and distribution constituted false advertising.

ONY claimed the article contained five erroneous factual statements concerning the relative

effectiveness of Curosurf and Infasurf: (1) that Infasurf “was associated with a 49.6% greater likelihood of death” than Curosurf; (2) that the Curosurf treatment for RDS was associated with a significantly reduced likelihood of death compared with Infasurf; (3) that the authors’ model found Infasurf to be associated with a significantly greater likelihood of death than Curosurf; (4) that the study showed a significantly greater likelihood of death with Infasurf than Curosurf; and (5) that Curosurf was associated with lower mortality after adjusting for various patient and hospital characteristics (asserted in the concluding sentence).

ONY’s main methodological objection to the article was that it failed to mention the length-of-stay data, which, ONY claimed, was intended to obscure the fact that that infants treated with Curosurf had a greater ex ante chance of survival than those treated with Infasurf. According to ONY, including the length-of-stay data would have made clear to readers that the different results stemmed from differences in the groups of patients treated, not from differences in the effects of the drugs. ONY also objected to the failure to cite articles that reached different conclusions and to the use of retrospective data, which allegedly gave rise to “selective distortion,” and to the fact that Chiesi and Cornerstone paid Premier to collect data demonstrating their product’s effectiveness. The district court granted the defendants’ motions to dismiss. The court found the article to be non-actionable opinion because it “reflects the facts on which the authors’ conclusions are based,”⁴ and it further found that the disclosures, under the heading “Conflict of Interest,” that the study was sponsored by Chiesi and that the authors had ties to Chiesi indicated to a reasonable reader that the article represented the authors’ opinions.⁵ The court denied ONY’s cross-motion to amend the complaint as futile.

Second Circuit Ruling

On appeal, the Second Circuit, in a decision by Judge Gerard E. Lynch, first addressed the Lanham Act claims based on publication of the article. Section 1125(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a), provides a civil cause of action for a “false or misleading description of fact, or false or misleading

representation of fact” in interstate commerce. The court noted that the Act covers conduct that would be protected by the First Amendment but for its false and misleading character and that precedent requires particular care in applying defamation and related causes of action to academic works. In particular, the Constitution protects statements of opinion, although, as the court noted, “the line between fact and opinion is not always a clear one.”⁶

The court observed that academic scientific discourse “poses several problems” for the fact-opinion framework, notably that the conclusions presented in scientific journal articles are presented as being capable of objective verification or refutation. In relation to scientific discourse about matters that are subject to disagreement, the court stated that the “traditional dividing line between fact and opinion is not helpful.”⁷ It pointed out that although scientific hypotheses are in principle matters of verifiable “fact,” for First Amendment purposes they are “more closely akin to matters of opinion, and are so understood by the relevant scientific community.”⁸ The court explained that “it is the essence of scientific method that the conclusions of empirical research are tentative and subject to revision, because they represent inferences about the nature of reality based on the results of experimentation and observation.”⁹

Implicitly invoking the “marketplace of ideas” paradigm,¹⁰ the court bolstered its reasoning by noting that conclusions presented to the scientific community in peer-reviewed journals are available for other scientists to attempt to replicate, analyze, refute, question, etc. Research in novel areas “may be highly controversial and subject to rigorous debate by qualified experts,” and courts are “ill-equipped to undertake to referee such controversies.”¹¹ Instead, “the trial of ideas plays out in the pages of peer-reviewed journals, and the scientific public sits as the jury.”¹² For support, the court quoted *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994), for the proposition that scientific controversies “must be settled by the methods of science rather than by the methods of litigation,” as well as several district court decisions to the same effect. It is relevant, the court pointed out, that ONY had not alleged that the data

presented were fabricated or fraudulent but rather that the inferences drawn from the data were wrong and that other variables should have been included. When the conclusions reached are presented with an accurate description of the data and methods used, the court observed, the validity of their conclusions “may be assessed by other members of the relevant discipline or specialty.”¹³

The court held, therefore, that “to the extent a speaker or author draws conclusions from non-fraudulent data, based on accurate descriptions of the data and methodology underlying those conclusions, on subjects about which there is legitimate ongoing scientific disagreement,” the statements in the article are not actionable under the Lanham Act, N.Y.G.B.L. § 349, or New York’s common law of injurious falsehood (product disparagement or trade libel).

As for ONY’s claim that Chiesi and Cornerstone tortiously interfered with its prospective economic advantage by touting the article’s finding for promotional purposes, the court held that in the absence of any allegation that they misstated the article’s conclusions, the claim was not viable. The court therefore affirmed the dismissal of the complaint in its entirety.

Discussion

ONY represents a specialized application of the settled libel-law principle that opinions based on true, disclosed facts are not actionable.¹⁴ The court implicitly adopted the view that, at least in cases where no deliberate wrongdoing is alleged, the refutation of faulty scientific findings “depend[s] ... not on the conscience of judges and juries, but on the competition of other ideas.”¹⁵ The court’s holding that accurately reported, non-fraudulent scientific findings are not actionable could apply to litigation involving scientific or technical studies relating to a wide range of products or services that implicate unsettled questions as well as to litigation over expert analysis in controversial – and high-stakes – areas such as art authentication, where millions of dollars can ride on determining whether a work was painted by Pollock or by a skillful imitator.¹⁶

The court's refusal to inject itself into a matter of legitimate scientific debate drew upon the "marketplace of ideas" framework that has come to define our First Amendment jurisprudence. The court noted that academic freedom is a "special concern of the First Amendment,"¹⁷ as did the district court in *Gordon and Breach*, where Judge Leonard B. Sand wrote that debate in academic journals, like classroom teaching, is "peculiarly" part of the "marketplace of ideas" and thus near the core of the First Amendment.¹⁸ *ONY* is consistent in this respect with the Supreme Court's embrace of the "marketplace of ideas" concept, as recently expressed most explicitly in Justice Anthony Kennedy's plurality opinion in *United States v. Alvarez*, in which he quoted Brandeis and Holmes and wrote that in a free society "[t]he response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth" and that "[t]he remedy for speech that is false is speech that is true."¹⁹

The *ONY* court thoughtfully navigated the intersection of product promotion and academic freedom in a manner that allows breathing room for responsible commercial use of good-faith scientific and technical research, in keeping with fundamental free-speech principles. At the same time, by carefully limiting the circumstances in which scientific studies will qualify as protected opinion, the court left room for claims to go forward over assertedly manipulated data or false or misleading descriptions of research findings, such as in the context of pharmaceutical detailing.

To be sure, the "marketplace of ideas" may be more satisfying in theory than in fact. The potential harm from an erroneous study can be difficult to promptly and effectively counter – especially in our age of instantaneous electronic communications, in which falsehoods can rapidly take root and be hard to neutralize or eradicate. The market impact of effective promotion of faulty comparative product analysis can be substantial and long-lasting even if the study's flaws are readily apparent to experts in the field. As the facts of *ONY* illustrate, logistics often do not favor the rapid rebuttal that the market requires; *ONY*'s rebuttal letters were not published in the *Journal* until after the district court had already

dismissed its lawsuit. But in *ONY* the Second Circuit wisely declined to endorse court-imposed liability as a remedy for the shortcomings of informed scientific debate.

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- 1 2013 WL 3198153 at *5.
 - 2 859 F. Supp. 1521 (S.D.N.Y. 1994), *aff'd after trial*, 166 F.3d 438 (2d Cir. 1999).
 - 3 Clifton Leaf, *Do Clinical Trials Work?*, N.Y. TIMES (SUNDAY REVIEW), July 14, 2013, at 6.
 - 4 No. 11–CV–1027S, 2012 WL 1835671, *10 (W.D.N.Y. May 18, 2012).
 - 5 *Id.* at *11.
 - 6 2013 WL 3198153 at *4.
 - 7 *Id.* at *6.
 - 8 *Id.*
 - 9 *Id.* at *5.
 - 10 The Supreme Court has stated that the First Amendment creates an open marketplace where ideas ... may compete without government interference." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008). *See also Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies ... the remedy to be applied is more speech, not enforced silence."); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").
 - 11 *ONY*, 2013 WL 3198153, at *5.
 - 12 *Id.*
 - 13 *Id.* at *6.
 - 14 *See, e.g., Rinaldi v. Holt, Rinehart & Winston Inc.*, 42 N.Y.2d 369, 380 (1977) ("Opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth.").
 - 15 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).
 - 16 Vol. 10, No. 1 of the IFAR JOURNAL (2008) is dedicated to scientific analyses of a controversial group of then-recently discovered paintings attributed to Jackson Pollock, including analysis of whether pigments and

binders in the paintings existed during Pollock's lifetime. More recently, forensic analysis of paint pigments has been cited in lawsuits brought against the now-defunct Knoedler gallery and its former president for selling allegedly fake Abstract Expressionist paintings. See Michael Shnayerson, *A Question of Provenance*, VANITY FAIR (May 2012), at <http://www.vanityfair.com/culture/2012/05/knoedler-gallery-forgery-scandal-investigation> (“[A]ll the works may be fakes, although no one can yet say, with absolute certainty, whether any are: even forensic tests can be flawed.”); Patricia Cohen, *Second Suit Accuses Knoedler Gallery of Selling Fake Art*, N.Y. TIMES, Mar. 28, 2012, at <http://www.nytimes.com/2012/03/29/nyregion/knoedler-gallery-is-accused-of-selling-fake-rothko-painting.html> (“A forensic analysis of the painting commissioned by the De Soles found that some of the materials and markings were ‘inconsistent and irreconcilable with the claim’ that the painting was done by Rothko, according to the suit, which also names Ms. Freedman as a defendant.”).

- 17 ONY, 2013 WL 3198153, at *4 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603(1967)).
- 18 *Gordon and Breach*, 859 F. Supp. at 1541 (citations omitted).
- 19 132 S. Ct. 2537, 2550 (2012).

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