

**IM 450-01**  
**Intellectual Property Law and New**  
**Media**  
**Fall 2022**  
**Oct. 18, 2022**  
**Day 15**

**Tort Liability in New Media,**  
**Non-disparagement Covenants/Clauses,**  
**SLAPP suits & Anti SLAPP law**  
**&**  
**Mr. Baron on Tort Cases**

# **Tort Liability in New Media**

# **Content is King – But it can get you in trouble.**

- **New media allows users and publishers to interact and share content.**
- **But, who is legally responsible and for what content?**

# **Where Can You Find User Generated Content (UGC)?**

- **UGC has been around for a long time.**
  - **Examples: Pillsbury Bake-Off contests, op-ed page of newspaper, etc.**
- **But, new media UGC is widely disseminated in various media outlets and does not typically receive editorial review.**

# **What Tort Liabilities Can Publishers Face With User Generated Content?**

- **Defamation**
- **Obscenity**
- **Right of Publicity/Right of Privacy**
- **Infliction of Emotional Distress**
- **Civil Rights (e.g., Fair Housing Laws)**

# **What Protections Exist to Shield Internet Publishers From Tort Liability?**

- **Section 230 of the Communications Decency Act (CDA)**
  - **“No provider or user of an interactive computer service (ICS) shall be treated as the publisher or speaker of any information provided by another information content provider.”**

**47 U.S.C. § 230(c)(1).**

# What Protections Exist to Shield Publishers From Liability? *(cont'd)*

- Section 230 encourages (but does not require) websites to filter or review submissions. “**No provider** or user of an interactive computer service **shall be held liable** on account of any action voluntarily taken **in good faith** to restrict access to or availability of material that the provider or user considers to be **obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable**, whether or not such material is constitutionally protected...” 47 U.S.C. § 230 (c)(2).

- Often, charges are dismissed due to protections afforded publishers, (see below), but sometimes, costly litigation has preceded application of the protection. For example:
- [Website Initially Denied 230 Dismissal But Gets It on Appeal--Shiamili v. Real Estate Group](#)

Here a “rouge” district judge finds for plaintiff, then the circuit appeal overrules on 230 grounds.

# What Protections Exist to Shield Publishers From Liability? *(cont'd)*

- Exceptions/When Liability May Apply:
  - No immunity for violation of federal criminal laws,
  - Intellectual property violations,
  - Right of publicity claims (in some jurisdictions), and
  - Applicability of the *Electronic Communications Privacy Act of 1986* or similar state laws.

# Potential exceptions to CDA 230 Immunity

- *Jane Doe v. Friendfinder Network*
  - Federal District Court ruled that the immunity provisions in Section 230 of the CDA do not bar a state law claim for a violation of certain intellectual property rights set out within the state law of the jurisdictional state, including (and specifically in this case) a person's "right of publicity."
  - This ruling opens the door to right of publicity claims based on state laws that might not be overruled by Section 230 of the CDA

# **Non-disparagement Covenants/Clauses**

# Speech-restricting provisions as pre-tort filters

- Remember: Defamation deals with publishing FALSE information that is harmful to reputation. The law prohibits defamation without the need for restrictive covenants.
- But what about TRUE speech that casts someone in a bad light, but would NOT be ruled as illegal speech (because it is true AND because others need to know)?
- **Speech-restricting contract provisions** have long been the practice, including (especially) in the tech sector.
- Increasingly in the news, especially in light of #MeToo..

# Non-Disclosure Agreements and the #MeToo Movement

- The #MeToo Movement has turned a spotlight on confidential settlement agreements and how they prevent victims from speaking out.
- The controversy over confidentiality agreements is likely to come up in a wide array of contexts.
- Although media coverage has largely referred to “non-disclosure” provisions as a single thing, the phrase refers to several different contractual provisions that might restrict a party’s ability to speak. Understanding the ways in which those different provisions work can put dispute resolution professionals in a better position to help parties navigate the available options.

# Settlement agreements – so many different provisions

- **Non-Disclosure Provision.** (Can't say anything)
- **Non-Disparagement Provision.** (Can't say negative things)
- **Non-Cooperation Provision.** (Can't help other victims)
- **Affirmative Statements.** (If asked, you must say . . . .)
- [https://www.americanbar.org/groups/dispute\\_resolution/publications/dispute\\_resolution\\_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/](https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/)

# How Silicon Valley silences sexual harassment victims

- Tech workers often sign non-disclosure agreements promising not to reveal trade secrets, but in addition to those standard NDAs, some lawyers say Bay Area companies also are using non-disparagement clauses to gag employees who experience harassment. Add that to the reluctance of many women to speak up for fear of reprisals, and experts say the vast majority of sexual harassment stays in the shadows — making meaningful change difficult.
- “Those types of clauses can prevent people from coming forward, and end up covering up sexual harassment,” said Maya Raghu, director of workplace equality for the National Women’s Law Center in Washington, D.C. “And in many cases cover up serial harassment and serial harassers within a company or within an industry ... It’s a huge problem.”
- <https://www.mercurynews.com/2017/07/16/how-silicon-valley-silences-sexual-harassment-victims/>

# **SLAPP suits & Anti SLAPP laws**

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- **Strategic lawsuit against public participation (SLAPP) intends to censor, intimidate, and silence critics by threatening litigation, then carrying it out in order to “wear out” the accused resources (in order to shut them up\_**
  - **Typically, the plaintiff might not expect to win a lawsuit. They want to scare and/or wear out the person who wants to write/has written a negative review.**
- **Many states (including Illinois) have anti-SLAPP laws that may help protect freedom of speech (especially in the online-review environment).**
  - **Anti-SLAPP laws may allows a defendant to file a motion dismiss the case and thereby protect their free-speech rights.**
  - **Some jurisdictions forbid speech-restrictive covenants that forbid customers/clients from posting negative reviews.**
  - **Some states have neither anti-SLAPP nor anti-speech-restrictive covenant laws.**
- **Debate continues as to which (SLAPP suits & Anti SLAPP laws) better serve free speech, protect against defamation, and promote fairness.**

# Tort Law – A Lawyer's Perspective

# Big Data meets Right of Publicity

- *La Fronza v. PeopleConnect, Inc.* 1:21-cv-00280 (N.D. Ill.)
  - What is a class action lawsuit?
  - Who benefits from a class action lawsuit?
  - What are the elements to meet a class action?
    - Numerosity
    - Common questions of law or fact
    - Typicality of claims and defenses
    - Adequacy of representative parties

# Big Data meets Right of Publicity

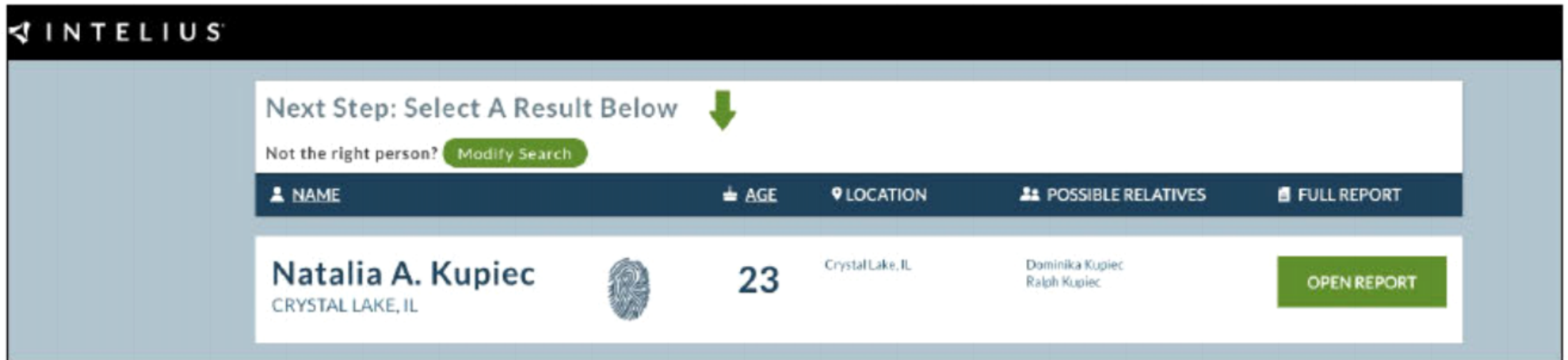
- *La Fronza v. PeopleConnect, Inc.* 1:21-cv-00280 (N.D. Ill.)
  - Key provisions of the Illinois Right of Publicity Act (IRPA)
    - "Commercial purpose" means the **public use or holding out of an individual's identity** (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising.
    - A person may not use an individual's identity for commercial purposes during the individual's lifetime without having obtained **previous written consent** from the appropriate person or persons specified in Section 20 of this Act or their authorized representative.
    - A person who violates Section 30 of this Act may be liable for either of the following, whichever is greater:
      - (1) **actual damages, profits derived** from the unauthorized use, or both; or
      - (2) **\$1,000.**

# Big Data meets Right of Publicity

- ***La Fronza v. PeopleConnect, Inc.* 1:21-cv-00280 (N.D. Ill.)**
  - **Can companies harvest publicly available information about me, package that information into a database and then use my name as a trigger to sell subscriptions to access the database?**
  - **Is that a use of my name or likeness for a commercial purpose?**
  - **Do data companies need to gain express consent from the people whose names appear in their database?**

# Big Data meets Right of Publicity

- *La Fronza v. PeopleConnect, Inc.* 1:21-cv-00280 (N.D. Ill.)
  - How does people search work?



The screenshot shows the Intelius website interface. At the top, the Intelius logo is visible. Below it, a white box contains the text "Next Step: Select A Result Below" with a green downward arrow. Below this, there is a link "Not the right person?" and a green button labeled "Modify Search". A dark blue header bar contains five categories: "NAME", "AGE", "LOCATION", "POSSIBLE RELATIVES", and "FULL REPORT". Below this header, a search result for "Natalia A. Kupiec" is displayed. The result includes her name, location "CRYSTAL LAKE, IL", a fingerprint icon, her age "23", her location "Crystal Lake, IL", and a list of possible relatives: "Dominika Kupiec" and "Ralph Kupiec". A green button labeled "OPEN REPORT" is located to the right of the result.

NAME	AGE	LOCATION	POSSIBLE RELATIVES	FULL REPORT
Natalia A. Kupiec CRYSTAL LAKE, IL	23	Crystal Lake, IL	Dominika Kupiec Ralph Kupiec	OPEN REPORT

# Big Data meets Right of Publicity

- ***Butler v. Whitepages*, 19-cv-04871 (N.D. Ill.)**
  - First case to settle in the country.
  - Class of Illinois and Ohio residents have settled.
  - Illinois class residents will receive a minimum of \$40 per claimant.
  - If 10% to 20% claim rate, Illinois class will receive \$125-\$245 each.
  - Total settlement fund = \$4.07 million.
  - Plaintiffs's lawyers will get approximately 1/3.

# Big Data meets Right of Publicity

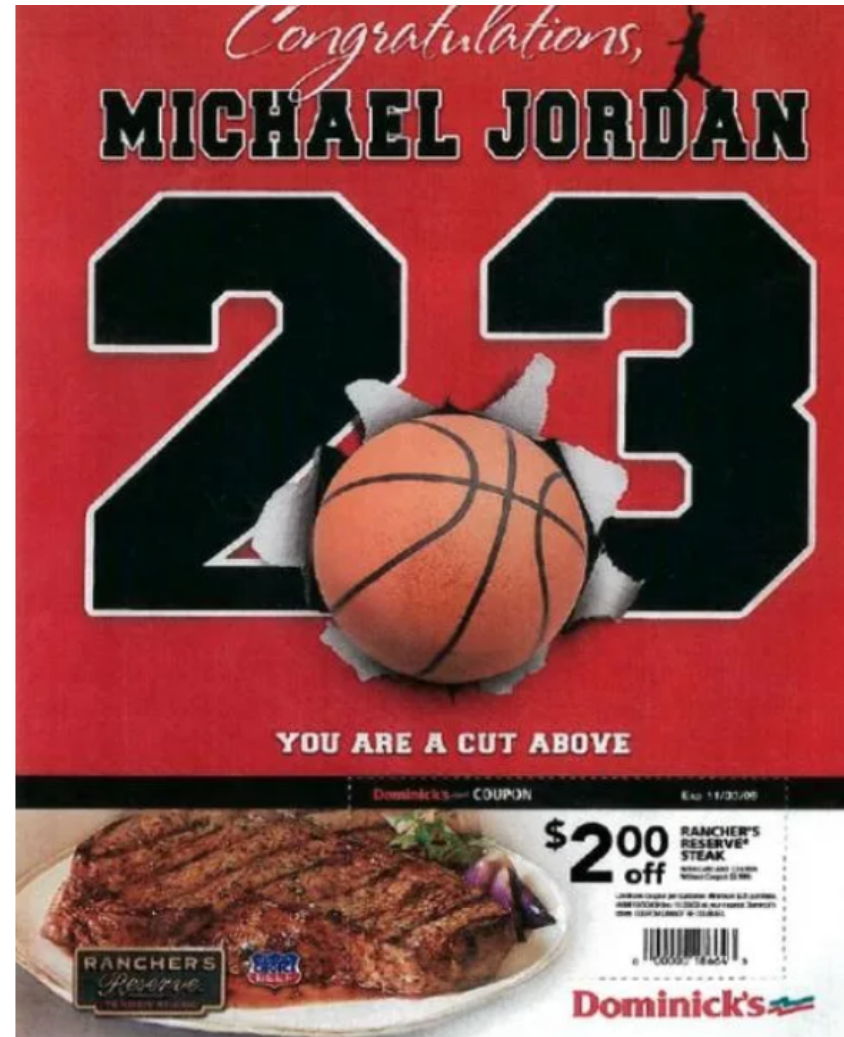
- *La Fronza v. PeopleConnect, Inc.* 1:21-cv-00280 (N.D. Ill.)
  - How does people search work?

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# Anatomy of a Right of Publicity Suit

Jordan v. Dominick's



# Anatomy of a Defamation Suit

Van Horne v. Muller



# Take-Aways

- **Big Data is the Next Frontier for Right of Publicity Suits**
- **Celebrities (but not only celebrities) have rights of publicity and the right to protect their reputations from false statements.**
- **Split second decisions about content can lead to years of litigation.**
- **Full blown litigation – from beginning to end – can take 5+ years and costs millions of dollars.**
- **It's hard to beat sports heroes in their home “court.”**