Summer Edition 2021

A newsletter brought to you by the Sports Law Group at Proskauer.

Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. *Three Point Shot* brings you the latest in sports law-related news and provides you with links to related materials. In this issue, we feature contributions from our talented group of summer associates. Thanks to Andrew K. Johnson, Benjamin G. Childress, and William S. Wyman for their hard work on these articles.

Your feedback, thoughts and comments on the content of any issue are encouraged and welcome. We hope you enjoy this and future issues.

Edited by **Robert E. Freeman**

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Two, Four, Six, Eight, SCOTUS Sets the Record Straight…in Cheerleader Speech Case

Whether foreseeable or ironic, the impassioned words (or F-bombs) of a dejected junior varsity cheerleader recently brought a rather important First Amendment question before the Supreme Court. That is, whether a public school can lawfully remove a student from an extracurricular activity for profanity-laden social media posts transmitted to fellow students off school grounds on a Saturday. By a vote of 8 – 1, the Court upheld a Third Circuit majority ruling that the defendant Mahanoy Area High School's decision to suspend a then 14-year-old, plaintiff Brandi Levy ("Levy"), for an expletive-loaded rant on social media expressing her irritation with the school's cheerleading team violated her right to free expression. (*Mahoney Area School Dist. v. B.L.*, No. 20-255, 594 U.S. ___ (June 23, 2021)).

In 2017, Levy came up short in try-outs for her Pennsylvania high school's varsity cheerleading team, landing on the JV team. Clearly unhappy with the decision, that weekend she turned to social media to gripe while in a local convenience store located off school grounds. However, as the Court noted, she didn't voice her frustration "with good grace"; instead, she logged into social media to make several posts, including one rather un-cheery image of her and a friend flipping the bird, with a caption that read: "F-- school, F-- softball, F-- cheer, F-- everything." Levy's posts on an ephemeral messaging app were designed to be viewed by her social media "friend" group and disappear after a short time. However, Levy's cathartic posts didn't quite disappear from memory, as one recipient took a screenshot of Levy's rants and surreptitiously shared it with coaches and school administration. The result was that Levy was suspended from the cheerleading squad for a year.

Not to be defeated, Levy and her parents filed suit against the school in Pennsylvania district court. With the First Amendment issues up in the air, Levy stuck the dismount. The District Court found that Levy's statements were constitutionally protected by the First Amendment and granted Levy's request for an injunction ordering the school to reinstate Levy to the cheerleading squad because her posts did not cause *substantial disruption* at the school, citing the landmark *Tinker* precedent that held that students do not "shed their constitutional rights to freedom of speech or expression," even "at the school house gate," and that a public high school could not constitutionally prohibit a peaceful student political demonstration consisting of "pure speech" on school property during the school day. Yet, in *Tinker*, the Supreme Court had stated that schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."

On appeal, a Third Circuit panel affirmed the district court's decision but found *Tinker* not applicable to this case because Levy's speech took place off campus and thus the school could not discipline her for engaging in a form of free speech. The school district then filed a petition for certiorari, asking the Supreme Court to decide whether the *Tinker* standard "applies to student speech that occurs off campus."

Refusing to draw a bright line, the majority stated that it did not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus, as the school's regulatory interests "remain significant in some off-campus circumstances." While the Court declined to outline a precise list of school-related off-campus activities that could be properly regulated by a school to prevent substantial disruption or protection of the school community, Justice Breyer did note that, generally speaking, the leeway the First Amendment grants to schools in light of their special characteristics is "diminished" when it comes to off-campus protected speech.

Ultimately, the Court ruled that Levy's statements, albeit vulgar, were protected speech. The Court found that because the posts were made outside of school hours and off school grounds, sent to a targeted audience, and did not specifically mention the school's name or target a member of the school community, and since the school's interest in teaching good manners and its evidence of disruption or loss of team morale was unconvincing, the posts at issue did not create a substantial interference that would overcome Levy's right to free expression under *Tinker*.

As this case showed, beyond the (potential) disturbance a JV cheerleader may have caused with a less-than-spirited post about her school lies the constitutional right to free speech. In closing, Breyer puts aside the crude speech and becomes a cheerleader for team SCOTUS on the importance of First Amendment rights: "[W]e cannot lose sight of the fact that, on what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated."

Premier League Scores a Hat Trick in Ireland's High Court

One of the largest soccer leagues in the world continues to run up the score against illegal streaming sites. On June 22, 2021, The Football Association Premier League Limited (the "Premier League"), obtained an extension of a blocking order from the High Court of Ireland that allows the Premier League to compel Irish internet service providers ("ISPs") to undertake certain enhanced measures to block the IP addresses of servers transmitting illegal streams of Premier League football matches during the 2021/2022 Premier League season. (*The Football Association Premier League Ltd v. Eircom Ltd.*, [2021] IEHC 425 (June 22, 2021)). This ruling comes after the Premier League successfully obtained the first live blocking injunction in Ireland in 2019. Subsequently, the Premier League was able to obtain an extension of the blocking order for the remainder of the 2019/2020 season and the 2020/2021 season. Authority for these blocking orders comes from, among other sources, Article 8(3) of Directive 2001/29/EC (Copyright Directive), which states, in part: "Member states shall ensure that rightholders are in a position to apply for an injunction against intermediaries

whose services are used by a third party to infringe a copyright or related right."

The order compels each defendant – Eircom Limited, Sky Ireland Limited and Sky Subscribers Services Limited, Virgin Media Ireland Limited, and Vodafone Ireland Limited (collectively, the "Defendants" or "Irish ISPs") – to block the IP addresses of pirate servers streaming Premier League matches as reported to the Irish ISPs by the Premier League's technology partners on or around match time. Notably, no defendant opposed the order, highlighting the culture of teamwork in fighting piracy the Premier League has developed with European ISPs.

This activity in the Irish High Court is part of an ongoing campaign by the Premier League against illegal streams of their matches. As we outlined in the April 2017 edition of *Three Point Shot*, the effort kicked off in earnest in 2017, when the High Court of Justice in England, Chancery Division, granted an injunction requiring various English ISPs to block illegal streams at the Premier League's request. Groundbreaking for its time, unlike previous injunctions, it allowed for the blocking of IP addresses of suspected pirate servers at the ISP level and in real-time.

Following their success in England, the Premier League moved on to the next round and sought to mirror this strategy in Ireland. The initial 2019 ruling cites heavily to the blocking order first used in England and its success. In the Irish court ruling, Justice Haughton stressed the effectiveness of these dynamic blocking orders, noting that academic literature shows that such orders reduce access to illegal streaming sites by 90%. Similar to the English blocking orders, the Irish blocking order also contains safeguards to address the issue of "over-blocking," or interference with legitimate streams. For example, the blocking measures are halted after the matches have ended and the Irish ISPs and others are permitted to make an application to the court for relief if they believe legal material is being blocked; the blocking order also contains an "emergency brake" provision that the Irish ISPs can use, in certain circumstances, to suspend certain blocking measures if it is reasonably necessary.

While the Premier's League's precise game plan for blocking pirate servers is undisclosed, the basics are straightforward. The Premier League employs anti-piracy partners who identify servers associated with unlicensed live streams at or during match time. These partners report the IP addresses to the Irish ISPs who are then able to block the servers in real-time, while matches are underway. This tactic has proven successful, but pirate streaming services invariably find ways to circumvent these methods with the use of VPNs and other tactics. Anti-piracy measures are often a cat-and-mouse game and are not foolproof, yet such blocking orders are designed not only to shut down illegal streaming at the source but also to seriously discourage users from turning to illegal streaming by making it as inconvenient and unreliable as possible (as compared with the viewing experience on lawful channels). This reality has led the Premier League to refine their strategy further and is why the most recent blocking injunction also allows them to pierce the pirate servers' defense by using undisclosed, increasingly sophisticated anti-piracy techniques.

Any winning team will tell you that to continue to be successful, you must adapt to your opponent. So far, the Premier League has done this by making such blocking orders more dynamic year-to-year to keep up with technological changes. Based on their success in England and Ireland, it seems that, wherever they take the pitch, they will have success tackling unlicensed streaming.

No Wiretap Liability for Barstool Sports' Recorded Interview under an Assumed Identity

"The call on the trial floor was that there was no interception. After further review, the ruling of the court stands." This encapsulates the recent decision of the Supreme Judicial Court of Massachusetts, which also marked the culmination of a longtime dispute between Barstool Sports, Inc. ("Barstool") and Joseph Curtatone, the mayor of Somerville, Massachusetts. (*Curtatone v. Barstool Sports, Inc.*, No. SJC-13027 (Mass. June 14, 2021)). The case centered around Mayor Curtatone's allegation that Kirk Minihane ("Minihane"), a Barstool

employee, and Barstool itself, violated the Massachusetts wiretap act (Mass. General Laws c.272 § 99) by illegally intercepting Curtatone's communications when Minihane conducted a recorded interview with the Mayor under an assumed name. The court handed down its decision in mid-June, but the disagreement started years before.

Barstool Sports is a sports and pop culture media company originally founded in 2003 as a free weekly newspaper, but which soon grew into a well-known brand with a presence on the web, podcasts and in streaming video. As the Massachusetts Supreme Judicial Court noted, it has a "reputation for publishing crass content." In 2019 a Boston newspaper published an article about Barstool and days later Mayor Curtatone chimed in with critical statements about the media company. Barstool responded with unkind words about Mayor Curtatone. Thus, the rivalry between Curtatone and Barstool was born.

A few days after the parties' online spat, in early June 2019, Minihane reached out to Mayor Curtatone with a request for an interview. This long shot attempt by Minihane was rejected immediately by Curtatone. On June 5, 2019, Minihane again reached out to the City of Somerville's Public Information Officer, but this time falsely identifying himself as a reporter for a major Boston newspaper requesting to interview the Mayor. This attempt proved successful, and Minihane, posing as a major newspaper reporter, conducted an interview with Mayor Curtatone on June 6, 2019. Before conducting the interview, but still posing as a newspaper reporter, Minihane received permission from Mayor Curtatone to record the conversation (and later posted it on Barstool's website). However, Mayor Curtatone remained unaware that the interviewer was actually Minihane. Shortly after the interview hit Barstool's website, Mayor Curtatone brought suit against Minihane and Barstool, alleging that they had violated the Massachusetts wiretap act.

In Massachusetts, it is unlawful to willfully "intercept" any wire or oral communication, absent an exception; "interception," as defined by the wiretap act, "means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication." Mass. General Laws c.272 § 99 B 4. The state wiretap act provides a cause of action to any aggrieved person whose oral or wire communications were "intercepted, disclosed or used…." Under Massachusetts precedent, to be successful in his claim against Minihane and Barstool, the court stated that Curtatone had to prove: (1) that the interception was "secretly" made; and (2) without prior authority by all parties. As noted by the court, it first considers whether the alleged "interception" was actually made in secret; if it determines that the conversation was not secret, then such recording does not constitute an "interception" within the meaning of the statute and it will not look to the second part of the test.

Mayor Curtatone made two arguments in support of his position. He first contended that the wiretap act requires the parties to a recorded conversation to give what he referred to as "actual consent," which he argued was impossible to give without knowing the true identity of the interviewer. Second, Mayor Curtatone argued that Minihane secretly heard and recorded the conversation because, from the Mayor's point of view, Minihane was hearing and recording a conversation between Curtatone and a newspaper reporter. In other words, Curtatone argued that because he thought he was speaking to a specific newspaper reporter, the conversation was secret to anyone other than Curtatone and the reporter Curtatone thought was conducting the interview.

On the other side of the ball, Minihane and Barstool argued that the conversation was not recorded in secret. According to Barstool and Minihane, it would be impossible for somebody who is in fact a party to the conversation to be listening to it in "secret," regardless of whether that person is lying about their identity. Further, Barstool argued that Curtatone's consent to be recorded foreclosed any argument that the recording was made in secret.

On January 15, 2020, a Massachusetts Superior Court granted Barstool and Minihane's motion to dismiss, finding that Mayor Curtatone had actual knowledge of the recording of the telephone call and thus, the call was neither secret nor an "interception" under the state wiretap act.

On appeal, the Massachusetts Supreme Judicial Court ultimately agreed with the lower court that the conversation was not illegally intercepted. In the court's reasoning, Curtatone's agreement to be recorded doomed the wiretap act claim, even given the misleading nature of the interview. As the high court explained: "The identity of the party recording the communication or, indeed, the truthfulness with which that identity was asserted is irrelevant; rather, it is the act of hearing or recording itself that must be concealed to fall within the prohibition against 'interception' within the act." Because of this, the court never considered the issue of whether Curtatone authorized Minihane to listen to the conversation.

Curtatone, unfortunately for him, found himself playing a game that he had not prepared for – the dispute itself, particularly the dismissal of claims, merely produced more content for Barstool to post on its media properties. Mayor Curtatone, however, would likely prefer another event like this not to happen to him; perhaps he could suggest that all of his future interviews be conducted over FaceTime.

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