The Joke Is on Your Client

An Analysis of Liability Coverage and Defenses for the Creators of Online Parody Accounts

By Steven A. Bader

Understanding the potential liability coverage for litigation stemming from proliferating social media satire or hijinks and the procedural and substantive defenses will put defense attorneys ahead of the curve.

High school pranks no longer consist of whoopee cushions, "kick me" signs, and fleeting moments of embarrassment. Instead, modern teenagers create fake, and often offensive, social media accounts that appear to be authored by classmates or authority figures. In fact, the practice is prevalent enough that Twitter requires satirists to use designations such as "not" to ensure a parody or spoof account is viewed as a joke. Twitter Parody, Commentary, and Fan Account Policy, https://support.twitter.com/articles/106373-parody-commentary-and-fan-account-policy#

(last visited Jan. 19, 2015). Unlike more traditional juvenile jokes, Internet postings are quickly, and often permanently, disseminated to the masses. As a result, the subjects of these fictitious social media accounts often fail to see the humor and instead see defamation, invasion of privacy, and infliction of emotion distress.

For example, an assistant middle school principle in Oregon sued several students who created a fictitious social media account in the administrator's name. *Matot v. C.H.*, 975 F. Supp. 2d 1191 (D. Ore. 2013). A teenager in Illinois brought suit against four classmates for their creation of a fake Facebook account that published racist and sexually explicit commentary. *Teens Sued for Fake Facebook Profile, Ki Mae Heussner*, ABC News, Sept. 29, 2009, http://abcnews.go.com/Technology/AheadoftheCurve/teens-sued-fake-facebook-profile/story?id=8702282 (last visited Feb. 26, 2005). And the mayor of Sheboygan, Wisconsin, threatened legal action against a high school student who created a satirical Twitter account that posted political gaffes that appeared to be authored by the mayor. Bruce Vielmetti, *Sheboygan Mayor Threatens Lawsuit Over Fake Twitter Account*, Milwaukee Journal Sentinel, Nov. 21, 2011, http://www.jsonline.com/blogs/news/134222703.html (last visited Feb. 26, 2015).

This type of litigation will likely increase as the use of social media continues to grow

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among youth. The aim of this article is twofold: (1) to educate insurers and coverage counsel on how to evaluate whether an insured has liability coverage for a claim that stems from the creation or use of a "parody account"; and (2) to assist defense counsel to identify procedural and substantive defenses that may be available in these suits. As a caveat, the article does not analyze every potential coverage issue that could arise in these scenarios, nor does it offer a comprehensive view of the various defenses that may be viable. Rather, the purposes of the article are to discuss some common themes that will arise in this type of litigation and to assist lawyers as they develop arguments to support their clients' positions in these cases. To begin, a "parody profile," a term originating with Twitter and also known today as a "social parody profile" or as a "parody account," has become a general term that refers to a social media account created and used to impersonate, to lampoon, or to parody others.

Online Parody Suits—General Liability Insurance Coverage Principles

Satirists who are sued for their online activity will typically tender defense of the suits to their homeowner's insurance carriers. Yet, at this point, there is no case law on whether an insurer is obligated to provide coverage for these types of suits. As is always the case, coverage will depend on the allegations, the policy language, and relevant case law. Attorneys should be familiar with the fundamental issues presented by these scenarios, and they should also become acquainted with proposed revisions to the language of personal liability umbrella policies (PLUP) that will affect coverage in these cases.

The Basics of an "Occurrence"

A standard homeowner's insurance policy provides liability coverage for bodily injury that arises out of an "occurrence." An occurrence is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result(s) in bodily injury or property damage." However, even if an "occurrence" is present, the typical policy excludes coverage for the intentional acts of an insured.

Harm Caused by a Statement Can Be an Accident

The term "accident" in an insurance policy means "an event which takes place without one's foresight or expectation." Black's Law Dictionary, Accident (9th ed. 2009). Courts generally recognize that because publishing requires deliberate action by an author, publication-induced damages are not accidental. *See Stellar v. State Farm*, 69 Cal. Rptr.3d 350, 354 (Cal. Ct. App. 2007). Nevertheless, the question becomes trickier if an injury caused by a publication or communication is unintentional. For example, some courts have found unintended harm caused by jokes and innuendo is an "accident" for purposes of insurance coverage. *See Maine State Academy of Hair Design, Inc. v. Commercial Union Ins. Co.*, 699 A.2d 1153, 1157 (Me. 1997).

Whether the creation and use of a parody account is an "accident" is debatable. On the one hand, the formation and use of a parody account requires deliberate and intricate action by the author. It is distinct from an off-hand joke or an inappropriate comment. On the other hand, parodies are generated for humor—not to harm the subject. Hence, the reaction to a parody would arguably be an accident that was not within the author's foresight and expectation. Coverage counsel should explore analogous case law and be prepared to consider authority from other jurisdictions to complete this analysis.

Internet Postings May Expose the Subject to Continuous or Repeated Harm

The "continuous or repeated exposure" language presents a tempting argument for coverage in these cases because this provision broadens the definition of occurrence to include damage caused by a gradual process, as opposed to a sudden event. *U.S. Fidelity and Guar. Co. v. Dealers Leasing, Inc.* 137 F. Supp. 2d 1257, 1263 (D. Kan. 2001). Most parody profiles are a series of comments published over a period of time, each of which theoretically "exposes" a plaintiff to the alleged harm.

At least one federal court has found that whether repeated Internet postings constitute a "continuous or repeated exposure" was a fact question for the purposes of an insurer's request for declaratory relief. *D.B.C. v. Pierson*, Nos. 2:13–CV–00377–LSC, 2:13–CV–00378–LSC, 2014 WL 2155017 (N.D. Ala. 2014). Additionally, some commentators submit that this language will likely trigger coverage for Internet-based defamation. Jim Pattillo, *Coverage Issues for Social Media Defamation in CGL and HO Policies,* Claims Management (Feb. 7, 2012), http://claims-management.theclm.org/home/article/social%20media%20defamation%20insurance%20coverage%20claims (last visited Feb. 26, 2015). Again, it is unsettled whether creating and using a parody-related social media account exposes the subject to "continuous or repeated" harm, but the frequency of social media postings could cause courts to latch onto this language in an attempt to find coverage for an insured.

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Words May Cause Bodily Injury

Most plaintiffs will allege bodily injury in the form of emotional distress that has manifested itself in physical symptoms such as headaches, nausea, and vomiting to trigger coverage in a defendant's insurance policy. Courts have found these allegations constitute "bodily injury" for the purposes of insurance coverage. *See, e.g., Voorhees v. Preferred Mut. Ins. Co.*, 588 A.2d 417, 418 (N.J. 1991). Even so, situations will arise in which a plaintiff does not claim bodily injury and instead alleges embarrassment and anxiety. *See, e.g., Allstate Ins. Co. v. Diamant*, 518 N.E.2d 1154, 1156–57 (Mass. 1988). These allegations will not trigger coverage. Insurers and coverage counsel must examine a plaintiff's alleged injuries caused by a fake social media account

to assess whether the alleged harm falls within the scope of coverage.

The Intentional Acts Exclusion Does Not Eliminate Coverage for Youthful Pranks

The "intentional acts exclusion" will preclude claims for injury that are "expected or intended from the standpoint of the insured." The exclusion negates coverage for willful and malicious actions taken by an insured, but it will not repudiate coverage for a deliberate act taken by an insured if the intent of the insured is not to cause harm. *See, e.g., American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 613 (Minn. 2001).

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Parody accounts that are the product of teenage hijinks will most likely fall outside the scope of an intentional acts exclusion. For instance, in *Ram Mutual Insurance Company v. Meyer*, the court found that a teenager who tripped a classmate as a joke did not intend to injure him, and as a result, the intentional acts exclusion did not defeat his request for liability coverage. 768 N.W.2d 399, 406 (Minn. Ct. App. 2009). *See also Walser*, 628 N.W.2d at 613 (finding high school students who pulled on ankles of classmate as he hung from a basketball hoop did so as part of a joke and not with the intent that the classmate fall and suffer injury).

Whether an intentional acts exclusion will eliminate coverage will depend on the communications at issue. If the publications are mean-spirited and insulting, an insurer may have a strong argument that the context of the insured's actions imply a malicious intent, and the exclusion may apply. To the contrary, if the communications are simply distasteful and juvenile jokes, the intentional acts exclusion will likely not defeat coverage.

In an effort to negate the uncertainty associated with an intentional acts exclusion, some insurers have crafted PLUP language designed to eliminate coverage for tortious online behavior. If a PLUP is involved, counsel should heed the specific language of the policy and its provisions for online behavior.

Online Parody May Be Excluded from Coverage Under a PLUP

A PLUP affords additional indemnity and broadens coverage for an insured. This typically includes coverage for "personal injury" claims such as defamation and invasion of privacy. Recently, insurers have acted to limit coverage for suits that arise from mischief.

The Insurance Services Office, Incorporated (ISO) PLUP form DL 98 01 10 06 contains two exclusions that may eliminate liability coverage for suits premised on the creation of a social media parody. John Browning, Gerald Deneen, & Carol Kreiling, *The Impact of Social Media on Personal Lines* 10, Swiss Reinsurance Corporation (2011), available at http://www.aaic.com/NewsLetter.nsf/0/91AF64D06A33C3AE8625796C0056CF2A/$File/Impact%20of%20Social%20Media%20on%20Personal%20Lines.pdf. First, the form excludes coverage for injury "[a]rising out of oral or written publication of material, if done by or at the direction of an 'insured' *with knowledge of its falsity*." Browning, Deneen, & Kreiling, *supra*, at 6–7 (emphasis added). A parody social media profile, by its nature, is created by someone with knowledge of its falsity. Hence, an insurer using this form would have a strong argument against coverage for satirical social media postings.

Second, the policy excludes coverage for injury "[a]rising out of a criminal act committed by or at the direction of an 'insured.'" Browning, Deneen, & Kreiling, *supra*, at 6–7. In California it is a crime to "knowingly and without consent credibly impersonate[] another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding [that] person…." Cal. Penal Code §528.5 (a). The scheme specifies that "[a]n impersonation is credible if another person would reasonably believe, or did reasonably believe, that the defendant was or is the person who was impersonated," and "[f]or purposes of this section, 'electronic means' shall include opening an e-mail account or an account or profile on a social networking Internet Web site in another person's name." Cal. Penal Code §528.5 (b) (c).

California's law, although specifically geared toward fake online accounts, arguably would not defeat coverage for a parody account, which by definition, is not a "credible impersonation." With that said, the statute and other laws that prohibit online harassment could act to defeat coverage in certain circumstances. *See State Cyberstalking and Cyberharassment Laws*, Nat'l Conf. of State Legis., http://www.ncsl.org/research/telecommunications-and-information-technology/cyberstalking-and-cyberharassment-laws.aspx (last visited Feb. 26, 2015).

Ultimately, insurers will likely have more questions than answers when defense of a suit based on a parody account is tendered. Coverage counsel must be conversant in the questions outlined above to advise their clients on this issue.

Procedural and Substantive Defenses to an Online Parody

A lawsuit brought against the teenage author of a parody social media account can often be pared down to two basic procedural issues and two fundamental substantive issues. Procedurally, these suits may fail for absence of personal jurisdiction and expiration of the statute of limitations. Substantively, the two primary issues are whether the communication at issue is a spoof that cannot reasonably be understood as a statement of fact and whether parents can be liable for their children's creation of a satirical social media account or postings generated through the account. Attorneys should be aware of this jurisprudence as the defense against the suit is prepared.

Personal Jurisdiction Based on Internet Publication Is a Difficult Issue

If your client is a foreign resident and has created a parody social media account, personal jurisdiction will be an issue. More than 10 years ago, Professor Patrick J. Borchers authored an article for the *Northwestern Law Review* entitled, "Internet Libel: The Consequences of a Non-Rule

Approach to Personal Jurisdiction." 98 Nw. U. L. Rev. 473 (2004). Borchers pointed out that as of 2004, there was no standard, or even majority trend, that governed whether a plaintiff in an Internet-based defamation suit could bring suit in his or her state of residency, or whether suit would have to be brought in the defendant's state of residence. More than 10 years after publication of Borchers' article, his observations remain true.

Courts apply either the *Zippo* test or *Calder/Keeton* test to assess whether sufficient "minimum contacts" exist to assert personal jurisdiction over a foreign Internet user. Borchers, 98 Nw. U. L. Rev. at 481 (citing *Zippo Mfg. Co. v. Zippo Dot Com,* 952 F. Supp. 1119 (W.D. Pa. 1997); *Calder v. Jones,* 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770 (1984)). Jurisdiction under the *Zippo* test depends on the level of interactivity provided by the site, while jurisdiction under the *Calder/Keeton* test depends on the effect of the publication in the forum state. *Id*. at 476–78, 481.

There is no bright-line rule to determine whether a court will extend jurisdiction over a foreign defendant. As the U.S. District Court for the Eastern District of Michigan observed, "[d]etermining personal jurisdiction in a case of internet libel is a thorny proposition." *Lifestyle Lift Holding Co., Inc. v. Prendiville*, 768 F. Supp. 2d 929, 934 (E.D. Mich. 2011) (applying the *Zippo* test and declining jurisdiction over a Florida resident who published commentary about a Michigan business). Courts that have applied the *Calder/Keeton* test have arrived at contrary conclusions in their rulings. *Compare Goldhaber v. Kohlenberg*, 928 A.2d 948, 955 N.J. Super. 2007) (extending personal jurisdiction over California defendant who authored Internet posting about New Jersey plaintiff), *with Farquharson v. Metz*, Civil Action No. 13–10200–GAO, 2013 WL 3968018 (D. Mass. July 23, 2013) (finding no personal jurisdiction over Canadian citizen who posted Facebook comments about his ex-wife who lived in Massachusetts). Other courts have expressly limited the precedential value of opinions by confining them to the facts of the considered case. *See, e.g., Baldwin v. Fischer-Smith*, 315 S.W.3d 389, 398 (Mo. Ct. App. 2010) (applying the *Calder/Keeton* test to assert jurisdiction over a foreign defendant but stating "we reiterate that we have not sought to tease out any universal rule about personal jurisdiction in internet cases. We merely decide this case.").

As a practitioner, it is important to recognize the unsettled character of this question. Although case law lacks clarity on this issue, the variety of holdings on the topic should allow you to formulate a persuasive argument to support your client's position.

The Statute of Limitations Generally Accrues at the Time of First Publication

Given the omnipresent nature of Internet postings, it is important to identify when the statute of limitations begins to accrue for a suit based on a social media posting. Although case law has not answered this specific question, jurisprudence on Internet publication in general holds that the statute begins to run at the time of first publication.

Most courts have adopted the single publication rule to determine when the statute of limitations accrues for a suit premised on an Internet posting. *Mayfield v. Fullhart*, 444 S.W.3d 222, 229 (Tex. Ct. App. 2014) (citing *Nationwide Bi–Weekly Administration, Inc. v. Belo Corp.,* 512 F.3d 137, 144 (5th Cir.2007) (further citations omitted). Under the rule, a claim accrues at the time of the initial publication. *Id*. at 227. The single publication rule has been adopted in many jurisdictions, including the Second and Ninth Circuits, as well as state and federal courts in Kentucky, New Jersey, Georgia, California, and New York. *Belo Corp.,* 512 F.3d at 144.

Case law that has adopted the single publication rule for Internet publications has all involved the mass media or dissemination on a public website. When the publication is made on a private website, courts have held that the "continuous publication" or "discovery rule" applies, and the cause of action does not accrue until the plaintiff learns of the posting. *Swafford v. Memphis Individual Practice Ass'n,* No. 02A01–9612–CV–00311, 1998 WL 281935, at *8 (Tenn. Ct. App. June 2, 1998). The Oklahoma Supreme Court also applied the discovery rule in a case in which the defendant attempted to conceal publication from the plaintiff, but that situation did not involve the Internet. *Woods v. Prestwick House, Inc.,* 247 P.3d 1183, 1190 (Okla. 2011).

Facebook, Twitter, and other social media sites are public websites in the sense that anyone can create and use an account. Hence, there is a strong argument the single publication rule should apply. Yet an individual must have an account to access the site, and in this sense, social media accounts are arguably private. In fact, most social media accounts allow users to modify privacy settings to limit who can view an account. If a spoof social media account is concealed from a plaintiff through the privacy settings, there may be an argument that the discovery rule should govern. Of course, if the parody social media account is not accessible to the public at large, how the plaintiff would demonstrate having suffered damage does seem problematic.

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Parody Is a Complete Defense to Defamation-Based Torts

Virtually all claims against the creator of a satirical social media account can be defended on the basis of parody. Parody is an "exaggeration or distortion" through which an author "clearly indicates to his audience that the piece does not purport to be a statement of fact but is rather an expression of criticism or opinion." *New Times, Inc. v. Isaacks,* 146 S.W.3d 144, 158 (Tex. 2004). Lawsuits for libel, slander, invasion of privacy, and infliction of emotion distress will be dismissed on summary judgment if the communication at issue is parody. *See e.g. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Walko v. Kean College,* 561 A.2d 680, 683, 688 (N.J.

1988); *Stien v. Marriott Ownership Resorts, Inc*., 944 P.2d 374, 380 (Utah Ct. App. 1997).

Because parodies are not representations of fact, courts have found these communications are mutually exclusive of defamation-based torts. *See, e.g., Victoria Square, LLC v. Glastonbury Citizen*, 891 A.2d 142, 145 (Conn. 2006). Courts apply a reasonable person standard in determining whether a communication is a representation of fact or a parody, and in doing so, recognize that the fictitious reasonable person "does not represent the lowest common denominator, but reasonable intelligence and learning. He or she can tell the difference between satire and sincerity." *Patrick v. Superior Court,* 27 Cal. Rptr. 2d 883, 887 (Cal. Ct. App. 1994).

The Indiana Court of Appeals issued a noteworthy opinion on the merits of a suit based on an Internet parody. *Hamilton v. Prewett*, 860 N.E.2d 1234 (Ind. Ct. App. 2007). The facts, analysis, and holding of the opinion illustrate how courts around the country may consider the merits of this type of suit. Ultimately, the *Prewett* court affirmed summary judgment for the defense, but the concurrence authored by Judge Edward Najam suggests that Internet parodies may not be ripe for summary judgments in all cases.

Hamilton v. Prewett: *An Internet Parody of First Impression*

The parodying website in *Prewett* satirically described the plaintiff as a graduate of a "prestigious mail order college," insinuated that use of his products would lead to improved physical appearance, and generally presented him as a dishonest miscreant. *Hamilton v. Prewett*, 860 N.E.2d at 1239. The district court found the communications to be parody as a matter of law and dismissed the case. On review, the appellate court affirmed the dismissal after performing a two-step analysis. First, the court determined that the website was a parody because it found no reasonable person could believe the postings to be assertions of fact. *Id*. Second, the court examined case law from around the country and determined, as a matter of first impression in Indiana, that parody and defamation are mutually exclusive. *Id*. Because the website was a parody, and because parody is not actionable as a tort in Indiana, the court affirmed the summary judgment for the defense and dismissed the case. *Id*. Nonetheless, the court distinguished parody from fact-based attempts at crude humor and wrote, "[a] defendant who couches a defamatory imputation of fact in humor cannot simply avoid liability by dressing his wolfish words in humorous sheep's clothing." *Id*. at 1245.

Judge Najam concurred with the result but disagreed with the majority's proposition that parody and defamation are always mutually exclusive. *Prewett*, 860 N.E.2d at 1248–49 (Najam, J., concurring). Instead, he argued, foreign case law intimates that parody and defamation can co-exist. Judge Najam pointed out that the California Court of Appeals has recognized that some "forms of humor which ridicule may in certain circumstances convey a defamatory meaning and be actionable," and courts in New York have written, "the danger implicit in affording blanket protection to humor or comedy should be obvious[:] … one's reputation can be as effectively and thoroughly destroyed with ridicule as by any false statement of fact." *Id*. at 1250 (quoting *San Francisco Bay Guardian,* 21 Cal. Rptr. 2d at 467 and *Frank v. Nat'l Broad. Co.,* 119 A.D.2d 252, 506 N.Y.S.2d 869, 875 (N.Y. Ct. App. Div. 1986). Judge Najam also cited an Illinois opinion that held "[a] defendant cannot escape liability for defamatory factual assertions simply by claiming that the statements were a form of ridicule, humor or sarcasm." *Id*. at 1251 (quoting *Kolegas v. Heftel Broad. Corp.* 607 N.E.2d 201, 209 (Ill. 1992)). Ultimately, Judge Najam did not believe that the record created a genuine issue of material fact about whether the communications were imputations of fact as opposed to parody, and as a result, concurred in the judgment. *Id.*

Prewett: *The Defense Roadmap for Summary Judgment*

Prewett provides the framework for how to posture the defense of an Internet parodist for summary relief. The opinion, and the concurrence, set forth (1) how to present the factual record to show that the communications at issue are parody and (2) the legal rubric that holds that parody and defamation are mutually exclusive.

Initially, defense counsel must frame the record to show that the communications are parody when judged against the reasonable person standard. Three themes should be presented in the statement of undisputed facts. First, emphasize the context of the account. Many accounts will include designations to show that it is not genuine, such as the "not" designation recommended by Twitter. Anything on the account that identifies it as a spoof should be highlighted in the presentation of the case. Second, establish that all parties and fact witnesses understood the account to be satire. Even plaintiff's witnesses should agree that the account does not impute fact, and instead, is a crude attempt at humor. If plaintiff or one of plaintiff's witnesses claims the parody imputes fact, elicit testimony from the witness that the plaintiff is nothing like the satirical alter-ego. This presents a little bit of a catch-22 to the witness. Either the witness (1) will acknowledge that he or she understood the account to be a spoof because the real plaintiff would not make such comments, or (2) will have to admit the plaintiff behaves and/or communicates in the same manner as the fictitious counterpart, which would greatly minimize any argument the plaintiff may have about damage to reputation. Finally, highlight the outlandish makeup of the postings. Courts judge whether the statements impute fact based on a reasonable person standard that recognizes the average person can distinguish between satire and sincerity. The communications in *Prewett* provide an example of eccentric publications that cannot be imputations of fact as a matter of law.

Once the undisputed record shows that the communications at issue are parody, defense counsel should set forth the legal principle that parody and defamation are mutually exclusive. This is the law in every jurisdiction that has considered the issue, and *Prewett* offers a persuasive discussion on why this principle should be recognized by courts facing this as an issue of first impression. A plaintiff may rely on the *Hewett* concurrence to support the notion that parody is not mutually exclusive of defamation. However, the opinions quoted in the concurrence are taken somewhat out of context, and defense counsel must be prepared to address these distinctions. The courts in *San Francisco Bay Guardian* and *Frank* both found that the statements in question were not representations

of fact, but rather parodies that no reasonable person could believe to be true. *San Francisco Bay Guardian*, 21 Cal. Rptr. 2d at 468; *Frank*, 119 A.D.2d at 262, 506 N.Y.S.2d at 875. Those courts, *in dicta*, simply recognized that humor alone is not a defense if the communications are imputations of fact. The *Kolegas* court declined to afford summary relief to the defendants, but *Kolegas* is not a case about parody. Instead, the defendants in *Kolegas* made assertions of fact in a mocking tone, which the Illinois Supreme Court held could be defamatory because a reasonable person could find the communications to be true. *Kolegas,* 607 N.E.2d at 213.

Negligent Supervision—The New Trend in Internet Defamation

Parents of some online humorists have found themselves brought into litigation based on allegations of negligent supervision of their child's Internet activities. Thus far, two states have considered the merits of this type of case, and these courts have split on whether these claims can withstand summary judgment. A third court has considered the issue, but it declined to opine on the substance of that particular allegation. Defense counsel should be familiar with this growing trend and the early jurisprudence on this issue.

Parental Liability for a Child's Creation of a Fake Online Profile

In *Finkel v. Dauber*, a group of minor children created a Facebook group to share comments about a classmate and her purported sexual deviance. 906 N.Y.S.2d 697, 701 (N.Y. Sup. 2010). The Supreme Court of Nassau County, New York, granted a summary judgment in favor of the defense on the negligent supervision theory. *Id*. at 703. The court noted that negligent supervision claims generally require evidence that a parent allowed a child to access a dangerous instrument, and "[t]o declare a computer a dangerous instrument in the hands of teenagers in an age of ubiquitous computer ownership would create an exception that would engulf the rule against parental liability." *Id*. at 702.

In contrast, the Georgia Court of Appeals recently held that whether a parent can be liable for negligent supervision of his or her child's Internet activities is a fact question. *Boston v. Athearn*, 764 S.E.2d 582 (Ga. Ct. App. 2014). In *Athearn*, two friends, a boy and a girl, created a Facebook account, posing as a classmate, which landed them in trouble at school. After the boy's parents were informed by the school about the account, they did not instruct their son to take it down. The account remained active for more than one year after the parents were made aware of its existence. The Georgia Court of Appeals held that whether the parent defendants were negligent when they failed to instruct their son to remove the false page was a fact question in light of their knowledge of the account and the distress that it caused the satirized classmate. *Id*.

Finally, in *Matot v. C.T.*, the court granted the defense motion for summary judgment after it ruled that the plaintiff, a middle school assistant principal, did not assert an actionable claim under the Computer Fraud and Abuse Act against students who created a parody social media account using the assistant principal's name. 975 F. Supp. 2d 1191 (D. Or. 2013). Although the plaintiff alleged a count of negligent supervision against the student's parents, the court declined to consider the merits of that claim. *See generally id*.

The Outlook for Negligent Supervision Claims Going Forward

The *Finkel* order recognizes that the Internet is pervasive and constantly accessed by children. In doing so, it arrives at what many defense attorneys would view as a common sense approach to whether parents are liable for their children's creation of a social media spoof. Moreover, the fact that the *Matot* court granted summary judgment to the defense without considering the substance of the negligent supervision theory suggests that the court did not see any merit to the claim.

Athearn is the only opinion that has found a parent may be liable for their child's creation of an online parody account. However, in many ways, *Athearn* can be limited to its facts. Arguably, it only permits parental liability if a parent knows that a child has created a fake online profile, and in response, does nothing about it. Negligent supervision claims usually involve scenarios in which a parent knows of a child's proclivity for tortious mischief, or situations where a child is entrusted with a dangerous instrument. Defense counsel should be able to posture a persuasive motion for summary judgment if the negligent supervision theory is based on nothing more than the parent-child relationship and the child's access to a computer.

Negligent supervision claims against the parents of a social media parodist will likely become more common for at least two reasons. First, a suit based on a negligent supervision theory eliminates the potentially knotty insurance coverage question given the allegation of negligence against the parent. Second, it is unclear if parents will be able to assert a parody defense in these cases. Although intuition suggests that the defense should be available, the *Athearn* court did not consider parody as a defense and the *Finkel* court analyzed the issues of negligent supervision and parody separately.

Defense counsel should be able to posture a persuasive motion for summary judgment if the negligent supervision theory is based on nothing more than the parent-child relationship and the child's access to a computer.

Conclusion

As individuals continue to embrace social media, online parodies will proliferate, causing an increase in related litigation. Lawyers who can advise their clients on coverage issues and defenses related to these suits will be ahead of the curve and better equipped to adapt their practices to the challenges presented by the growing litigation trend spawned by fictitious social media accounts.