

ORIGINAL

1  
 2 IN THE UNITED STATES DISTRICT COURT  
 3 FOR THE WESTERN DISTRICT OF PENNSYLVANIA  
 4 Civil Action No. 05-145J

5 ----- X  
 6 VALENCIA M. McCLATCHEY,

7 Plaintiff,

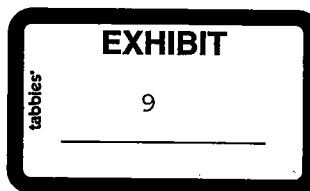
8 vs.

9 THE ASSOCIATED PRESS,

10 Defendant.  
 11 ----- X

12  
 13  
 14 DEPOSITION OF: JAMES R. GERBERICH

15 January 19, 2006, 9:10 a.m.  
 16  
 17  
 18  
 19  
 20  
 21



1 photograph at issue in this case?

2 A. That's correct.

3 Q. And what, if anything, did you do to  
4 prepare for topic 11?

5 A. At the request of some time ago,  
6 reviewed the information that when we removed that  
7 image and the history behind it prior to my joining  
8 the department I'm in today.

9 Q. All right.

10 Do you recall what information it was  
11 that you reviewed?

12 A. I looked at some logs in the system and  
13 reviewed the process that we use to remove the  
14 picture on request.

15 Q. When you say that we removed the  
16 picture, what do you mean by removed the picture?

17 A. We deleted it from the database.

18 Q. Could you explain to me the process  
19 behind deleting the McClatchey photograph from the  
20 AP database?

21 A. Simply removing that entry from the  
22 database. It's a manual operation. Image is struck  
23 from the system.

24 Q. The McClatchey photograph is located on

1 a server. You physically remove the image from the  
2 server?

3 A. That's correct.

4 Q. To delete it?

5 A. That's correct.

6 Q. Do you know when that occurred?

7 A. I believe that occurred on November 4th  
8 or 5th, as I recall, 2004.

9 Q. In your review did you find out why it  
10 was removed?

11 A. We have a standard process. We were  
12 notified that the image was being withdrawn. And we  
13 followed the procedure and removed the system or  
14 removed the image from the system.

15 Q. At that time do you alert your  
16 members/subscribers that you have deleted the image  
17 from the system?

18 A. This process does not affect member  
19 systems. So, no, we did not.

20 Q. So if the member system had the  
21 McClatchey photograph on their system, The  
22 Associated Press by deleting it from The Associated  
23 Press system would not affect the copy that was  
24 still on the member/subscriber system?

1 A. I'm not sure.

2 Q. I'm not sure I understood my question  
3 either.

4 A. I'm not sure I understand what you're  
5 asking.

6 Q. I'll ask it again.

7 So when The Associated Press deleted  
8 the McClatchey photograph from its system it did  
9 nothing or took no actions to delete the photograph  
10 from its member or subscriber systems; is that  
11 correct?

12 A. We took no action.

13 I'm still not sure I understand the  
14 question because they're unrelated. At least the  
15 way I think, they're unrelated.

16 Q. Could you just answer the question I  
17 asked though first.

18 When The Associated Press deleted the  
19 McClatchey photograph from its system it took no  
20 action, at that time, to ensure that the McClatchey  
21 photograph was also deleted from its members' or  
22 subscribers' systems; is that correct?

23 A. That's correct.

24 Q. Do you know who makes the decision to

1 Q. Did you produce that E-mail as part of  
2 the production in this lawsuit?

3 A. I believe, I believe so.

4 MR. HALL: Counsel, I'll say on  
5 the record I've been through every document  
6 that's been produced in this case several  
7 times and have not seen such an E-mail. I  
8 would ask that it be produced.

9 MR. PENCHINA: That E-mail, it  
10 has been withheld and identified on the  
11 privilege log. That E-mail conveyed  
12 instructions from the legal department.

13 MR. HALL: Who was the attorney  
14 that conveyed the instructions?

15 MR. PENCHINA: As we sit here at  
16 this moment, I do not recall. I will review  
17 the document again and be happy to  
18 specifically identify it for you on the  
19 privilege log.

20 Q. Prior to November 2004, the McClatchey  
21 photograph was accessible by The Associated Press  
22 members and subscribers; is that correct?

23 A. Yes.

24 MR. HALL: I'd just like to mark

1 Are you prepared to testify as to topic  
2 12 today?

3 A. I am.

4 Q. What, if anything, did you do to  
5 prepare to testify on topic 12?

6 A. I reviewed a system downloads report.

7 Q. What is a system download report?

8 A. We track the access of images and track  
9 downloads. So when an image has been accessed and  
10 downloaded it creates and generates a report.

11 Q. What do you mean by access an image?

12 A. A physical download.

13 Q. So your use of access and download is  
14 the same; is that correct?

15 A. If an image has been downloaded, we  
16 track that, yes. Tracking a download of an image.

17 Q. Would that be from that download from  
18 the photo archive?

19 A. Yes.

20 Q. Do you track access of images prior to  
21 them getting to the photo archive?

22 A. I do not.

23 Q. Does The Associated Press track access  
24 to images prior to their arrival at the photo

1 Q. And the next, next to that it says,  
2 submit date, which is 9/11/2002, 23:30:07.

3 What does that represent?

4 A. It represents the time that the image  
5 was stamped in the system. And 8:00 p.m., 8:30 p.m.  
6 in the evening.

7 Q. How is the submit date different from  
8 the creation date; specifically the times on it?

9 A. I don't have knowledge of this specific  
10 image. In this specific image, I don't know why  
11 these times -- why the time on the left is what it  
12 is. I don't know this particular picture and how it  
13 was sourced.

14 Q. The next row down says, special  
15 instructions. It says, no sales, September 11, 2001  
16 file photo, worldwide photos out.

17 MR. PENCHINA: Objection. You  
18 just misread it.

19 MR. PENCHINA: It's wide world  
20 photos, not worldwide.

21 MR. HALL: Thank you.

22 Q. Let's start with no sales.

23 Does that refer to the fact that it was  
24 a handout image, and that automatically means it's

1 no sales within The Associated Press system?

2 A. The syntax "no sales" serves two  
3 purposes in this particular field. It serves a  
4 notice to anybody reading the metadata. It's also  
5 part -- that syntax is part of a thesaurus that  
6 significantly limits the availability of this image  
7 inside the AP system.

8 Q. How does it limit the availability of  
9 the image within the AP system?

10 A. It's part of the entitlements process,  
11 user entitlements process. An image that is  
12 flagged, an image that carries this syntax "no  
13 sales," the system understands that, reads that  
14 field, and limits this image, restricts this image  
15 from clients that are not able to see this picture,  
16 these types of pictures.

17 Q. But the no sales designation would not  
18 limit the availability of the image to members and  
19 subscribers of The Associated Press; is that  
20 correct?

21 A. It would not limit the image to AP  
22 members. That is correct.

23 Q. The next, special instructions, it says  
24 September 11, 2001 file photo.



1 the legal right to have the image?

2 A. I don't know the answer to that.

3 Q. Who would know the answer to that?

4 A. I'm not -- I don't know the operation  
5 in 2001 at that level. I'm sorry. 2002 level, that  
6 level.

7 Q. Who would know the operation of the  
8 editorial team in 2002?

9 A. I believe David Ake who was part of the  
10 editorial team in 2002.

11 Q. All right.

12 So The Associated Press does have a  
13 process by which the editorial team can review  
14 whether The Associated Press is legally entitled to  
15 have an image. But you are unaware of whether that  
16 was done specifically with regard to the McClatchey  
17 photo; is that correct?

18 A. That is correct.

19 Q. If you could, I'd like to go through  
20 each of these fields on Plaintiff's Exhibit 4 and  
21 have you explain to me what they represent.

22 Are you able to do that, sir?

23 A. I am.

24 Q. The first appears to be a caption. And

1 A. I did not. Just purely the way any  
2 image with those restrictions would be, would have  
3 some limitation.

4 Q. Right.

5 But you testified earlier that there's  
6 no restriction with respect to members and  
7 subscribers based on the fields that were filled out  
8 in the McClatchey photo?

9 A. That's correct.

10 Q. So, in fact, all of the members and  
11 subscribers from 2002 in September of 2002 through  
12 November 2004 would have gotten a distribution of  
13 the McClatchey photograph; is that correct?

14 A. As I understand, there was one  
15 distribution of the image on September 11, 2002. A  
16 single instance of distribution.

17 Q. And the single instance of distribution  
18 in September of 2002 would have been a distribution  
19 to all the current members and subscribers of The  
20 Associated Press on that date; is that correct?

21 A. That's correct.

22 Q. And the Associated Press, as I  
23 understand it from your responses in this case, has  
24 no understanding what, if anything, any of those

1 MC 00424, the 15,000 news outlets you're saying  
2 would include news outlets that were not members or  
3 subscribers of The Associated Press?

4 A. That is correct.

5 MR. HALL: And I've already asked  
6 on the record for the number of membership  
7 subscribers.

8 MR. PENCHINA: Correct.

9 Q. If you could turn, please, to MC 00426,  
10 please. And this begins page 1 of 3 of a section  
11 from The Associated Press Web site under frequently  
12 asked questions. And I'd like you to focus on No.  
13 2: Who owns The Associated Press.

14 My question is is it accurate as it  
15 states in the answer to No. 2 that The Associated  
16 Press is owned by its 1,500 U.S. daily newspaper  
17 members?

18 A. That's accurate.

19 Q. So The Associated Press actually is  
20 made up of 1,500 United States newspaper members; is  
21 that correct?

22 A. I can't testify to whether it's 14 or  
23 1,600. This is a statement that indicates 1,500. I  
24 don't know that that number is accurate.

1 photograph on them.

2 My question is on either Plaintiff's  
3 Exhibit 4 or 5 is there any information contained in  
4 that data that would limit the use of the photograph  
5 to a particular news story?

6 A. There's a number of references to  
7 Flight 93 and 9/11. And there is an object name  
8 that is specifically September 11 Flight 93 Image.  
9 The September 11 Flight 93 Image in the object name  
10 refers to corresponding news story, or if there is a  
11 corresponding news story, and it appears that there  
12 would be from the object name there, that it would  
13 refer to that story.

14 Q. Okay.

15 A. So in addition to the caption  
16 information, the object name is, in our world,  
17 indicates that it would refer to a story.

18 Q. But there's nothing in Plaintiff's  
19 Exhibit 4 and 5 that mandates the use of the  
20 McClatchey photo specifically with any news story  
21 only?

22 A. There's nothing. There's nothing that  
23 mandates it. My personal opinion would be hard to  
24 use it without it. I mean, it would be hard to use

1 the picture without the story, without a story  
2 relating to it.

3 Q. Without a story relating to the  
4 photograph.

5 A. That's right.

6 Q. The McClatchey photograph, Plaintiff's  
7 Exhibit 4 and 5 was not linked to any specific news  
8 story regarding Flight 93, correct?

9 A. I believe it's linked to the story  
10 about the picture about McClatchey. That's my  
11 belief. I mean, obviously I wasn't part of this in  
12 2002.

13 Q. Right.

14 But there's nothing on Plaintiff's  
15 Exhibit 4 and 5 that links it specifically to the  
16 story about the photograph in McClatchey; is that  
17 correct?

18 A. I believe when this image was captured  
19 and distributed, that the story September 11 Flight  
20 93 image was a news story, a story that AP  
21 distributed.

22 Q. Okay.

23 A. And that this would go with that story.

24 Q. But there's no restriction on use for

1 member/subscriber regarding the McClatchey photo in  
2 Exhibits 4 and 5?

3 A. There is no restriction. That's  
4 correct.

5 (Copy of responses and objections  
6 to interrogatories marked Plaintiff's Exhibit  
7 9 for identification as of this date.)

8 Q. I'm going to mark as Plaintiff's  
9 Exhibit 9 and hand to you a copy of responses and  
10 objections of defendant The Associated Press to  
11 plaintiff's first set of interrogatories numbers 1  
12 through 16 to defendants.

13 I ask you if you've ever seen this  
14 document or these responses?

15 A. I have not.

16 Q. Did you play any role or assist in any  
17 way in the responses to the interrogatories by  
18 Associated Press in this case?

19 A. I haven't seen the document. So I  
20 can't answer that question. I provided information  
21 that was requested. And that was the extent of what  
22 my involvement was.

23 Q. Now, I don't want the specific  
24 information you provided. But did you provide more

1 PhotoArchive system?

2 A. Yes.

3 Q. So this would have been after the  
4 initial distribution in September 11, 2002 of the  
5 McClatchey photograph?

6 A. This report indicates that the first  
7 acquisition of the image. Then you see at the top  
8 this digital signature number is listed, 6430495.  
9 The first acquisition of this image was June 30,  
10 2003.

11 Q. Right. But you didn't answer my  
12 question.

13 This PhotoArchive system list of  
14 downloads from the McClatchey PhotoArchive only  
15 indicates who downloaded the McClatchey photograph  
16 after the initial distribution in September 11,  
17 2002?

18 A. That's right.

19 Q. If you look over at the right it says  
20 amount.

21 Do you know what that refers to or  
22 under the column AP, period?

23 A. It would refer to the amount that the  
24 particular client would have been charged for their