

Photojournalist Has No Privacy Protection Act Claim

Digital Media and Data Privacy Law Blog

on 02.01.2012

Posted in Newsroom Search Warrants

In a decision released this week, a panel of the Fourth Circuit affirmed the decision of the Eastern District of Virginia holding that a photojournalist had no claim under the federal Privacy Protection Act for a search of the journalist's home conducted pursuant to a warrant, where law officers had probable cause to believe the journalist was involved in a crime.

The plaintiff in Sennett v. U.S., No. 11-1421 (4th Cir. Jan. 30, 2012), was a photojournalist who routinely covered protests, political demonstrations, and acts of "grassroots activism" and published her images under the name "Isis." In her complaint, she alleged that her work was published in the mainstream media as well as on her own blog and on other websites.

In April 2008, the plaintiff was covering what she believed to be a demonstration at the International Monetary Fund's annual meeting at a hotel in Washington, D.C. Acting on a tip, she arrived at the scene at approximately 2:30 a.m. and videotaped the demonstration.

Ultimately, the protest became criminal, though the plaintiff claimed no knowledge of the protesters' plan to destroy private property. The protesters entered the hotel lobby, set off firecrackers and pyrotechnics, threw paint-filled balloons, and shattered a large glass window, causing an estimated \$200,000 or more in damage.

Officials with the FBI Joint Terrorism Task Force investigating the incident reviewed surveillance video from the hotel and noticed a woman wearing a light beret, black combat boots, and a dark backpack and carrying a small handheld camera, apparently photographing the incident. The woman was seen arriving at the same time as the protesters, standing outside the hotel with some in the group while other protesters entered the lobby, and leaving with or in the same general direction as the protesters. After watching video of earlier demonstrations and seeing a woman in similar clothing, and relying on two confidential informants, law officers identified the woman as the plaintiff.

Officials sought and received a warrant to search the plaintiff's home and seize any items related to the IMF protest as well as clothing and virtually any device that would store video or photographs. Several items were seized, including a hard drive containing thousands of photos.

Photojournalist Has No Privacy Protection Act Claim Where Search Was Supported By Probable Cause

The plaintiff was never charged or arrested as a result of the investigation.

The plaintiff later filed a claim against the federal government and the officer who sought and obtained the search warrant alleging violations of the Privacy Protection Act, 42 U.S.C. § 2000aa et seq.

Generally speaking, the PPA prohibits the federal government from conducting searches and seizing "any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." The law is designed to prevent, among other things, newsroom searches.

Congress enacted the PPA in response to a 1978 decision of the U.S. Supreme Court, *Zurcher v. Stanford Daily*, 436 U.S. 547, which held, essentially, that journalists have no more protection against unreasonable searches and seizures under the Fourth Amendment than do ordinary citizens. In *Zurcher*, the Supreme Court held that the Fourth Amendment did not prohibit the search of a newspaper office (the Stanford University student paper) for photos revealing the identities of people who assaulted police officers during a demonstration. This was so even though no one from the newspaper was suspected of involvement in the incident.

However, the PPA does not give journalists unlimited protection against searches and seizures. Among the exceptions in the statute is the "suspect exception," which the government relied on in *Sennett*. This exception provides that "police can avoid the constraints of the [statute] . . . when the person possessing the materials is a criminal suspect, rather than an innocent third party."

The Fourth Circuit panel affirmed the lower court's decision on summary judgment that officials had probable cause to believe, under the totality of the circumstances, that the plaintiff had committed a criminal offense relating to the hotel incident. For example, she arrived with the protesters at the hotel and left the scene with or in the same general direction as the protesters. While there may have been an innocent explanation for the plaintiff's actions at the hotel---she was covering the incident as a journalist---according to the Fourth Circuit, this did not eliminate the existence of probable cause under the governing totality of the circumstances test.

Moreover, while the plaintiff claimed that officials knew she was a photojournalist and failed to reveal this in the affidavit supporting their request for a search warrant, according to the Fourth Circuit panel, even if true this cannot destroy the existence of probable cause without more. Quoting the district court, "to accept [plaintiff's] argument that her status as a photojournalist is a game changer in the probable cause analysis . . . is tantamount to doing what Congress declined to do, namely exclude journalists from the PPA's 'suspect exception.'"

Photojournalist Has No Privacy Protection Act Claim Where Search Was Supported By Probable Cause

While the plaintiff's job explained her presence on the surveillance video, the court found that other facts permitted officers to reasonably conclude she was involved in the vandalism of the hotel.

Additionally, the fact that she was never charged did not defeat the existence of probable cause, which is judged at the time the search is conducted---not later.

Journalists and photographers should keep the Sennett case in mind when covering protests and demonstrations against the financial industry, some of which have allegedly turned criminal. While the PPA offers some protection from searches and seizures, the PPA does not immunize the media from searches where officers have probable cause to believe the journalists have committed or participated in criminal acts. The Sennett case makes clear that, in the view of the Fourth Circuit panel, someone's status as a journalist does not automatically render him or her above suspicion in a criminal investigation.