Recording police is protected activity

A federal appeals court has expanded First Amendment protection to private taping of law enforcement

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Civil Rights and Constitutional Law

When hip-hop star Dr. Dre began arguing with police officers outside one of his Detroit-area concerts in 2001 — after the police threatened to close the venue if Dre and other concert promoters displayed a sexually explicit film montage on stage — his concern was likely more about the quality of the concert than the video one of his associates was making of the confrontation. But after that video appeared on the concert's DVD release, the police officers brought a civil suit against Dre on the grounds that taking the video without their permission constituted a violation of Michigan's eavesdropping statute. The Michigan statute, like California's and the statutes of 10 other states, requires two-party consent to record a "private conversation," and the police officers claimed they were protected by the law even while performing their official duties.

While the Michigan Supreme Court eventually dismissed the suit because it found a number of people were present during the recording and so the conversation was not "private" as the statute requires, the court left open the question whether the police officers could have claimed the statute's protection if the conversation had taken place in a closed office, at a roadside traffic stop, or in another similarly secluded location. That is not an idle question: In the past five years, arrests for recording police officers without consent have surged to coincide with the growing ubiquity of video cameras in cellphones. Individuals in California, Michigan, Maryland, Florida, Oregon, Pennsylvania, Massachusetts and Illinois have been arrested, and in many cases prosecuted, under state eavesdropping laws for no crime other than recording a police officer acting in his or her official capacity without the officer's permission, sometimes exposing police corruption and abuse in the process.

Now, the federal appellate courts have finally begun to step in. Late last month, the First Circuit U.S. Court of Appeals in Boston became the first federal appeals court to deny a bid for qualified immunity by police officers facing a civil rights suit after they arrested a passer-by on Boston Common, whose only mistake was to use his cellphone to record the beating they were giving to another arrestee. Although the charges against the passer-by for breach of the Massachusetts eavesdropping law and disturbing the peace were eventually dismissed, the First Circuit in *Glik v. Cunniffe* used the passer-by's appeal as an opportunity to make clear, in no uncertain terms, that efforts by private citizens to record police officers acting in their official capacities are protected by the First Amendment.

The court explained that "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" Moreover, the court ruled, it is of no consequence whether the person recording the police is a journalist or a private individual, because the constitutional right to record public officials is "not one that inures solely to the benefit of the news media." Rather, "[t]he proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cellphone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status."

In taking such a strong line, the First Circuit also became the first federal appellate court to find that the First Amendment right of private individuals to record the police is "clearly established." While the Third Circuit held in 2010's *Kelly v. Borough of Carlisle* that the police may not arrest a private individual for recording them during a routine traffic stop, that right was not "clearly established" at the time and the Third Circuit found the police could not be held liable. Likewise, the Ninth Circuit has held journalists have a right to gather news, but has not addressed whether that right extends to private individuals, and while the Eleventh Circuit has identified a general First Amendment right to record matters of public interest, it has never found police officers liable for an arrest arising entirely from a nonconsensual video recording.

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In *Glik*, however, the First Circuit addressed the question head on, concluding the idea that "police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights" is "self-evident," and that "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."

While *Glik* marks a watershed development in First Amendment law, the decision's precedential reach extends no further than the four New England states plus Puerto Rico, over which the First Circuit has jurisdiction. Thus, it offers no help to people like Tiawanda Moore, a 20-year-old who began recording her conversations with Chicago police after the officer who responded to her domestic battery call fondled her and gave her his phone number, and the Internal Affairs representative assigned to investigate refused to take her seriously and pressured her to drop her sexual assault claim against the officer. Moore suffered through arrest, prosecution and trial on a Class 1 felony (the same level charge as forcible rape, and carrying with it a maximum penalty of 15 years in prison and a $25,000 fine) for violating Illinois' eavesdropping statute — eventually avoiding prison only by a jury's acquittal earlier this year.

Nor does *Glik* help Vallejo native Lonell Duchine, who was arrested in April for videotaping police on his cellphone — from his own garage — as they arrested a suspect at gunpoint on his residential street. Vallejo police officers demanded Duchine's phone, and when he refused to give it to them, placed him in handcuffs and charged him with interfering with police activity. Fortunately for Duchine, the American Civil Liberties Union took on his case, and the Vallejo district attorney's office dropped the charges. Duchine's police record will remain, however, as will the emotional toll of being arrested in front of his family.

But even if the rest of the federal circuits fall in line with *Glik*, individual police officers will always have substantial on-the-ground discretion to handle situations involving citizens' First Amendment right to record law enforcement. Several major metropolitan police departments, including Atlanta's and Cleveland's, have publicly committed to respecting these newly identified constitutional rights, and they deserve commendation for doing so. Other departments, however, have not been so compliant. For example, the chief of the Beaverton, Ore., police department told reporters last year that his officers would continue to arrest individuals who record them, despite a memo from the Beaverton city attorney explaining that such arrests are unlawful and the department's recent settlement payout in a lawsuit for conducting such an arrest.

At the least, perhaps the chief's comments will give Dr. Dre some new ideas about where to hold his next concert.

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TWEET

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Fenwick & West, declined to elaborate on why the company waited to file a trademark application for tweet.

IP lawyers speculate there could be many reasons, from financial constraints to wanting business partners to use the word tweet and help generate buzz. Twitter may have thought it could rely on common law rights, which are based on use and priority of use, and could choose to wait until it became successful before prosecuting the marks.

But proving common law rights can be difficult, even when a company's mark is successful, lawyers said. And now overuse of tweet is becoming a problem for Twitter. So it's taking steps to rein it in.

"Twitter doesn't want tweet to become generic for that type of communication," said Susan Hollander, an IP partner at K&L Gates in Palo Alto. "Theoretically, anyone could use that mark. And if that happens, it will no longer be associated with Twitter."

Companies have a few options in these situations. They can oppose rival trademark applications. Twitter did not oppose the trademark application for "Let Your Ad Meet Tweets." But it has opposed applications for "25 Tweets," "Tweetmarks," "Tweetiator," "Lutvtweet" and others.

Companies can buy the companies that own rival trademarks. Tweetdeck, an application for organizing the display of tweets, applied to trademark its name in April 2009. Twitter bought the company in May for more than $40 million.

Or companies can take their grievances to court, as Twitter has done with Twittad. It's an unusual step but it sends a clear message, said Neil Smith, an IP partner at Ropers Majeski Kohn & Bentley in San Jose.

"They want to set the tone of being aggressive," Smith said. "It sends a signal to the world, we may have a little dispute with the trademark office, but we will file suit against you in San Francisco, which may make your life miserable."