



**Low, Low Lo-Jack**  
By: Jim Astrachan

Who knows what peril lurks for an advertiser who incorporates a reliable news account into an ad campaign to draw the public's attention to the serious problem of car theft and, at the same time, sell its product? LoJack knows!

Peter Fanelle was a self-employed buyer and seller of engine parts. One night he was waiting for something or someone at a Philadelphia garage just as police raided. The garage, it seems, was suspected of being a local "chopshop" operation, where stolen cars were dismantled and their parts sold. Police were led to the garage by a stolen car with an installed LoJack, a radio transmission device, activated once a car is reported stolen. Mr. Fanelle's was arrested, cuffed, and taken to the waiting van for transport to the police station.

Two days after the incident, the Philadelphia Inquirer ran an article about the arrest of Mr. Fanelle and several other men who were at the garage that night. The names and photos of the arrested men, including Fanelle, were printed and the newspaper article described them as suspects.

The newspaper article soon found its way to LoJack. No doubt, an industrious employee in LoJack's marketing department thought there was great

hay to be made out of the article. After all, LoJack had brought the police to the garage and the LoJack-installed care was rescued. LoJack's photo copier soon became busy as twelve-page packages were created and distributed to car dealers throughout three states. Included in the package, headlined "LoJack Stolen Vehicle Police Recovery Network", was a page of car theft statistics, representations about the LoJack system, a copy of Consumers Digest's best buy award certificate, a page of expenses incurred once a car is stolen, and five pages of various car theft and recovery vignettes. Also enclosed with each package was a photocopy of the Philadelphia Inquirer article containing Mr. Fanelle's name and close-up, full-face photograph!

Eighteen months after his arrest, Mr. Fanelle was tried and found not guilty of all charges stemming from his presence at the garage. LoJack, however continued to distribute its package of materials to dealerships for ten months following Mr. Fanelle's acquittal. When Mr. Fanelle learned he was the center piece of LoJack's promotion, he sued LoJack for defamation and violation of his right of publicity.

LoJack moved to dismiss the defamation action contending that not one of the individual documents in the promotional package, standing alone, was untrue or defamatory. LoJack argued that truth is a defense to defamation and every word of the newspaper article was true, as Mr. Fanelle had been arrested at the garage. Fanelle contended the package, taken as a whole, gave rise to the implications of defamation because it branded him a car thief.

The Supreme Court of Pennsylvania had yet to rule on whether Pennsylvania recognizes a cause of action for "defamation by implication." It had, however, ruled that the literal truth of separate statements will not render a communication true where the implications of the communication as a whole are false.

Defamation by implication is not a novel theory. Prosser wrote that it occurs when a "defendant juxtaposes a series of facts so as to imply a defamatory communication between them, ... or otherwise creates a defamatory implication...". Even though the newspaper account was literally true, LoJack may have defamed Mr. Fanelle.

Numerous federal courts, including the Fourth Circuit Court of Appeals, have recognized that defamation may arise out of a false implication and not only out of literal facts.

LoJack, when it took an article documenting the arrest of Mr. Fanelle and placed it in a promotional package related solely to car theft, created a consonance between the article and the material relating to car theft. The court ruled that a reasonable person might easily conclude, after reading the promotional package, that Mr. Fanelle was a car thief, and that LoJack, a credible product, was responsible for the arrest of the car thief, Mr. Fanelle.

If LoJack stepped into the defamation bucket with its right foot, its left foot became wedged in the right of publicity bucket. Not only had LoJack likely defamed Fanelle by including the newspaper article in the package, but the fact that the article contained his name and photo may have caused LoJack to have violated his right of publicity. This was because the article containing Fanelle's name and photo offered a vivid, valuable news account of the value of LoJack. Therefore, Mr. Fanelle's name and photo had value, and the use of his name and photo for advertising or promotion without permission, could be a violation of his publicity rights. This was no different than an advertiser including in its ad without consent, a picture of a movie star.

One has to wonder whether the LoJack employee who created the promotional package acted alone or whether there was more than one person in the company with gross lack of judgment. Was there any internal process of review? Most advertisers clear their broadcast and print ads with knowledgeable legal counsel, but how many clear the day to day stuff churned out in house?

This case should make advertisers a lot more cautious about what the "back room" is doing at any given moment, as it is clear that those efforts do slip through the cracks and can result in severe damages and embarrassment.

---

*James B. Astrachan is a principal at the Baltimore firm of Astrachan Gunst & Thomas, P.C. Jim is former Chair of the Maryland Bar Association IP Committee and can be reached at [jastrachan@agtlawyers.com](mailto:jastrachan@agtlawyers.com).*