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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through November 25, 2012

UPCOMING EVENTS

MEDIA AND ENTERTAINMENT LAW CONFERENCE
January 17, 2013, Los Angeles, CA

MLRC STANFORD DIGITAL MEDIA CONFERENCE
May 16-17, 2013, Palo Alto, CA

MLRC LONDON CONFERENCE
September 23-24, 2013, London, England

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MLRC 2012 Annual Dinner

Andrea Mitchell, Alex Castellanos and Governor Edward Rendell Discuss Money, Messaging and the Media in the 2012 Presidential Campaign

Left to right: Alex Castellanos, Andrea Mitchell and Governor Edward Rendell

On Wednesday, November 14, 2012, over 600 members and friends attended MLRC's Annual Dinner at the Grand Hyatt in New York. Andrea Mitchell of NBC News moderated a discussion, entitled "Politics, Media & Money: Campaigning in the New Media and Money Environment," with former Pennsylvania Governor Edward Rendell and Republican strategist, media consultant, and television commentator Alex Castellanos.

The discussion focused on the recent presidential election, including the role of money, messaging and America's evolving demographics. Ms. Mitchell asked panelists about the billion dollars plus spent in the campaign, the role of social media in the campaign and the post-election challenges facing both President Obama and the Republican Party.

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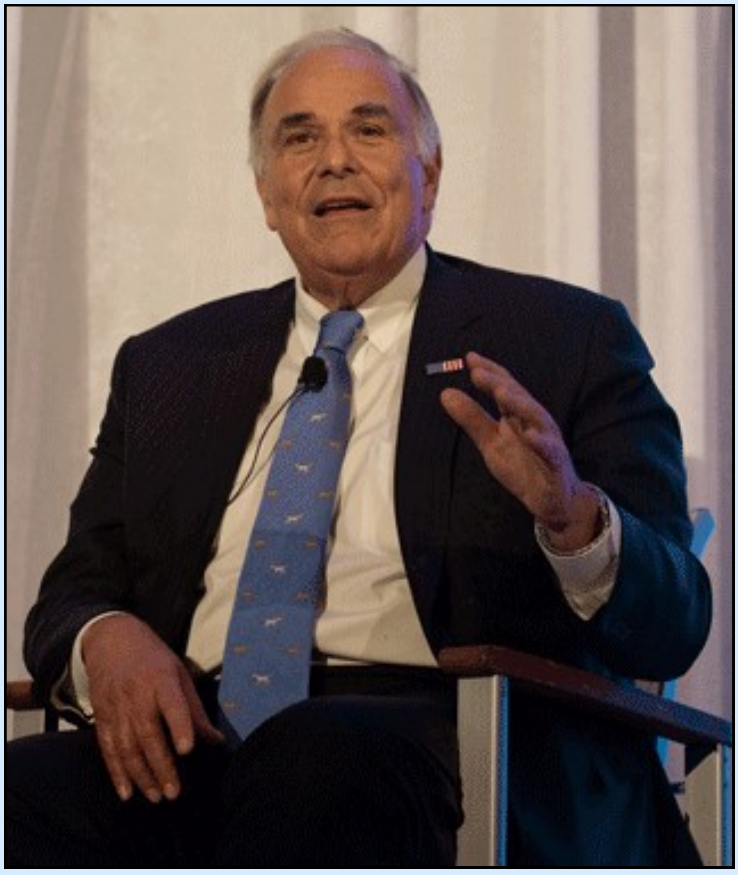
ALEX CASTELLANOS: I do want to be a contrarian on the amount of money spent in politics. I think there is a money problem in politics. I think we don't spend nearly enough....This year we spent $8 billion on Halloween. We spent $2 billion on just Halloween candy. We spent more on cavities than candidates. And this, we're picking the leader of the free world. As long as it's freely expressed, as long as it is publicly acknowledged, and it could be done instantly now, then why not let the American people compete with their votes and their dollars?

GOV. RENDELL: Iif you shot me up with sodium pentothal, I would answer, "Did you ever make a decision based on the fact that someone contributed a lot of money or raised a lot of money for you?" And I think I would say "No," and that would be the truth. But I have to tell you there were times when I agonized about it, and there's no business, there's no reason under the sun that anyone should agonize over it.... So it creates a terrible appearance of impropriety, which cuts at the morale of our citizens and our democracy, and it creates real problems.



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ALEX CASTELLANOS: Nothing new grew under the shade of the big Bush tree for eight years. Success has that penalty. It stunts the next generation. It wasn't ripe this election, but it's getting there. We're seeing a new generation of Republicans: the Rubio's, the Jeb Bush's, the Susana Martinez's. And with new leading men and leading women, there'll be a new script.

* * *

ANDREA MITCHELL: Is this Bill Clinton's Democratic Party or President Obama's or a combination because Bill Clinton was the closer, and he did, some would say, better than Mariano Rivera?

GOV. RENDELL: I don't think there's that much difference between the Obama Democratic Party and the Clinton Democratic Party. I think they're both fairly pragmatic, and I think their views are much closer than you would think. Bill Clinton was extraordinary in this campaign. I mean he worked incredibly hard for President Obama, and was incredibly effective. You know it's sometimes much easier for you to campaign for somebody else than for yourself. You can say things about somebody else, and it's not bragging. If you said the same things about yourself, it is. And he made the case for President Obama's reelection better than the President did, in my judgment.

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Cocktail reception preceding the dinner.

ANDREA MITCHELL: We have never seen social media playing the role that social media played. How did that affect the two parties' operations?

ALEX CASTELLANOS: What the Obama people did that I thought was very different from what Republicans did is they built these communities, and it was your neighbor; it was somebody you might know. If not, it's somebody that lived around the corner. And so all of a sudden there's a social embarrassment factor. "Everybody else is going to vote. They might know if I don't vote." And a lot of contacts peer to peer, a real community building exercise that I think made a huge difference. What were Republicans doing? Voice over IP contacts, one way out from a centralized place--old school. And that, I think, is the difference between the past and the future.

GOV. RENDELL: Yeah, I think that's right. But I think there was one other thing operating in this election that we've never seen before, and this is a morality play because the Republicans in many states shamefully tried to make it harder for people to vote. Shamefully. It was disgraceful, in my judgment. Shortening the early voting days; shortening hours; all these voter ID laws that most of which were stayed or thrown out by the courts, but they had the effect of angering voters.

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ANDREA MITCHELL: The Republicans still talk about Ronald Reagan, and Ronald Reagan is as long ago to a young Republic voter as Thomas Dewey was to those of us who were coming out of school. So there's not that connection.

GOV. RENDELL: And Andrea, they talk about the Ronald Reagan that never existed.... They've rewritten history. They're rewritten history. There's a Ronald Reagan out there that never existed. Ronald Reagan was the ultimate pragmatist. He knew how to get things done. He knew how to compromise.

* * *

ANDREA MITCHELL: Let me ask you, Ed, about this president as he approaches a second term. Why do I hear Senate Democrats saying to me, "Why doesn't he reach out to us? Why don't we know him better?" Does he not like the politics? Does he not like to do that? Is he arrogant? Is he shy? What is it about this president where you hear so many people criticizing the Congressional relations? And I'm talking about Democrats.

GOV. RENDELL: No, no. Look, presidents are like the rest of us. They have different personalities. I think President Obama is intrinsically shy. I think he's a private person. He's not Bill Clinton. He's not Tip O'Neill. He's not Ronald Reagan. He isn't. That was in their personalities to do those things.

* * *

ALEX CASTELLANOS: Our great presidents, modern presidents, whether it's FDR, whether it's Kennedy, whether it's Reagan, whether it's Clinton--the bridge to the 21st Century, the new deal, the new frontier, rendezvous with destiny--the job of a president is to take this country to the next place--is to lift our eyes over the horizon a little bit. That's what missing, I think, in the Republican firmament. That's who Obama was last time.

GOV. RENDELL: But I think you need more than a leading man or a leading woman. You have to change the fundamental outlook of the party.

A transcript of the dinner panel will be published in December.

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Thank you, Liz Ritvo!

By Sandy Baron, MLRC Executive Director

On behalf of all of the members of the MLRC, I want to thank outgoing Defense Counsel Section President, Liz Ritvo of Brown Rudnick. Liz is finishing up an excellent year as leader of the DCS and of its Executive Committee and, in that role, as a director on the MLRC Board of Directors. She will remain on the DCS Executive Committee throughout 2013 as President Emeritus.

2012 DCS President Liz Ritvo

Liz, as many of you know, is a smart, practical, experienced litigator and media counselor. She brings a wealth of talent to the Defense Counsel Section leadership and the Board of Directors. She was a great spokesperson for the DCS at the MLRC Board, but more to the point, she was a valuable thinker about MLRC, its programs and projects.

Among her legacies in this role will be the launch of the MLRC Media Copyright and Trademark Committee in 2013. This was a concept developed by Liz, and brought into being through her consistent leadership.

Liz has had a long history of service with MLRC and all of us look forward to years and years of working with Liz in the future. Her ability to cut through and hit at a clear vision of programs and projects and concepts is invaluable. As Executive Director, I cannot adequately thank her for those skills that she brought to bear on all of our behalf. When Liz spoke, I tried to take good notes, because I knew that her articulation of whatever was under consideration would be a valuable and interesting one.

To Liz Ritvo: our deepest gratitude.

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MLRC Forum on Challenges of Digital Technologies on Television Business Models

On Wednesday, November 14, 2012, the Media Law Resource Center held its annual Forum, this year focusing on new business-interrupting technologies that are impacting the television industry.

The two-hour session, titled, "We Interrupt This Broadcast... Disruptive Technologies and New Television Business Models," featured: Alan Wurtzel, President, Research & Media Development, NBCUniversal; Richard Greenfield, Media Analyst, BTIG; and Bruce Keller, Partner, Debevoise & Plimpton LLP.

The panel discussion was moderated by Mary Snapp, Vice President and Deputy General Counsel, Microsoft Corporation.

Left to right: Alan Wurtzel, Richard Greenfield, and Bruce Keller. Not pictured: Mary Snapp.

Alan Wurtzel began the session with a presentation on his research exploring the use of digital media platforms during NBC's coverage of the three Olympic Games held between 2008 and 2012. Among his findings were that the more devices, e.g., smartphones and tablets, viewers used in addition to television, the more Olympics coverage they watched. Remarkably, during the London Olympics, 54% of the viewers in the NBC study watched Olympics coverage *simultaneously* on two or more devices.

Richard Greenfield, in his presentation, noted that with the success of digital content services like Netflix, consumers expect to watch content when they want, where they want, and on the device they want. They have also become accustomed to "marathoning" – watching several hours of programming at a single sitting without extensive commercial interruption. More and more networks are responding by licensing video-on-demand of earlier seasons of programs that are still in production.

During the panel discussion led by Mary Snapp, Greenfield suggested that a future television revenue stream that would meet the expectations of digitally connected consumers is a lighter load of short, targeted, and creative ads that consumers are more likely to watch even if they can be skipped.

Bruce Keller gave an overview of current litigation challenging new technologies that the broadcast networks claim to be infringing their copyrights, the two most significant of which involve the Aereo internet streaming service (which delivers unlicensed real-time broadcasts to subscribers over the internet via individually assigned dime-sized antennas) and the Dish Network's Hopper DVR and AutoHop service which entirely skips the commercials of the major broadcast networks' primetime line-ups. Federal District Courts in New York and Los Angeles have denied preliminary injunctions in the Aereo and Dish Network cases, respectively, and both decisions have been appealed.

MLRC members can access a reading list for the Forum – covering all of the various business and legal challenges of new video technologies, and including all of the briefs and opinions in the recent litigation – on our website at: http://medialaw.org/component/k2/item/1332 You can subscribe to Richard Greenfield's blog for http://www.btigresearch.com/ and follow him on twitter: @richgreenfield1.

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Cert. Petition Filed in Belfast Project Subpoena Case

Court Should Clarify Source Protection in Criminal Context

Two journalists who conducted confidential interviews with IRA members as part of an oral history project on the Northern Ireland conflict filed a petition for certiorari this month asking the Supreme Court to rule that they are entitled to challenge a criminal subpoena on First Amendment grounds. In July, the First Circuit effectively foreclosed as a matter of law any First Amendment challenge to a criminal subpoena seeking confidential source information. See In re Request from United Kingdom Pursuant to Treaty Between Government of U.S. and Government of United Kingdom on Mutual Assistance in Criminal Matters, No. 11-2511, 2012 WL 2628046 (1st Cir. July 6, 2012) (Lynch, Torruella, Boudin, JJ.). *See also "First Circuit Refuses to Quash UK Subpoena for Confidential Belfast Project Interviews,"* MediaLawLetter July 2012.

Background

The subpoenas were issued to Boston College pursuant to 18 U.S.C. § 3512, and a Mutual Legal Assistance Treaty between the United States and the United Kingdom. The subpoenas are part of an investigation by United Kingdom authorities into the 1972 murder of Jean McConville, an alleged informer on the activities of the IRA.

The UK subpoena seeks confidential interviews conducted by Boston College's "Belfast Project," designed to preserve historical information and provide insight into Northern Ireland's "Troubles" and other conflicts. The Project's director was Ed Moloney, a journalist and writer. Anthony McIntyre, a journalist and former IRA member, recorded interviews with IRA members for the Project. The recordings were to remain confidential until the interviewees' death, absent their consent.

Boston College's motion to quash was denied. Moloney and McIntyre had sought to intervene to challenge the subpoena arguing, among other things, that Boston College did not adequately represent their and their families' concern for personal safety. The district court denied their motion to intervene. A separate complaint filed by Moloney and McIntyre was also dismissed and they appealed to the First Circuit on constitutional and procedural grounds.

First Circuit Decision

With respect to the constitutional protection for confidential sources, the First Circuit held that under *Branzburg v. Hayes*, 408 U.S. 665 (1972), disclosure in the context of a criminal subpoena presents no legally cognizable First Amendment or common law injury. "If the reporters' interests were insufficient in Branzburg, the academic researchers' interests necessarily are insufficient here," Judge Lynch wrote. In addition, in a footnote, the court dismissed any suggestion that the subpoenas were issued with a "bad faith purpose to harass."

On October 17, Justice Breyer granted a stay pending filing and resolution of a cert. petition to the Supreme Court.

Cert. Petition

The questions presented in the Petition are:

1. Whether persons with Article III standing to object to criminal subpoenas of confidential information have a First Amendment or Due Process right to be heard and to present evidence in support of their objections.
2. What legal standard governs judicial review of subpoenas issued by foreign governments pursuant to Mutual Legal Assistance Treaties and 18 U.S.C. § 3512.

On the constitutional issues, the Petition argues that the First Circuit decision creates a circuit split because it directly conflicts with the Second Circuit's decision in *The New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006). Moreover, it argues that review is warranted to resolve the longstanding differences in judicial opinions about the scope of *Branzburg*.

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FROM PETITIONERS' BRIEF....

Since the Court's decision in Branzburg forty years ago, circuit courts have reached conflicting conclusions about whether, and the extent to which, the First Amendment's structural protections for information-gathering protect against the forced disclosure of confidential information. The First Circuit substantially expanded that conflict by holding that Branzburg precludes as a matter of law the right to pursue a challenge to a criminal subpoena on First Amendment grounds.

First, the lower court's decision directly conflicts with the Second Circuit's recent decision in Gonzales, 459 F.3d 160. Gonzales held that a newspaper had the right to bring a declaratory judgment action to challenge a criminal subpoena of confidential information held by third parties. Id. at 165-67. The right to be heard recognized by Gonzales included the right to present evidence in support of the First Amendment objections asserted. Id. at 168-69, 172-74. That was the very right rejected by the First Circuit in this case, which instead established a rule denying academics, journalists, and all other persons the right to personally defend confidentiality commitments made in exchange for obtaining information on matters of legitimate public interest.

Second, the lower court's decision conflicts in principle with circuit courts that, despite having differing views of Branzburg, have recognized the right to be heard on a case-specific basis when objecting to subpoenas seeking the disclosure of confidential information. See, e.g., United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981); McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003). The lower court found the First Amendment interests so wanting as to not even require consideration of the discretionary factors applicable to foreign requests for subpoenas in civil cases. United Kingdom, slip op. at 30 (Pet. 28a).

Third, the lower court's decision conflicts in principle with First Amendment precedent of this Court. Even in the absence of a First Amendment "privilege," the Court has held that a careful, fact intensive balancing process is required when compulsory process "impinge[s] upon such highly sensitive areas" as freedom of speech, political association, and academic freedom. Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957); see also NAACP, 357 U.S. at 462; McIntyre, 514 U.S. at 344, 347.

Fourth, the lower court departed from Branzburg and circuit courts that have applied Branzburg by foreclosing the right to challenge a subpoena on the First Amendment grounds of "bad faith" by law enforcement. See generally Branzburg, 408 U.S. at 710 ("if the newsman . . . has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered") (Powell, J., concurring). Where, as here, the objector had no private right of action under a treaty and no administrative procedure remedy, the lower court's denial of a right to be heard on a judicial claim for relief eviscerated well-established First Amendment and Due Process rights.

Instead of applying the sensitive, case-specific analysis required by other courts when First Amendment interests are at stake, the lower court held that Branzburg effectively adjudicated the claims not only of the reporters who came before the Court in 1972, but those of all future persons who assert that a criminal subpoena unjustifiably infringes on their First Amendment rights. The effect of the lower court's decision, moreover, is not limited to journalists and academics who gather information about domestic or foreign affairs. The decision also affects the rights of all persons who, in this digital age, disclose information about themselves to third parties.

Petitioners are represented by Eamonn Dornan, Dornan & Associates PLLC, Long Island City, NY; James J. Cotter III, N. Quincy, MA; and Jon Albano, Bingham McCutcheon LLP, Boston, MA.

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Bartnicki Keeps Reporter Off the Witness Stand in Florida

Journalist's Privilege Applies to Testimony About the Transmission of an Unauthorized Recorded Conversation

By George D. Gabel Jr. & Matthew H. Mears

Florida Circuit Court Judge Frank E. Sheffield ruled that a reporter from *The Florida Times-Union*, Matt Dixon, cannot be compelled to testify in the State's case against a former aide to Lt. Gov. Jennifer Carroll, finding that the State failed to overcome the qualified journalist's privilege. *State v. Cole*, 11 CF 03254 (Fla. Cir. Ct. Nov. 14, 2012).

The State alleges that a staffer to Lt. Governor Carroll, Carletha Cole, secretly recorded a conversation that she had with Carroll's chief of staff, Jon Konkus, in September of 2011. Ms. Cole was concerned that Carroll's office had become so dysfunctional that it threatened the ability of Governor Scott to run the state. She shared her views in an interview with Dixon. Hours after Dixon posted his story, Cole was fired.

Three days later, the Times-Union posted a recorded conversation between Cole and Konkus. In the recording, Konkus criticized the Governor for "not leading" and remarked that the Governor's chief of staff was afraid of Carroll. The posting prompted an investigation by the Florida Department of Law Enforcement. Ultimately, Cole was charged with the crime of transmitting an unauthorized recording.

In order to develop its case against Cole, the State sought to compel the testimony of Matt Dixon. Counsel for Dixon and the Times-Union moved to quash the subpoena and requested a protective order, citing the protections of the journalist's privilege. In Florida, news reporters are protected by a "qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news." § 90.5015(2), Fla. Stat. (2012).

The Court ruled in favor of the Times-Union, holding that Florida's statutory codification of the journalist's privilege "must be read in conjunction with Bartnicki," and that "a reporter's information from a recording, including the delivery of that recording is protected by the First Amendment as 'speech.'"

The State argued that the privilege was inapplicable, based on the crime fraud exception. Under that exception, there is no privilege for "physical evidence, eyewitness observations, or visual or audio recording of crimes." *Id*. Counsel for the Times-Union, relying on *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001), argued that the delivery of a recording was analogous to the delivery of a handbill or pamphlet, and was thus "speech" entitled to First Amendment protections. Counsel argued that Florida's journalist's privilege must be construed in harmony with *Bartnicki* so as not to run afoul of the First Amendment.

The Court ruled in favor of the Times-Union, holding that Florida's statutory codification of the journalist's privilege "must be read in conjunction with *Bartnicki*," and that "a reporter's information from a recording, including the delivery of that recording is protected by the First Amendment as 'speech.'" (Order at 3.) While such protections are not absolute, the court found that the State failed to overcome the qualified journalist's privilege.

The qualified journalist's privilege can only be overcome by showing that the information sought is relevant, that it cannot be obtained from alternative sources, and that a compelling interest exists for the disclosure of the information. § 90.5015(2)(a)-(c), Fla. Stat. (2012). While there was no dispute that the information sought was relevant, the State failed to carry its burden on the second and third elements. As to the second element, the Court found that there were alternative sources for the information sought, such as the computer that was used to transmit the unauthorized recording and Cole's internet service provider.

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The third element can only be satisfied where the "need for the testimony is so compelling that [the State] cannot otherwise establish its case." *State v. Bellon*, 36 Med. L. Rep. 1767, 1768 (Fla. 6th Cir. Ct. 2007) (citing *McCarty v. Bankers Ins. Co.,* 195 F.R.D. 39, 47 (N.D. Fla. 1998)). In analyzing this element, the Court weighed the freedom of the press against the need for the information sought. The court considered two cases where First Amendment protections trumped the interests of the State in prosecuting individuals who transmitted information in violation of a statute, *see Tribune Co. v. Huffstetler*, 489 So. 2d 722, 724 (Fla. 1986), and *Morgan v. State*, 337 So. 2d 951 (Fla. 1976), and concluded that "First Amendment protections weigh heavily" in this context. (Order at 5.)

The court's decision illustrates the tension between the journalist's privilege that shields certain information from disclosure and the right of litigants' to every man's evidence. The journalist's privilege is rooted in the First Amendment and embodies a recognition that protecting a free and unfettered press is a sufficiently compelling interest to justify depriving litigants of potential sources of information.

The journalist's privilege cannot be defined by bright lines or by absolutes; instead it involves a continual balancing of one societal interest against another. As this case illustrates, the privilege ensures that news reporters will not be called upon by litigants out of convenience or expediency. Instead, reporters can only be called to the witness stand after a litigant has shown that the testimony is not available through other sources and is essential. In *State v. Cole*, the State's subpoena was quashed because the State failed to establish that it had no other way to prove up its case.

Nonparties, Morris Publishing Group LLC, d/b/a The Florida Times-Union and Matt Dixon, were represented by George D. Gabel Jr., a partner in the Jacksonville office of Holland & Knight LLP, and Matthew H. Mears, an associate in the firm's Tallahassee office.

Counsel for the State of Florida is John P. Hutchins, III, Assistant State Attorney, Tallahassee, Florida. Counsel for Defendant, Carletha L.Cole, is Steven R. Andrews and Stephen G. Webster, with the Law Offices of Steven R. Andrews, PA, Tallahassee, Florida.

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Ninth Circuit Grounds Chuck Yeager's Publicity Claims Against Memorabilia Website

The Ninth Circuit recently affirmed summary judgment dismissing right of publicity claims brought by famed pilot Chuck Yeager against an aviation memorabilia website. *Yeager v. Bowlin*, No. 10-1597 (9th Cir. Sept. 10, 2012) (Fletcher, Reinhardt, Tashima, JJ.).

The Court affirmed that Yeager's claims were barred by the single publication rule. The Court also held that the district court did not abuse its discretion by striking Yeager's written declaration in opposition to summary judgment which contained detailed answers to questions he could not answer doing his deposition.

In 2008, Chuck Yeager sued the owners of Aviation Autographs for federal trademark and state right of publicity violations. Through its searchable website, Aviation Autographs sells aviation-related memorabilia, including aircraft posters signed by Yeager. The items were offered for sale on the website in 2003 and the pages offering these products remained unchanged.

A federal district court granted summary judgment to defendants on statute of limitations grounds. *See Yeager v. Bowlin,* 2010 U.S. Dist. LEXIS 718 (E.D. Cal. 2010). The district court held the website was a single integrated publication since it displayed identical content to all viewers of the site. In a novel argument, Yeager claimed that the single publication rule did not apply to the ongoing sale of a product for commercial gain. Under Yeager's argument the statute of limitations would restart each time a product mentioning him was sold. According to the district court, this would mean the statute of limitations would never run so long as defendant offered Yeager-related items for sale. "This is the exact result the single publication rule seeks to avoid," the district court concluded.

The district court also struck a proffered declaration in opposition to summary judgment under the sham affidavit rule. During his deposition, Yeager could not recall answers to over 200 questions, even when shown exhibits in an attempt to refresh his memory. The declaration filed three months later, however, contained detailed answers to those questions.

Sham Affidavit Rule

The Ninth Circuit first addressed the sham affidavit rule, holding that a district court's decision to apply the rule is reviewable under an abuse of discretion standard. The Court cautioned that "newly remembered facts, or new facts, accompanied by a reasonable explanation, should not ordinarily lead to the striking of a declaration as a sham." However, here the disparity between the deposition and affidavit was "extreme" and Yeager "provided no reason for his sudden ability to recall specific facts." Thus the district court's decision was not an abuse of discretion.

Single Publication Rule

Although the Court noted that "applying the single integrated publication test to non-traditional publications can be tricky," it concluded that the district court correctly calculated the statute of limitations as accruing in October 2003.

The Court flatly rejected Yeager's claim that modifications to unrelated portions of defendants' website constituted a republication of the complained of material.

> We reject Yeager's argument and hold that under California law, a statement on a website is not republished unless the statement itself is substantively altered or added to, or the website is directed to a new audience. This holding is consistent with cases in which we have applied the single-publication rule to federal statutes and with decisions of other courts, and prevents freezing websites in anticipation of litigation.

Chuck Yeager was represented by Jon R. Williams, Boudreau Williams LLP, San Diego, CA. Defendants were represented by Todd M. Noonan, Stevens, O'Connell & Jacobs LLP, Sacramento, CA.

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Minnesota Federal Court Applies Single Publication Rule to the Internet

Fringe Candidate's Libel Suit Dismissed

Joining the list of states that have applied the single publication rule to the Internet, a federal district court this month dismissed a libel complaint against The Huffington Post as time barred. *Shepard v. TheHuffingtonPost.Com, Inc.*, 2012 U.S. Dist. LEXIS 163374 (D. Minn. Nov. 15, 2012).

Although no Minnesota state court had considered the issue, the federal court was convinced that the state would follow the principles outlined in Firth v. State of New York, 775 N.E.2d 463 (N.Y. 2002) and subsequent cases. Thus the statute of limitations here began to accrue when the alleged defamatory article was published on the defendant's website.

The plaintiff, acting pro se, had been a fringe candidate for Minnesota State Senate. The Huffington Post, in an article titled "Support Jack Shepard, The Arsonist, For Congress," pointed out his dubious qualifications, including convictions for criminal sexual conduct and drug possession and being accused of arson.

Screenshot of Huffington Post article.

The court rejected plaintiff's argument that his complaint was timely because the article had been "updated" after original publication. The only updates cited by plaintiff were hyperlinks to the original article. Hyperlinks to the original article, however, "do not restart the statute of limitations," the court concluded relying on the recent Third Circuit in Philadelphia Newspapers, LLC, 690 F.3d 161, 175 (3d Cir. 2012) (providing a new link to original article "may allow for easy access" to the article, but does "not amount to the restatement or alteration of the allegedly defamatory" content).

The court also rejected plaintiff's argument that the limitations period should be tolled under the Servicemembers Civil Relief Act, 50 U.S.C. App. § 526 which extends the statute of limitations for claims brought by active duty military members. Plaintiff's allegation that he was a covert agent for the government was insufficient proof to active military duty.

The lawsuit was also dismissible on the merits. The statements in the article were either true or hyperbole. And the headline calling plaintiff an "arsonist" was true in the context of the entire piece which explained that plaintiff was "accused of arson."

Plaintiff acted pro se, The Huffington Post was represented by Katharine A. Fallow and Michael B. DeSanctis, Jenner & Block in Washington, D.C.; and James E. Dorsey, Fredrikson & Byron, PA, Minneapolis, MN.

For more on this topic see "The Single Publication Rule and the Internet: Applying an Old Rule to New Publishing Platforms" in MLRC Bulletin 2012:2

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Two Different Pennsylvania Superior Court Panels, Two Very Different Results

Status of False Light Law in Disarray

By Amy B. Ginensky, Michael E. Baughman, and Eli Segal

Within a span of just a few months, the Pennsylvania Superior Court reached very different conclusions in two defamation and false light actions, both of which involved an elected official who sued the press over more than fifteen separate publications. In *Henderson v. Lancaster Newspapers, Inc.*, No. 1816 EDA 2011 (Sept. 28, 2012), an unpublished opinion, a three-judge panel affirmed the trial court's grant of summary judgment against former Lancaster County Commissioner Molly Henderson on falsity and actual malice grounds. In *Krajewski v. Gusoff*, 53 A.3d 793 (Aug. 14, 2012, reargument denied Oct. 22, 2012), a panel of three different judges revived former Philadelphia City Councilwoman Joan Krajewski's lawsuit, vacating in part the trial court's dismissal and leaving the state's law of false light in disarray.

The panel held that the trial court got it right—all of the publications were substantially true or protected expressions of opinion and there was no evidence of actual malice.

Henderson v. Lancaster Newspapers, Inc.

At issue in *Henderson* were a series of newspaper articles and opinion pieces published in 2006 and 2007 that reported and commented on, among other things, a grand jury investigation into whether the three Lancaster County commissioners, including Henderson, met in violation of the Sunshine Act in connection with the sale of a nursing home. The grand jury report released to the public at the end of the investigation, while more critical of the other two commissioners, found that all three commissioners had violated the Sunshine Act. Indeed, all three commissioners pled guilty to violating that Act—Henderson to one violation and her fellow commissioners to two. Not surprisingly, the local newspapers covered the investigation, guilty pleas, and grand jury report extensively.

After losing her re-election bid, Henderson sued Lancaster Newspapers, Inc. ("LNI") and nine individual defendants for defamation and false light invasion of privacy based on nineteen articles, editorials, and letters to the editor published in three newspapers owned by LNI. Corrections or clarifications had been published for five of those nineteen pieces at Henderson's request. In her lawsuit, Henderson claimed that the press portrayed her especially badly in its coverage of the grand jury investigation because LNI had an ownership interest in the hotel portion of a convention center and hotel development project that Henderson opposed as commissioner. According to Henderson, the press, motivated by LNI's interest in the project, used the investigation to turn the electorate against her and ensure that she did not win another four-year term.

After almost forty depositions and substantial briefing, the trial court granted the defendants summary judgment. The trial court found that, despite the five corrections and clarifications, all of the publications at issue were substantially true or protected expressions of opinion. It also found that, despite her claims of ill-motive, Henderson did not produce any evidence that any of the defendants acted with actual malice. On appeal, a unanimous Superior Court panel affirmed. The panel held that the trial court got it right—all of the publications were substantially true or protected expressions of opinion and there was no evidence of actual malice. In addition, while Henderson did not press her false light invasion of privacy claim on appeal, the panel noted that there can be no such claim based on publications about matters of "legitimate concern to the public."

The deadline for filing a petition for allowance of appeal with the Pennsylvania Supreme Court has now passed, which means that this five-year-old legal battle has successfully come to a close for LNI.

Krajewski v. Gusoff

In 2008, the *Northeast Times*, the local newspaper in Philadelphia City Councilwoman Joan Krajewski's district,

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published a series of columns, editorials, letters to the editor, and political cartoons criticizing Krajewski for her participation in a controversial City retirement program. Krajewski filed a defamation and false light invasion of privacy suit based on seventeen of those publications.

The trial court dismissed her defamation claims because the publications were all non-actionable expressions of opinions and because she failed to plead facts sufficient to show actual malice. It dismissed her false light claims for the same reasons and because, under *Rush v. Philadelphia Newspapers, Inc.*, 732 A.2d 648 (Pa. Super. Ct. 1999), Pennsylvania does not permit false light claims based on publications about matters of "legitimate concern to the public."

A three-judge Superior Court panel—which did not overlap at all with the *Henderson* panel—unanimously affirmed the dismissal of Krajewski's defamation claims as to three of the publications about which she continued to complain on appeal, holding that they did not "'contain[] a provably false factual connotation' such as to exempt them from protection under the First Amendment." (Quoting *Milkovich v. Lorain Journal*, 497 U.S. 1, 20 (1989).) As to an editorial, political cartoon, and letter to the editor published on the December 8, 2008 Opinion page, however, the panel held that, while each were "themselves expressions of opinion," the three pieces collectively could be read to imply false and defamatory facts.

The defendants asked the Pennsylvania Supreme Court to allow an appeal to clarify when, if ever, public officials may recover for false light invasion of privacy based on publications about matters of legitimate public concern.

In ruling on Krajewski's false light claims, the Superior Court panel "disavow[ed]" a prior panel's holding in *Rush* over a decade earlier that limited false light invasion of privacy claims to publications about matters that are not of legitimate concern to the public. But the *Krajewski* panel did not just vacate the trial court's dismissal of Krajewski's false light claims as to the December 8, 2008 Opinion page. It also vacated the dismissal of her false light claims as to the three publications it had already found constitutionally protected under *Milkovich*.

After their application for reargument was denied, the defendants filed a petition for allowance of appeal with the Pennsylvania Supreme Court on two false light issues (in addition to one defamation issue, which we will not detail here).

First, the defendants asked the Pennsylvania Supreme Court to allow an appeal to clarify when, if ever, public officials may recover for false light invasion of privacy based on publications about matters of legitimate public concern. It is currently unclear whether a public official may ever recover for false light in Pennsylvania for publications about her conduct in office.

In *Krajewski*, as well as in *Larsen v. Philadelphia Newspapers*, 548 A.2d 1181, 1188 (Pa. Super. Ct. 1985), the Superior Court allowed such suits to proceed. But in *Rush* and in *Strickland v. University of Scranton*, 700 A.2d 979, 987 (Pa. Super. Ct. 1997), the Superior Court flatly held that Pennsylvania does not permit false light invasion of *privacy* claims based on publications about matters of "legitimate concern to the public."

This black-line rule—which the *Krajewski* Court "disavow[ed]"— has been the basis for dismissal of false light claims in many other cases in Pennsylvania since *Rush* and *Strickland* were decided. Indeed, the *Henderson* panel cited it as the law *after* the *Krajewski* panel issued its opinion.

In petitioning for an appeal on this issue, the defendants highlighted that many of the state high courts to have considered false light invasion of privacy claims have refused to recognize the tort at all—regardless of whether the plaintiff is a public official and regardless of whether the subject matter of the publication is of public concern. Five of those courts—the highest courts of Colorado, Florida, Minnesota, North Carolina, and Texas—thoroughly discussed and weighed the pros and cons of permitting the tort before ultimately rejecting it for the same basic reasons. *See* *Denver Publ'g. Co. v. Bueno*, 54 P.3d 893 (Colo. 2002); *Jews for Jesus v. Rapp*, 997 So.2d 1098 (Fla. 2008); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998); *Renwick v. News & Observer*, 312 S.E.2d 405 (N.C. 1984); *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994).

For starters, false light is almost entirely duplicative of defamation: other than defamation's requirement that a statement be "defamatory" and false light's requirement that a statement be "highly offensive to a reasonable person," the torts are nearly identical. More important, to the extent there are situations in which a court could find a statement

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actionable for false light but not defamation, no would-be speaker could feel comfortable predicting what those situations are.

While defamation's contours—including both the substantive and procedural rules that govern it—have been carefully shaped by courts and legislatures over the course of many decades, those of false light have not. Further, false light's "highly offensive to a reasonable person" standard is inherently subjective and difficult to define. Thus, concluded the highest courts of Colorado, Florida, Minnesota, North Carolina, and Texas, recognizing the tort would create an unacceptable risk of chilling free speech.

Second, the defendants asked the Pennsylvania Supreme Court to allow an appeal to clarify that where a court concludes that the First Amendment bars recovery for a defamation claim based on a particular publication, it necessarily follows that the First Amendment also bars recovery for a false light invasion of privacy claim based on that same publication.

Relying on *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), *Time, Inc. v. Hill*, 385 U.S. 374 (1967), and a host of other federal and state cases, the defendants argued that because the First Amendment is a check on the power of the state to award damages for lawsuits of any kind, the same constitutional protections apply whatever the label given to the claim. This includes the requirement articulated in *Milkovich*, in the defamation context, that where a publication is about a matter of public concern, a plaintiff must plead a provably false statement or implication of fact.

As Professor Rod Smolla put it, "[t]o permit, via the false light tort, causes of action that would otherwise not be permitted as a matter of law because they fail to allege provably false statements of fact, is to open a wide and dangerous loophole in the fabric of defamation law; eliminating a requirement that has both common-law and constitutional significance."

The *Krajewski* panel specifically found that three of the publications at issue did *not* satisfy *Milkovich*. Therefore, the defendants explained in their petition, it was plainly unconstitutional to allow Krajewski's false light claims to proceed as to those same publications.

While the Pennsylvania Supreme Court, like the United States Supreme Court, grants appeals to only a small percentage of those who request one, the defendants argued that it should do so here to bring much-needed clarity to this muddled area of Pennsylvania law.

While the Pennsylvania Supreme Court, like the United States Supreme Court, grants appeals to only a small percentage of those who request one, the defendants argued that it should do so here to bring much-needed clarity to this muddled area of Pennsylvania law.

It is difficult to reconcile the Superior Court's opinions in *Henderson* and *Krajewski*. One lesson to be learned, however, is that a different Superior Court panel can mean an entirely different ballgame.

Amy B. Ginensky, Michael E. Baughman, and Eli Segal of Pepper Hamilton LLP in Philadelphia represent the defendants in Henderson and Krajewski. The defendants in Henderson are also represented by George C. Werner of Barley Snyder in Lancaster. The plaintiff in Henderson is represented by Mark Schwartz of Bryn Mawr, PA and by William J. Gallagher and Leo M. Gilbbons of MacElree Harvey, Ltd., in West Chester, PA. The plaintiff in Krajewski is represented by Barbara A. Axelrod and James E. Beasley

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Alabama Court Affirms Dismissal of Libel Claim Over Broadcasts about Arrest

Failure to Allege Falsity Dooms Complaint

In an interesting fair report case, the Court of Appeals of Alabama affirmed dismissal of a libel complaint premised on a television station's accurate report about plaintiff's arrest, but failure to broadcast an update following the dismissal of charges. *Jackson v. WAFF, LLC, and Huntsville Broadcasting Corp.*, No. 2110643, 2012 Ala. Civ. App. LEXIS 295 (Ala. App. Oct. 23, 2012) (Thomas, Thompson, Pittman, Bryan, Moore, JJ.).

Under Alabama law, fair and impartial reports of arrests are privileged "unless it be proved ... that the publisher has refused upon the written request of the plaintiff to publish the subsequent determination of such suit, action or investigation." No reported Alabama case ever considered this portion of the statute. However, the Court found it unnecessary to "delve into the parameters of the fair report statute" because plaintiff failed to allege that any of the broadcasts were false. The Court also rejected plaintiff's argument that the fair report statute created a cause of action to obtain a retraction or clarification.

The Court found it unnecessary to resolve the meaning of the statute to decide the case because plaintiff did not plead that the statements in the broadcast were false. By doing so plaintiff conceded that the broadcasts were accurate accounts of a police investigation.

Background

In October 2010, Alabama police identified plaintiff as a suspect in a violent robbery. Television station WAFF-TV in Huntsville aired several reports about the matter, including asking the public for help in locating the "armed and dangerous" plaintiff. Plaintiff was captured and arrested, but after further investigation all charges were dismissed.

Plaintiff asked the station to report on the dismissal of charges, but the station did not respond and did not air any follow up reports. Plaintiff filed a libel suit against the broadcaster as well as a local newspaper which had also covered his arrest. The suit against the *Northwest Alabaman* newspaper was settled.

The station moved to dismiss on the basis of truth and privilege based on the state's fair report statute, Ala. Code § 13A-11-161. The statute protects the fair and impartial report of, among other things, the issuance of any warrant or the arrest of any person for any cause. The trial court dismissed the complaint.

Appeals Court Decision

On appeal, plaintiff argued that the television station was no longer entitled to the fair report privilege because it failed to report on the dismissal of charges. He also argued that the fair report statute, § 13A-11-161, created a cause of action against the television station for its refusal, after request, to report on the dismissal of charges.

The fair report statute enacted in the 1930's provides in its entirety:

"The publication of a fair and impartial report of the return of any indictment, the issuance of any warrant, the arrest of any person for any cause or the filing of any affidavit, pleading or other document in any criminal or civil proceeding in any court, or of a fair and impartial report of the contents thereof, or of any charge of crime made to any judicial officer or body, or of any report of any grand jury, or of any investigation made by any legislative committee, or other public body or officer, shall be privileged, unless it be proved that the same was published with actual malice, or that the defendant has refused or neglected to publish in the same manner in which the publication complained of appeared, a

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> reasonable explanation or contradiction thereof by the plaintiff, or that the publisher has refused upon the written request of the plaintiff to publish the subsequent determination of such suit, action or investigation."

The Court noted that the last portion of the statute discussing the publication of clarifications had never been construed. And the Court acknowledged that the text of the statute "does appear to support [plaintiff's] argument to a point."

However, the Court found it unnecessary to resolve the meaning of the statute to decide the case because plaintiff did not plead that the statements in the broadcast were false. By doing so plaintiff conceded that the broadcasts were accurate accounts of a police investigation.

The Court also rejected plaintiff's argument that § 13A-11-161 created a cause of action for "failure to retract." As the television station pointed out, "[o]ne claiming a private right of action within a statutory scheme must show clear evidence of a legislative intent to impose civil liability for a violation of the statute." The Court agreed and concluded that plaintiff failed to present any evidence of a legislative intent to impose civil liability on media outlets who fail to report on the subsequent determination of a police investigation.

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Fair Report Privilege Protects Articles on Corporation's Guilty Plea

Summary Judgment for Buffalo News Affirmed

A divided New York appellate court affirmed summary judgment for The Buffalo News, holding that statements about the guilty plea of an air cargo company were protected by the state's fair report privilege or were not "of and concerning" the individual plaintiff. *Alf v. The Buffalo News, Inc.*, No. 12-00560 (N.Y. App. 4th Dept. Nov. 16, 2012) (Centra, Peradotto, Carni, Lindley, Sconiers, JJ.).

Noting that newspaper articles should not be "dissected and analyzed with a lexicographer's precision," the majority found the articles fairly and accurately summarized the company's guilty plea to falsifying a document and paying fines and restitution to the government of $28 million.

In addition, statements that only mentioned the company and not the sole shareholder plaintiff were not "of and concerning" plaintiff.

While plaintiff's company had pled guilty to only a single charge of falsifying a document, the newspaper's allegations of repeated overcharges were substantially accurate, particularly in light of the Department of Justice's press releases which were similar to the statements made in the newspaper articles.

Background

Plaintiff, Christopher Alf, is the owner and CEO of National Air Cargo, Inc., an air cargo company that supplied the U.S. military in Iraq. The company was accused of overcharging the government. In 2007 the company pled guilty to one count of knowingly making a material misstatement to the United States and in 2008 agreed to pay fines and reimbursements of $28 million in settlement of all charges.

The Buffalo News published a series of articles covering the scandal and commenting on the settlement. Among the headlines: "Soft landing for air cargo company" and "'Dream Team' wins no-jail plea deal." An editorial asked "why in the name of decency should the leaders of National Air Cargo escape personal punishment for cheating the U.S. Defense Department—and, therefore, American troops and taxpayers—during wartime?"

Alf sued the newspaper for libel in October 2008. Last December, a trial court granted summary judgment dismissing his complaint.

Appellate Court Decision

Affirming summary judgment, the majority held that the news articles naming plaintiff were privileged under the New York fair report statute, Civil Rights Law § 74 ("A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding."). The alleged defamatory statements that only referenced National Air Cargo were not "of and concerning" plaintiff.

While plaintiff's company had pled guilty to only a single charge of falsifying a document, the newspaper's allegations of repeated overcharges were substantially accurate, particularly in light of the Department of Justice's press releases which were similar to the statements made in the newspaper articles.

Dissent

The dissenting judges found that the articles were not fair summaries of the guilty plea, and that repeated allegations of "cheating" leveled at plaintiff went beyond the facts of the corporation's guilty plea.

Plaintiff's lawyer has stated he intends to appeal the decision.

The Buffalo News is represented by Joseph M. Finnerty, Hiscock & Barclay, LLP, Buffalo, NY. Plaintiff is represented by John Walsh, Carter Ledyard & Milburn LLP, NY.

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Court Refuses to Enjoin Gawker From Publishing Hulk Hogan Sex Tape

No Prior Restraint Where the "Cat is Out of the Bag"

In a strong endorsement of the prohibition on prior restraints, a Florida federal court denied a motion for a preliminary injunction to prevent Gawker Media from publishing portions of a sex tape featuring famed wrestler Terry Bollea aka "Hulk Hogan." *Bollea v. Gawker Media, LLC,* No. 8:12-cv-02348 (M.D. Fla. Nov. 13, 2012) (Whittemore, J.).

The six-year old tape surfaced on the Internet in October and Gawker published an article about it together with a short video excerpt. On October 15th, Bollea filed a five count complaint against Gawker Media for intrusion, publication of private facts, violation of Florida's right of publicity law, and intentional and negligent infliction of emotional distress. In addition, he sought a preliminary injunction requiring Gawker to take down the video clip and bar Gawker from publishing any other portions of the tape.

The court denied the motion for preliminary injunction finding it would amount to an unconstitutional prior restraint under the First Amendment . In so ruling, the court found that the tape about plaintiff was a matter of public interest. In a footnote the court explained that "In the context of privacy law, the privilege to publish facts of legitimate public concern extends beyond the dissemination of news 'to information concerning interesting phases of human activity' even when the individuals thus exposed did not seek or have attempted to avoid publicity."

Here plaintiff's public persona, including a television reality show about his personal life and public discussion of his marriage and sex life, made the tape a matter of general public interest. And Gawker's decision to publish a video clip and article was a matter of editorial discretion regardless of how the tape came into its possession.

After argument on the motion for preliminary injunction, plaintiff added a claim of copyright infringement as an alternate basis for an injunction, relying on *Michaels v. Internet Entertainment Group, Inc.*, 5 F.Supp.2d 823 (C.D. Cal. 1998) (enjoining website from publishing and selling celebrity sex tape). But the court swept aside the comparison, noting that *Michaels* involved the commercial sale of a video as opposed to a video excerpt in conjunction with news reporting.

Moreover, the court described the situation as a case where the "proverbial cat is out of the bag." Injunctive relief would be ineffective in protecting plaintiff's privacy rights and could not justify a prior restraint against defendant.

Plaintiff has appealed the denial of his motion for a preliminary injunction to the Eleventh Circuit, and his opening brief is due December 31.

Gawker Media is represented by Seth Berlin and Paul Safier, Levine Sullivan Koch & Schulz, L.L.P., Washington, DC; Gregg Thomas and Rachel E. Fugate, Thomas & LoCicero PL, Tampa, FL; and Cameron Stracher, Litigation Counsel for Gawker Media. Plaintiff is represented by Charles J. Harder and Jonathan Waller, Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, Los Angeles, CA; Kenneth Turkel and Christina K. Ramirez, Bajo Cuva Cohen Turkel, Tampa, FL; and David R. Houston, Reno, NV.

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New York Court Holds Government's Promise of Confidentiality Trumps Public Interest in Disclosure of Historic Anti-Communist Records

Cert. Petition Pending to the U.S. Supreme Court

By Cynthia E. Neidl and Michael J. Grygiel

In a recent opinion focused on the public's right of access to historic records relating to the New York City Board of Education's anti-Communist investigations occurring more than half a century ago, the New York Court of Appeals ruled that the government may redact the names and other identifying information of individuals who were promised confidentiality by their interrogators. *Matter of Harbatkin v. New York City Dept. of Records and Information Servs.*, 19 N.Y.3d 373, 380-81 (2012). Further, the Court ruled that it is constitutionally permissible for the City to condition unrestricted access to the records on an agreement not to publish or disclose the names or other identifying information of any school personnel who were promised confidentiality. *Id.* at 379.

A recent opinion focused on the public's right of access to historic records relating to the New York City Board of Education's anti-Communist investigations occurring more than half a century ago.

Background

From the 1930s through the early 1960s, New York City's public school teachers were the targets of a massive investigation into their political beliefs and associations. During these investigations, Saul Moskoff, Assistant Corporation Counsel for the City of New York assigned to the Board of Education and an individual well-known for his McCarthyism and anti-Communist sentiments, conducted extensive interrogations with more than a thousand teachers suspected of espousing Communist beliefs. Each interrogation was transcribed and preserved by the Board of Education's Law Department, along with additional investigative records about the informants who identified individual teachers as suspected Communist sympathizers. Those who refused to cooperate in the questioning were fired. While some were admittedly Communists Party members or sympathizers, there was never evidence that the accused teachers had abused their trust. Some were among the most brilliant, popular, and dedicated educators in the City.

Lisa Harbatkin, a scholar and historian actively involved in research and writing concerning the anti-Communist investigations, had a personal connection to the City's anti-Communist campaign. Her parents, both public school teachers, were among those interrogated by the City when McCarthyism reached a fever pitch during the 1950s. Ms. Harbatkin's father was one of the 400 teachers forced to surrender his teaching license, and livelihood, in the wake of the City's interrogations.

Through the course of her research, Ms. Harbatkin discovered that the New York City Municipal Archives housed records of the anti-Communist interviews and related materials. On October 17, 2008, after numerous unsuccessful requests for complete access -- including the names of the teachers who were interrogated, as well as of their informants -- to the records, Ms. Harbatkin filed a request under New York's Freedom of Information Law ("FOIL") seeking unredacted disclosure of the City's anti-Communist records. The City denied the request on the ground that disclosure would constitute an unwarranted invasion of the privacy of the teachers who were the subjects of the files. Ms. Harbatkin's administrative appeal was also unsuccessful. In response to her appeal, the City informed Ms. Harbatkin that her request for complete access to the records would be contingent on compliance with the City's newly created Section 3-02 of Title 49, Rules of the City of New York, entitled "Municipal Archives Guidelines for Archival Use of Board of Education 'anti-Communist' Case Files" ("Rule 3-02"), which was enacted as a direct response to her efforts to gain access to the historic records.

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Among other things, Rule 3-02 permits individuals unrestricted access to the records on the condition that they certify that they will not record or use any names or personally identifying information from the records. The City's Form MA-101D ("Form D") serves to implement Rule 3-02. In its current iteration, Form D requires a party seeking access to the anti-Communist files to certify that he/she will not "disseminate or publish in any form any names or other identifying personal information, relating to teachers and other school personnel investigated and/or questioned by the New York City Board of Education for alleged support of or association with the Communist Party" obtained from the restricted materials. Further, Form D warns researchers that a violation of its terms "may result in possible legal action against them and the organization, if any, that they represent."

Lower Court Proceedings

Ms. Harbatkin refused to sign Form-D, and on April 6, 2009, brought a hybrid proceeding against the City and others in New York Supreme Court, County of New York, seeking judgment pursuant to New York Civil Practice Law and Rules Article 78. Ms. Harbatkin's petition challenged the City's FOIL determination as arbitrary and capricious and an abuse of discretion. She argued that the requested materials were of significant public interest and educational value, while the privacy interests of the subjects of the investigations were minimal because (1) such individuals were likely retired or deceased, and (2) there is no longer anything inherently stigmatizing about being identified as the victim of a government investigation which the judgment of history has condemned as an ideological witch hunt entailing the systematic abuse of civil rights and liberties. Ms. Harbatkin also asserted constitutional claims with respect to the City's Rule 3-02 and Form D, arguing that the regulation violated her free speech rights under the First and Fourteenth Amendments and seeking declaratory and injunctive relief.

"The story of the Anti-Communist Investigations, like any other that is a significant part of our past, should be told as fully and as accurately as possible, and historians are better equipped to do so when they can work from uncensored records."

New York's FOIL requires that state and municipal agencies "make available for public inspection and copying all records," subject to certain enumerated exemptions. N.Y. Pub. Off. Law § 87(2). It has long been established that courts must narrowly construe the statutory exemptions from disclosure, and that the agency claiming an exemption from disclosure bears the burden of showing that the requested material falls within one of the statutory exemptions. *Matter of Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 150 (1987), *cert. denied*, 486 U.S. 1056 (1988); *Capital Newspapers Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987); *Matter of Newsday, Inc. v. Empire State Dev. Corp*., 98 N.Y.2d 359, 361-62 (2002); *Matter of Mantica v. New York State Dep't of Health,* 94 N.Y.2d 58, 61 (1999); *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274 (1996); *Matter of Russo v. Nassau County College*, 81 N.Y.2d 690, 697-98 (1993); *Matter of Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 580 (1980). The only exception arguably relevant with respect to the anti-Communist records permits an agency to deny access to records that "if disclosed would constitute an unwarranted invasion of personal property." N.Y. Pub. Off. Law § 87(2)(b). In analyzing this exemption where, as both parties acknowledged, none of the seven privacy interests specified in FOIL as a basis for nondisclosure was implicated, New York courts must "balance the privacy interests at stake against the public interest in disclosure of information." *Matter of New York Times Co. v. City of New York Fire Dept.*, 4 N.Y.3d 477, 484, 485 (2005) (recognizing as a matter of first impression under FOIL that a privacy interest may exist "in the feelings and experiences of people no longer living").

By decision dated March 11, 2010, New York Supreme Court denied Ms. Harbatkin's petition and dismissed the proceeding.

> In light of the sensitive nature of the information, the minimal burden that compliance with the respondents' offer places on the petitioner and the total absence of evidence that the respondents fabricated concern for employee confidentiality only to frustrate the petitioner in the conduct of her scholarship, the court is persuaded that the respondents

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> have properly refused petitioner access to the unredacted files unless she agrees not to publish the names of individuals identified in the records.

Although the decision acknowledged that Ms. Harbatkin also challenged the constitutionality of New York City's Rule 3-02, the court failed to address those claims without explanation.

Ms. Harbatkin appealed to the Appellate Division, First Department, which summarily affirmed the trial court's decision on May 31, 2011. Without discussion, the First Department held that the "privacy interests of the surviving subjects of the investigation and their relatives . . . outweigh petitioner's interest in being able to publish the names of teachers contained in the records at issue." *Matter of Harbatkin v. New York City Dept. of Records and Information Srvs.*, 84 A.D.3d 700, 701 (1st Dep't 2011) (citing *Matter of New York Times Co. v. City of New York Fire Dept.*, 4 N.Y.3d 477 (2005)). With regard to Ms. Harbatkin's constitutional challenge, the First Department declined to rule on the issue because the trial court had decided the petition "purely on FOIL grounds." *Id.* Inexplicably, the First Department concluded that a ruling on the constitutional validity of the regulation would be "advisory," *id.*, even though the effect of its decision was to permit the City's continued enforcement of the regulation.

The Court concluded it would be "unacceptable for the government to break [its] promise [of confidentiality], even after all these years."

A Mixed Decision From the Court of Appeals

Ms. Harbatkin appealed to the Court of Appeals. The parties submitted substantial briefing, several *amici* filed a brief in support of reversal, and the Court entertained extended oral argument.

The Court issued its decision on June 5, 2012. Like the courts below, the Court of Appeals acknowledged that the applicable test was " 'whether any invasion of privacy . . . is unwarranted by balancing the privacy interests at stake against the public interest in the disclosure of the information.' " *Matter of Harbatkin*, 19 N.Y.3d at 380 (quoting *Matter of New York Times Co. v. City of New York Fire Dept.*, 4 N.Y.3d 477, 485 (2005)). Unlike the lower courts, however, the Court of Appeals made a distinction between the privacy interests of those individuals named in the records who had not received a promise of confidentiality from the government (such as, for example, those named as Communists by others, but not interrogated themselves), and those who had received such a promise. *Id.*

First, the Court of Appeals concluded that there would be no unwarranted invasion of personal privacy with respect to disclosure of the names and other identifying information of individuals who were *not* promised confidentiality. The Court reasoned that, in the absence of such a promise, the "claims of history" outweighed the privacy rights of those teachers and their families, which were diminished due to the passage of time and because "the label 'Communist' carries far less emotional power than it did in the 1950s." *Id.* The Court recognized the historical importance of the materials:

> The story of the Anti-Communist Investigations, like any other that is a significant part of our past, should be told as fully and as accurately as possible, and historians are better equipped to do so when they can work from uncensored records. Petitioner, or any other historian trying to trace the course of the investigations, would obviously face a serious handicap if required to work with the redacted transcript from which we quoted above.

Id.

However, the *Harbatkin* decision struck "a different balance" with respect to those individuals named in the records who had been promised confidentiality by the City. *Id.* In making this determination, the Court did not focus on the privacy interests of the individuals or the public interest in disclosure. Rather, the Court concluded it would be "unacceptable for the government to break [its] promise [of confidentiality], even after all these years." *Id.* The Court noted that the risk of harm or embarrassment to such individuals or their family members "may be small, but a representative of New York City's government solemnly assured [them] that the government would not subject [them] to that risk." *Id.* at 381. The Court left room for the

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possibility that the promises made would be "so ancient that [their] enforcement would be pointless," but gave no indication of when that time might be. *Id.* Accordingly, the Court modified the decisions of the lower courts in permitting the City to redact the names and identifying information of those individuals who had received a promise of confidentiality.

As to Ms. Harbatkin's constitutional challenge to Rule 3-02, the Court of Appeals concluded, without discussion or explanation, that her arguments "lack[ed] substance." *Id.* at 379. The term "lack substance," in New York Court of Appeals vernacular, means the First Amendment claim was regarded as frivolous.

In *Harbatkin*, the Court of Appeals did not take advantage of the opportunity to clarify the scope of its previous holding in *Matter of New York Times*, despite seeming to acknowledge during oral argument that FOIL's descendible right of privacy recognized for the first time in the *New York Times* case was distinguishable as derived from its unique factual setting involving the deeply personal nature of the 911 calls of those trapped in the World Trade Center towers on the tragic morning of September 11, 2001.

Further, the *Harbatkin* opinion's acceptance of the City's promises of confidentiality as controlling in the default privacy balancing analysis announced in *Matter of New York Times* not only ignored the inherently coercive conditions in which those promises were made -- intended more to leverage compliance and shield the Board of Education's own conduct from public scrutiny than to protect those targeted by its ideological cleansing activities -- but also subordinated the City's disclosure obligations to the terms of individual confidentiality agreements in a manner incompatible with FOIL's presumption of open access.

In doing so, *Harbatkin* exists in considerable tension with -- yet does not address -- a line of authority uniformly rejecting such agreements as unenforceable as a matter of law to block disclosure of otherwise non-exempt records under FOIL. *See Mulgrew v. Board of Educ. of the City of New York*, 31 Misc.3d 296, 303 (Sup. Ct., N.Y. Cnty.) (rejecting argument that NYS Department of Education's "assuring teachers of their confidentiality and directing principals not to share the results with anyone other than the subject teacher" was legally insufficient to block FOIL disclosure of controversial Teacher Data Reports, because " 'as a matter of public policy, the Board of Education cannot bargain away the public's right [of] access to public records' ") (citation omitted), *aff'd*, 87 A.D.3d 506 (1st Dep't 2011); *LaRocca v. Bd. of Educ. of Jericho Union Free Sch. Dist.*, 220 A.D.2d 424, 427 (2d Dep't 1995) (held, settlement agreement denying public access to its terms "is unenforceable as against the public interest"); *S-P Drug Co. v. Smith*, 96 Misc.2d 305, 311 (Sup. Ct., N.Y. Cnty. 1978) (held, state agency's disclosure obligations under FOIL cannot be preempted by the terms of a contract with a private party).

> In short, the decision elevates the promise of confidentiality as itself sufficient to establish an unabated personal privacy interest on the part of recipients unable to rely on an enumerated FOIL privacy exemption, notwithstanding the Court's recognition that historical circumstances otherwise no longer support the existence of that privacy interest.

To our knowledge, *Harbatkin* is the only case in which a New York State court has held, albeit in the narrow context of the *New York Times* default balancing analysis, that a government agency's FOIL obligations to disclose otherwise non-exempt records may be overridden by the terms of such an agreement. The reason for this complete pre-*Harbatkin* absence of authority is clear: if an executive agency's promise of confidentiality were sufficient to prevent disclosure under FOIL, the statute's purpose of promoting public accountability by maximizing access to government records would be negated. Finally, *Harbatkin*'s conclusion that the government's promises of confidentiality must be upheld to prevent surviving family members from being "hurt or embarrassed by learning" (*Harbatkin*, 19 N.Y.3d at 381) of the interrogations at the present time cannot be reconciled with the decision's holding that the privacy interests of those named in the interrogation transcripts who were not the recipients of such promises have become attenuated, "more than half a century after the interviews took place" (*id.* at 380), to the point that disclosure of their names is authorized under FOIL. Whether viewed as a matter of logical incoherence or incommensurability in the balancing process, it is difficult to understand why a government promise of confidentiality should be upheld as a bar to FOIL disclosure when the ostensible reason for its issuance is no longer valid. In short,

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the decision elevates the promise of confidentiality as itself sufficient to establish an unabated personal privacy interest on the part of recipients unable to rely on an enumerated FOIL privacy exemption, notwithstanding the Court's recognition that historical circumstances otherwise no longer support the existence of that privacy interest.

Postscript

On August 31, 2012, Ms. Harbatkin filed a *Petition for Writ of Certiorari* with the United States Supreme Court. The *Petition* raises the issues of whether Rule 3-02 violates the First and Fourteenth Amendments' guarantee of freedom of speech by (1) conditioning review of the anti-Communist series of records upon an individual's agreement not to disseminate or publish truthful information contained in those records, and (2) imposing content-based speech restrictions on core political speech without serving a compelling government interest and without complying with controlling constitutional procedural requirements. As summarized in Ms. Harbatkin's *Petition*:

> In the end, there is surely something disturbing, and more than a little ironic, about the events that have brought Ms. Harbatkin to this Court: the City now seeks, several decades after the fact, to prohibit Ms. Harbatkin from "naming names" in writing about this period in history. In a certain sense, this is the opposite of the practices reflected in the case files when the Board of Education wielded its power and authority to compel the systematic identification of public school teachers suspected of ideological infidelity. In this day and age, there is no reason to keep that information behind the government's closed doors where the political interrogations at issue were first conducted more than a half a century ago. There can be no doubt that the City's anti-Communist archives reflect a tragic, but important, chapter in not just the City's but the Nation's history. Moreover, the City of New York is hardly the first governmental entity to seek to suppress embarrassing information about historic practices that were coercive or threatening to the citizens it was entrusted with governing. Yet if New York's court rulings are permitted to stand, Ms. Harbatkin will be forced to decide between accessing the unredacted records or relinquishing her constitutional right to free speech. The chilling effect on all New Yorkers' First Amendment activities could hardly be more severe, as the government would be able indiscriminately to condition benefits on the surrender of constitutionally protected rights.

On October 10, 2012, the Clerk of the Supreme Court requested that the City respond to the *Petition*. The City failed to submit a response by the deadline of November 9, 2012, and the *Petition* remains pending.

Michael J. Grygiel, Cynthia E. Neidl and William A. Hurst of Greenberg Traurig, LLP's Albany office represented pro bono Petitioner-Appellant Lisa Harbatkin in the New York Court of Appeals and on her pending Petition for Writ of Certiorari in the U.S. Supreme Court. Elizabeth I. Freedman, Leonard Koerner and Marilyn Richter of New York City's Office of Corporation Counsel represented Respondent the New York City Department of Records and Information Services. Itai Maytal of Miller Korzenik Sommers LLP in New York City represented Amici Curiae Advance Publications, Inc., ALM Media, L.L.C., the Associated Press, Bloomberg News, GateHouse Media, Inc., The Hearst Corporation, The New York News Publishers Association, The New York Times Company and the Pen American Center in the New York Court of Appeals.

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Lord Leveson Issues Report on the Culture, Practices and Ethics of the Press

Proposal for Press Regulation is Likely to Change Forever the UK Press

By David Hooper

Lord Leveson's 2000 page report following a 16 month enquiry and its proposal for press regulation is likely to change for ever the UK press. This article explains how and why the enquiry took place, the background of the arrests of former senior editors at the News of the World, the terms of reference for the enquiry and Leveson's qualifications to conduct the enquiry

The extent of the changes is essentially a political matter, so the reaction of the Prime Minister is key and that is examined.

The proposals of Leveson are reviewed. A new form of regulation is clearly essential. But is Leveson really in tune with the workings of the press? How much power is he willing to give to legislators over the press? Do his proposals threaten to undermine investigative journalism? Is he imposing excessive burdens on the press? Can there be a level playing field between a regulated press and unregulated social media and will there be only one winner?

Background to the Leveson Inquiry

The first phone-hacking scandal related to the hacking into the voicemails of the Royal Princes which led to the conviction of the Royal correspondent of the News of the World and an outside investigator. This was dismissed by the newspaper as the conduct of a rogue journalist. There was an extremely myopic investigation of the extent of phone hacking by the Police which after and extremely brief investigation concluded that all was for the best in the best of all possible worlds. Investigations by the *Guardian* of 9 July 2009 followed by a similar article in the *New York Times* of 1 September 2010 revealed that phone hacking at the News of the World was on an almost industrial scale.

Following the revelation that the telephone of a missing murder victim, Milly Dowler, had been hacked in to by the newspaper the Prime Minister, David Cameron, in July 2011 announced that there would be a Judicial Inquiry into the Culture, Practice and Ethics of the Press. It is the seventh time in seventy years that there has been an enquiry into the practices of the Press in the United Kingdom. Pressure has now built up to produce an effective result which was not the consequence of the six previous efforts.

Terms of Reference

The Inquiry was divided into two parts. The first part was sub-divided into four modules. The first was to examine relationships between the Press and the public including phone hacking and other potentially illegal behaviour. The second module related to relationships between the Press and the Police and whether such relationships operated in the public interest. The third module was to examine the relationships between the Press and politicians and the fourth was to consider whether recommendations should be made regarding the future conduct of the Press and a system of regulation which would support the integrity and freedom of the Press whilst encouraging the highest ethical standards.

Part Two of the Inquiry was designed to look in to unlawful or improper conduct at News International and possibly police misbehaviour in relation to corrupt payments and to consider generally the issue of corporate governance at News International. However Part Two of the Inquiry has to be put on hold until the conclusion of criminal proceedings. It is open to question whether part two will ever take place.

How the Inquiry Worked

The Chairman Sir Brian Leveson, a Lord Justice sitting in the Court of Appeal was assisted by but presided over six independent assessors, many of whom had some connection with the world of journalism, plus a team of six barristers who acted for the Inquiry.

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The Inquiry itself was established under the Inquiries Act 2005 with the procedure being governed by the Inquiry Rules 2006. Those who felt that, for example, they played a direct and significant role in the events in question or the issues to be examined by the Inquiry or might be felt to be subject to explicit or significant criticism, could apply to become core participants, a matter determined by the Chairman. Of the Inquiry, Core participants, included various sections of the media and 51 of the alleged victims of phone hacking.

Core participants were able to be legally represented and could request that certain questions were put to witnesses and would be entitled to receive earlier notification of the findings of the Inquiry. Those with relevant evidence to give could be required under Section 21 Inquiries Act 2005 to produce a witness statement dealing with a number of listed points and to produce the relevant documents. Failure to provide such a witness statement was punishable by a fine and evidence had to be given on oath.

As the hearings developed a pattern emerged where Leading Counsel for the Inquiry, Robert Jay QC, would end his examination of the witnesses by pinpointing some potentially embarrassing detail about which the witness had had to volunteer details under his Section 21 Notice. It made for good theatre, but it did also provide a fairly unremitting picture of misconduct by the Press.

The evidence started in Court 73 at the Royal Court of Justice in London on 24 November 2011 and formally ended on 24 July 2012 by which time evidence had been taken from some 337 witnesses in person or by written submissions from 300 individuals or organisations. The Inquiry is reckoned to have cost somewhere in the region of £5.6m, a relatively modest cost compared to the Police Inquiries into hacking-related criminality and to the Bloody Sunday Inquiry which cost £155,628,791 of which the legal profession received no less than £67,603,621. At the end of the hearings Leveson produced a searing 100 pages of potential criticisms of the press which, under Rule 13 of the Inquiry Rules 2006, he sent to the core participants who might be subject to criticism to give them an opportunity to respond to those criticisms.

Arrests and Charges

During the course of the Inquiry, a constant flow of journalists, investigators and government officials have been arrested. A leading firm of lawyers in the City of London have been applying a toothcomb to the emails and other documents at News International and – on the instructions of News International – handing over to the Police any incriminating material. Those arrested had even included a former lawyer at one of the papers and another had the indignity of being interrogated as a suspect albeit not formally under arrest. Relatively few of the 40 or so individuals arrested have yet been exonerated by the Police and informed that they will not be prosecuted. Eight of them have been charged with conspiracy to intercept communications, generally known as phone-hacking.

These include two former News of the World editors, plus a former news editor, a chief reporter and a managing editor at the paper. The flaxen-haired former editor of the Sun, has additionally found herself accused of conspiring to pervert the course of justice with her husband, conduct which it is said arises out of trying to jettison a computer which the Police wanted to examine. Rebekah Brooks and Andy Coulson and two others are accused of a separate conspiracy which is said to involve corrupt payments to the Police and public officials. Those charges are said to include a payment to a police officer in return for a confidential phone directory listing the private numbers of members of the Royal Family and there are also allegations of payment of a sum allegedly in the region of £100,000 over a period of years to an official in the Ministry of Defence in return for official information.

While no one would condone such conduct – if it is established – and while many found it astonishing that the Police originally found there was nothing to investigate in

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terms of phone-hacking, a piece of blindness which cost a number of very senior officers their jobs, there are many who feel that there has been a degree of overkill in the Police investigation which is estimated to have cost somewhere in the region of £40m and to have engaged the attention of hundreds of police officers. To root out this criminality the Police felt it necessary to set up:

- *Operation Weeting* to investigate phone hacking at the News of the World;
- *Operation Elveden* to investigate payments to the Police and public officials;
- *Operation Tuleta* to investigate the alleged hacking by journalists into computers; and
- *Operation Sacha* into the issue of the perversion of the course of justice (in relation to Rebekah Brooks).
- Just for good measure, the Police had to set up a fifth operation called *Operation Kilo* which rather incestuously was designed to investigate alleged leaks by the Police themselves about the progress of *Operation Weeting*.

What seems to have happened might be thought to be a little more simple than all these inquiries would suggest. The alleged criminal conduct was relatively simple, namely that a number of journalists found it all too simple to listen to messages on people's cellphones. Clearly, that would have been illegal and a gross intrusion of privacy. It clearly moved into the criminal realm when it became a wholesale activity and moved beyond the occasional nugget of celebrity gossip into outrageous areas such as the hacking into the family telephones of murder victims.

It was often the product of a seemingly insatiable desire for celebrity gossip and of a mistaken belief on the part of certain journalists that the law did not apply to them and that these breaches of the criminal law were permissible and justifiable short cuts in the pursuit of their stories. The same considerations seemed to underpin the view of certain journalists that they could corruptly pay officials for confidential information. The story and the perceive public interest was thought to be everything.

Although the corrupt payments have received less publicity, arguably that conduct is even more serious than phone hacking, as it involves the corruption of public officials and not simply misconduct by the journalists themselves. The abhorrence felt by the public at the hacking of the Milly Dowler telephone and the fact that one of those charged, Andy Coulson, a former editor of the News of the World, worked as a director of communications for the governing Conservative Party and the fact that the likes of Rebekah Brooks were close socially to the British Prime Minister plus the fact that the Police had been remarkably myopic in not finding widespread evidence of phone hacking when they first considered the matter have led to this twin colossus of the Leveson Inquiry and the Police investigation when the actual allegations of wrongdoing seem relatively clear in nature.

The allegations are firmly denied by those involved and the trials are presently scheduled to commence in September 2013. In the meantime, we have all become expert in hacking, blagging (obtaining data-protected information by deception) and pinging (monitoring which signal mast a given cellphone used at a particular time and thereby locating its owner). The Leveson Inquiry which has been remarkably open with very full details being given on its website www.levesoninquiry.org.uk of the evidence and documents tendered to the Inquiry together with explanations of the various processes of the Inquiry, did, for very understandable reasons, feel it prudent to make a restriction order under Section 19 Inquiries Act 2005 restricting the reporting of the evidence when details were given as to how to hack telephones.

Leveson

The man chosen to head the Inquiry on the recommendation of the Lord Chief Justice, Lord Judge, was Sir Brian Leveson, a Lord Justice of Appeal in the Court of Appeal. It was a slightly odd choice as Leveson's practice had predominantly been as a criminal lawyer. Insofar as one can generalise there are two problems about criminal lawyers and the Press. One is that in their professional life criminal lawyers tend not to instinctively embrace the concept of open justice but rather to feel that the activities of the Press make the administration of the criminal law that much more difficult. Criminal lawyers also tend to feel that with the

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nature of the work and their interaction with those caught up in the criminal justice system whether as defendants, witnesses or juries, they are that much more attuned to a man in the street. Whether that is always the case or whether that was the case in relation to Leveson is a matter for debate. Leveson's strengths are an ability to get to the heart of the facts and to expose any wrongdoing.

His perceived weaknesses might be thought to be a dislike of the Tabloid Press, a reputation as a somewhat colourless individual and some doubts as to whether his intellectual qualities provided the right mix for this Inquiry. As to his determination to get to the heart of the issues as he saw them and his organisational skills in running the Inquiry and his ability to produce a report within the stipulated year there could be no doubt. However the tetchiness that was evident in him telling one distinguished witness that he scarcely needed to be lectured on the importance of the freedom of the Press and in his complaint to the Cabinet Secretary which the Judge apparently felt appropriate on the somewhat unconvincing grounds that this might represent Government policy and might be undermining the Inquiry – notwithstanding the fact that it was after all the Government who had set up the Inquiry – about a speech made by the Education Secretary, Michael Gove, who claimed that the Leveson Inquiry was creating a "chilling atmosphere" about freedom of expression and warning of the dangers of tighter regulation for newspapers, suggested a degree of over-sensitivity and reluctance to accept criticism. It raised doubts in the minds of some as to whether this was a man who really understood the press and was best suited to report on the law and practice of the press. Few, however, were neutral in the debate and he must at the same time have reassured those who feared that his recommendations might be brushed under the carpet.

Reaction of Prime Minister David Cameron

- Any change in the legal framework under which the press operates is a distinctly political matter. Initial reactions have shown that there are deep political divisions as to the extent to which and the manner in which the press should be regulated. The Prime Minister (PM) proposes to hold cross-Party talks to seek agreement as to how the Leveson proposals are to be agreed.

- The PM agrees with the concept of a new independent regulatory body, to be appointed so as to be independent of Parliament and the press, as proposed by Leveson. A difference arises as to whether legislation is required to establish it.

- Broadly speaking, the PM accepts Leveson's proposal that the new regulatory body should lay down a code of standards for the press, that it should run an arbitration service with a swift complaints handling procedure and that it should have power to demand suitably worded apologies and how they should be published and that the powers should in the last analysis be backed with the ability to levy fines of up to £1m. Leveson also envisages an arbitration service which would be administered by the regulatory body which would be part of the legal system and would be a factor to be taken into account in litigation but that the cost of such arbitration would be borne by the press.

- Where the PM has his main disagreement with Leveson is the idea that press regulation should be made part of the law of the land. That, he feels, is crossing the Rubicon.

- The PM's concern is that talk of legislation to "*provide the mechanism to recognise and certify a new regulatory body*" would be in effect to give a vehicle for politicians to impose regulations and obligations on the press.

- The PM also differs over Leveson's contention that legislation is necessary to implement his proposals over such matters as the award of costs or exemplary damages against the press, although he does not disagree in principle with the idea of such orders for costs or exemplary damages.

- The PM also is concerned about Leveson's proposed changes to the protection of journalistic material

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which exists under Section 32 Data Protection Act and its effect on investigative journalism, particularly when one bears in mind how wide the definition of such data is. The PM says that he is "*instinctively concerned*" about that proposal.

Leveson's primary recommendations therefore were:

- a new and independent regulatory body which should have no serving editor or member of the House of Commons or Government on the board but should contain people with experience of the industry;

- this would be a self-regulating regime which would set a Standards Code which would recognise freedom of speech and the importance of issues of public interest which he perceived to include such matters as the exposing of crime or serious impropriety or the public being seriously misled. However, the other side of the coin was that the Standards Code must relate to the way that the press treated people particularly in relation to an appropriate respect for their privacy where there was no public interest justification for breaching that privacy and equally for accuracy and avoiding of any misrepresentation of the facts.

- Leveson envisages legislation to underpin the system of independent self-regulation. His thinking is that such legislation is necessary to establish the parameters of the self-regulating body and to facilitate the recognition of that body in the legal process so taht exemplary damages and costs could be awarded against the press if they fail to comply with the requirements of the regulatory board. He envisaged that the self-regulatory body would be benchmarked by the Office of Communications (the body that regulates various forms of media such as television (Ofcom) in a sense of its composition and criteria being verified so that its procedures could be recognised by the courts.

- Leveson does also envisage a failsafe option that whereby if this regulatory system failed, legislation would be brought in to bring the regulatory body under the general umbrella of Offcom.

- The regulatory body should have power to direct appropriate remedial action for breach of the press standards it had established and powers to direct the nature and placement of apologies and corrections.

- The regulatory body should also have powers to impose appropriate sanctions which could include powers to impose financial penalties of up to 1% of turnover with a maximum penalty of £1m for serious of systemic breaches.
- The board would provide arbitration services for disputes where the costs would be borne by the parties subscribing to the regulatory board. It should be fair, quick and inexpensive. It should be inquisitorial and free for complainants to use. Clearly, it would be important to ensure that there was an appropriate filtering process for complaints.

- Leveson proposed that the protections that the media enjoy under Section 32 Data Protection Act in regard to data which is held for journalistic purposes should only apply where the processing of data is actually necessary for publication and not simply where it was undertaken with a view to publication. He would also want Section 32 to be amended to that there must be a reasonable belief on the part of the journalist who was processing the information that the material would be in the public interest with their being no weighting in favour of freedom of speech. He appears to favour that it should be objectively established that the likely interference with privacy would be outweighed by the public interest. As the PM noted, this could have implications for investigative journalism. It could also produce a significant raft of litigation where the media would face a considerable burden of proof.

- Leveson envisages newspapers having compliance officers and readers being able to find information in newspapers as to the compliance procedures. That is a development which could notably add to the

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burdens of the press and lead to ever tighter regulation of the press.

- Leveson wants that the Civil Justice Council to consider the level of damages in libel and privacy claims. Leveson envisages widening the criteria for the aware of exemplary damages which would take account of the extent of internal good governance and compliance with the code of standards by the press. One's concern here would be the underlying cost attached to such requirements and obligations and the scope for litigation. Damages have, from time to time, been reviewed by the courts under a system that appears to work reasonably well. There are parts of the Leveson Report which do appear to seek to fix everything and may suffer from the fact that Leveson's background is not in media law.

- Leveson makes criticism of the over-close relationship between the police and the press. He makes a number of practical recommendations to what is termed "*revolving doors*" suggesting that police officers should not take up positions in the press within 12 months of their leaving the police force and that there should be regulations and transparency as to dealings between the press and the police, including matters such as entertainment.

- There are a number of detailed recommendations and criticisms relating to the relationship between the press and politicians. Here, Leveson's recommendations are less specific, he would wish political figures to reflect constructively on such relationships and for there to be greater transparency.

- Leveson proposes that the Information Commissioner should issue practical guidance in relation to data protection which would support the press in improving its standards and practice in handling personal information.

- Leveson is highly critical of the News of the World, for example, criticising the favourable treatment their staff received when they were imprisoned or dismissed as a result of their misbehaviour. He also criticised the failure of management to deal appropriately with compliance issues at the News of the World.

- Leveson was highly critical of the Press Complaints Commission (PCC). He noted that Cameron had described it as "*ineffective and lacking in rigour*" and that the leader of the opposition had called it "*toothless poodle*". Leveson noted that it was not a regulator at all but a complaints handling body, which was under-utilised and had insufficient resources. He also criticised the fact that it had not monitored compliance with the PCC Code, instead he advocated the need for a genuinely independent and effective system of self-regulation. He rejected an entirely voluntary scheme which had been advocated by former executives of the PCC based on a five-year binding contract. He simply did not believe that would work.

Conclusion

The report is impressively thorough. The debate will now move into the political arena. So far as one can judge, there appears to be a strong majority for a new and effective system of regulation. There may be a majority for some sort of legislative framework for the regulatory body, but that will be a matter for negotiation and discussion with no political party wishing to be seen to be defending the press too strongly in the current climate in the United Kingdom. The concept of the importance of freedom of speech and the dangers of starting to regulate the press seem, at the very least, to be counterbalanced by the general distaste for the misbehaviour on the part of a section of the tabloid press.

The elephant-in-the-room, which Leveson does not seem to have properly grasped, is how one equates a greater regulation of the press with an inability to provide any such comparable regulation for the social media. An unequal playing field looks as if it is about to be created and the traditional press will be thereby weakened at the expense of the unregulated media.

David Hooper is a partner at RPC in London.

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Defamatory Libel in Canada

Ottawa Restaurateur Given 90 Day Jail Sentence

By Richard G. Dearden and Anastasia Semenova

Can you go to jail for defamatory libel in Canada? Yes. An Ottawa restaurateur was recently sentenced to 90 days in jail after being found guilty of defamatory libel under section 300 of the *Criminal Code of Canada* (*R v Simoes*) Ontario Court of Justice (Lahaie, J) November 16, 2012.

Pursuant to section 300 of the *Criminal Code of Canada*, any person who publishes a defamatory libel that the person knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding 5 years. Another defamatory libel offence is found in section 301 of the *Criminal Code of Canada.*

Online Reviews – Everyone Beware!

A restaurant owner (Marisol Simoes) who did not take kindly to a customer's online reviews of her restaurant created several online defamatory retaliatory responses to the bad reviews that were judged to be criminal. Simoes created gmail email accounts in the name of the customer and then sent false emails to the customer's boss and his staff at her workplace. The customer was devastated and complained to the police who laid two defamatory libel charges against Simoes under section 300 of the *Criminal Code of Canada*.

Count #1 stated that Simoes did, knowing it to be false, publish a defamatory libel by creating three fraudulent gmail accounts in the customer's name and by sending the following email to the CEO of the customer's employer (and his staff):

> "I am very lonely and really need some companionship. I am open to anything! Couples, threesomes and group sex. Am especially into transsexuals and transgenders (being one myself). I am a handful in many ways and am a tiger in the bedroom. Please message me back if you are interested in a good time!"

The email ended with the customer's name.

Simoes also created a false account in the customer's name on an adult dating site. The profile included the customer's wedding photo and repeated the sexualized and lewd statements that were sent in the email referred to in count #1.

The Section 300 Defamatory Libel Offence

The section 300 *Criminal Code* defamatory libel offence relates to the publication of a defamatory libel that a person knows is false. But what is a defamatory libel? A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published. Section 298 *Criminal Code of Canada*.

There are twelve deemed defences or exemptions for publications of defamatory libel specifically set out in the *Criminal Code*. For instance, exemptions exist for publications of defamatory matter in court proceedings, subjects of public interest, and truth (but only if the defamatory matter was published for the public benefit). Sections 305, 309, 311 *Criminal Code of Canada*.

It is shocking that the truth defence requires the added element of "public benefit" rather than simply proof that the defamatory statements are true which constitutes an absolute defence to a civil libel action.

The voluminous list of very vague exemptions suggest

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that this offence has no place in the *Criminal Code* but it has nevertheless been found to be constitutional. In *R v Lucas* [1998] 1 SCR 439, the Supreme Court of Canada found that section 300 of the *Criminal Code* infringed freedom of expression guaranteed by section 2(b) of the *Canadian Charter* of *Rights and Freedoms*, but that section 300 was saved by section 1 of the *Charter* as a reasonable limit prescribed by law in a free and democratic country. Justice Cory held:

> Is the goal of the protection of reputation a pressing and substantial objective in our society? I believe it is. The protection of an individual's reputation form wilful and false attack recognizes both the innate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian society. Preventing damage to reputation as a result of criminal libel is a legitimate goal of the criminal law. *Id.* at para 48.

The Section 301 Defamatory Libel Offence

The *Criminal Code of Canada* contains another defamatory libel offence that has been declared unconstitutional. Section 301 of the *Criminal Code* states:

Every one who publishes a defamatory libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Four Canadian superior courts have found section 301 to be unconstitutional. *R v Finnegan*, [1992] AJ No 1208 (Alta QB); *R v Lucas*, 1995 CanLII 6024 (SK QB) (not challenged on appeal); *R v Gill*, 1996 CanLII 8004 (ONSC); *R v Byron Prior*, 2008 NLTD 80 (CanLII).

In the most recent decision *R v Byron Prior*, Justice Hoegg found that the historic objective of section 301 was to prevent breaches of the peace – "truth, while always a defence to a civil action for libel, was not a defence to a criminal charge of libel since the essence of the offence continued to be that publication was likely to cause a breach of the peace." *Id.* at paras 26-27 (quoting *R v Stevens* (1995), 28 CRR (2d) 78 (MBCA), where the constitutionality of s. 300 was upheld).

The Court determined that the objective of section 301 was not so pressing and substantial as to override freedom of expression and that the section is offensive to modern day notions of justice. In *R v Lucas*, Justice Hrabinsky found section 301 unconstitutional because truthful comments can result in a criminal conviction.

The Cyberbully Sentence

Ontario Court of Justice Diane Lahaie found Simoes authored the false emails and dating site profile and described the emails as "venomous" and "not just inappropriate, but criminal." Judge Lahaie noted that the customer enjoyed freedom of speech to post online reviews of the restaurant as do all people in Canada. Judge Lahaie described the accused's conduct as "vindictive, premeditated, hostile, and malicious."

The anonymous defamation of the customer was considered akin to cyberbullying. Judge Lahaie noted that cyberbullying of this nature can drive people to more tragic consequences than what happened here. Judge Lahaie also found that the damaging words will forever target the customer's reputation in a simple Google search – "unlike graffiti, this can never be fully washed away." Time behind bars was necessary according to Judge Lahaie to send a message to Simoes and others that cyberbullying will not be tolerated. In addition to the 90 days incarceration, Simoes was sentenced to 2 years probation.

Game Changer

Judge Lahaie's sentence is a game changer for cyberbullies. The sentence sends a chilling message that there are serious penal consequences to anonymous destructions of reputations. We are in the Wild West frontier of cyberlibel today because user-generated content is largely standardless – there are no editors or moderators screening vast amounts of defamatory statements published on the Internet. As a result, it is predicted that more defamatory libel charges will be prosecuted and section 300 will no longer be a rarely used provision of the *Criminal Code of Canada.*

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Other Side of the Pond: Update on UK and European Media Law Developments

Troubles at the BBC, Elton John Libel Case, Comic Wins Libel Trial, Contempt Reform and More

By David Hooper

After the well-known disc jockey Sir Jimmy Savile died in 2011, the BBC prepared a programme investigating the allegations of sexual abuse that had surrounded Savile's life. Savile was remarkable in many respects in that during his lifetime he raised somewhere in the region of £40m for charity and he had been knighted for his charitable activities. He did however have a penchant for young girls and the allegations were that he used his charitable activities as an opportunity to raise his profile and as a cover for extensive sexual abuse of young girls.

The BBC Newsnight programme was however cancelled before transmission and instead the BBC broadcast two glowing tributes to Savile after his death. There were allegations of pressure being brought from on high in the BBC to stop the Savile programme going out in order to protect reputations of senior executives at the BBC. The allegations were aired in November 2012 on ITV the competing television network and were eventually shown on the BBC in a Panorama programme.

Lord McAlpine has already received a settlement of £185,000 from the BBC together with payment of his legal costs. This was an extremely high settlement

The allegations of mismanagement and a possible cover-up have spawned two inquiries, one is under a retired High Court Judge, Dame Janet Smith into the whole question of the extent to which Savile used his position at the BBC to carry out – allegedly with others employed by the BBC - systematic abuse of young girls. Additionally there is an inquiry under Nick Pollard an executive of Sky News into the way in which the decision to pull the programme was reached.

As if that was not bad enough, very shortly thereafter the BBC did contrive to show an unrelated programme on Newsnight about child abuse which had taken place in the 1970s at a Care Home in North Wales. At the heart of that programme was the contention that a senior Conservative political figure was involved in that child abuse. These allegations were clearly targeted at the man who had in the 1970s been the Treasurer of the Conservative Party, Lord McAlpine.

He was not named in the programme, but it was fairly widely known that he was the intended target of the programme. Various tweets both before and particularly after the programme identified him as the unnamed Conservative politician. Journalistically the programme was a disaster, being based on the testimony of one of the victims of the child abuse who had in an earlier judicial inquiry been criticised as unreliable. The programme appears to have been put together in some haste. The allegations were not put to Lord McAlpine for comment and when the controversy arose, the victim admitted that he was mistaken.

It was abundantly clear when the facts emerged that Lord McAlpine had nothing whatsoever to do with the child abuse and the allegations were demonstrably false. It seems that the programme was approved on the basis that Lord McAlpine was not named and in the context of the programme alone was not identifiable. However he clearly was the target of the programme and he had been extraneously identified in tweets.

A journalist behind the programme had also tweeted before the programme to plug it. He did not name Lord McAlpine, but was accused of having assisted in the general process of identification. Having concluded that McAlpine was not identified or identifiable in the programme, it would appear that the lawyers at the BBC concluded that they were not bound, as provided for in the BBC programme guidelines, to put the specific allegations of misconduct to Lord McAlpine. If this had all taken place some years ago and had involved not television but newspapers, the advice that Lord McAlpine was not identifiable would almost certainly have been correct.

However the advent of tweets has been a game changer and the likelihood now is that Courts will not look at the words of the programme in isolation, but will look against the

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background of the facts surrounding the programme which will include what has been tweeted. Those engaged in the clearance of such programmes are likely to have to take into account what is known to the world at large as a result of large-scale tweeting.

One of the other matters which will fall to be considered in the inquiry is whether the BBC acted correctly, once they had been advised that McAlpine was not identifiable in deciding that the allegation of misconduct need not be put to McAlpine. The likelihood is that that decision will be criticised and be held to have been wrong. There is perhaps an element of hindsight that comes into this, but had the allegations been put to Lord McAlpine before the programme, he could have demonstrated that he had no connection whatsoever with the Care Home where the abuse took place, having only visited it once on a political occasion and that the extraneous identifying facts about the abuser- clearly were not applicable to him. When those errors had been pointed out to the victim of the abuse, he immediately had realised his mistake and so if the allegations had been put to Lord McAlpine, the allegations would have been further investigated and would certainly not have been transmitted.

Lord McAlpine has already received a settlement of £185,000 from the BBC together with payment of his legal costs. This was an extremely high settlement as the damages should factor in the fact that an offer of amends had been made which would in normal circumstances produce a 50% discount in the damages to be paid. As the present maximum level of damages is £275,000 for libel cases the mathematics are a little difficult to follow.

What is clear is that the BBC realised they had made a catastrophic mistake – a mistake which was to cause the recently appointed Director General to resign after only 54 days in office and the action had to be settled at all costs. A cloud is thought to hang over a number of senior executives at the BBC. Lord McAlpine recovered a further £125,000 from ITV for a programme shown after the Newsnight programme when the presenter on the This Morning programme handed the Prime Minister a list of the names of people who were alleged on the internet to be child abusers.

The case is worth reading for the criticisms made of the defence solicitors, PSB Law LLP. Mr Justice Tugendhat considered that the claim was exaggerated. Above all, he strongly criticised the opportunist allegation of phone hacking.

The circumstances were such that Lord McAlpine who was not named was nevertheless identifiable. ITV settled for £125,000 damages. Lord McAlpine's lawyers are also going after those who have treated the name of Lord McAlpine as the allegedly guilty senior Conservative child abuser. Lord McAlpine's lawyers are suggesting to those who merely tweeted the name conversationally that they identify themselves and make a nominal payment to the charity Child In Need of between £5 and £100. Celebrity tweeters who include the half-witted and publicity-loving wife of the Speaker of the House of Commons, Sally Bercow are likely to be sued for more substantial sums.

This may well turn out to be a cautionary tale and future deterrent for people who have been repeating libels on Twitter probably without any realisation of the legal jeopardy they could face. The McAlpine debacle at the BBC has spawned yet another inquiry this time under a serving High Court Judge, Mrs Justice Macur.

A Case of Extortion

There have been a number of cases where claims against the media have been lost by the Plaintiff. One of the more interesting results was that in the case brought by *Peter Abbey v Andrew Gilligan & Associated Newspapers* [2012] EWHC 3217. Abbey was a business consultant with a chequered reputation and he became involved in the affairs of a company called Complete Leisure Group (CLG) which was involved on the fringes of the London Olympics. It appears that the auditors had refused to sign off the accounts of CLG.

Abbey took exception to the fact that the Evening Standard had published an email from Abbey which stated "*The Group has pissed away £400,000 of Lord Coe's money. DO NOT circulate this PLEASE*". This email was passed to Andrew Gilligan at the Evening Standard by another journalist and he had published it. The words used by Abbey in his e-mail, in the view of the judge, did not make the information actually confidential as regards himself.

The case is worth reading for the criticisms made of the defence solicitors, PSB Law LLP. Mr Justice Tugendhat considered that the claim was exaggerated. Above all, he

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strongly criticised the opportunist allegation of phone hacking which was made against the paper without evidence to support it. In reality the email had been passed to Gilligan by a journalist who had been unable to use it himself in a television programme he was producing. There was no suggestion that that journalist had obtained it by hacking. It had simply been leaked to him.

Tugendhat J considered the claim was an abuse of a civil process. He criticised the lawyers for a baseless threat to report the journalist to the police and for threats made in the course of pre-action negotiation relating to the adverse publicity that this action would necessarily engender with the (false) allegations of criminality. The Judge also considered that there was an abuse of process in that the proceedings were very stale. The email dated back to 2007 and the well-known firm of Schillings had correctly advised Mr Abbey that he did not have a claim.

The case was funded by a conditional fee agreement and the lawyers were also criticised for attempting unsuccessfully to use that as a means of leveraging settlement. Indeed, the Judge observed that the only people who stood to gain from the litigation were the lawyers. Abbey, it seems, had cold feet before the matter came to court, indicating that he would settle for payment of £3,000 to charity. Originally, he wanted up to £100,000. The case is a good illustration of how iniquitous the conditional fee agreement system can be and how such cases can ultimately lead to a potential conflict between lawyers and client, with the lawyers concerned to trigger their success fee. Fortunately, Abbey had taken out After The Event insurance of £125,000, so some, at least, of the paper's costs were met but the risk in such claims particularly when an unsuccessful defendant faces paying, not only a success fee on the costs but also the After The Event insurance premium are heavily weighted against the defendants.

Elton John – Scandal in the Wind

The singer, Sir Elton John, has in the past secured some very large awards against the media. One million pounds against The Sun for a series of false articles suggesting that he was using rent-boys and £350,000 against the Mirror for allegations of hypocrisy relating to his eating habits – damages were rather higher in those days. In 2008, he lost a libel action against a spoof diary about his attendance at his White Tie and Tiara Ball.

In *Elton John v Times Newspapers* [2012] EWHC 2751, his claim that an article in The Sunday Times about tax avoidance meant that he was involved in improper or morally objectionable tax avoidance or that there were grounds to investigate his tax affairs was rejected on the basis that the words did not bear that meaning. The article had named an accountant called Patrick MacKenna as the man who had set up the tax avoidance scheme and MacKenna was wrongly stated in the article to have been Elton John's former accountant. The court felt, however, that one could not extrapolate from that any allegation of wrongdoing on the part of Elton John.

The moral – if there is one – is that if you wish to obtain a privacy injunction, you must be assiduous in keeping your private life private and you should avoid setting yourself up as any sort of role model for the general public.

A Failed Privacy Claim

Steve McClaren v News Group Newspapers (2012) EWHC 2466 was another example of a failed privacy action at the heart of which was an extramarital affair and a kiss and tell story. The courts are still willing to find that there can be a legitimate interest in his stories when they relate to public figures –in this case, a former manager of the England football team - and where there is some basis for arguing that there is an expectation of a higher standard of conduct that might be applicable to lesser mortals.

The case was also of some interest for its examination of the relevance of the fact that McClaren had in the past been willing to discuss with newspapers his family and his private life. The moral – if there is one – is that if you wish to obtain a privacy injunction, you must be assiduous in keeping your private life private and you should avoid setting yourself up as any sort of role model for the general public.

A Claimant's Success – Not a Racist Comedian

Frankie Boyle v Mirror Group Newspapers [2012] EWHC 2700 in what may turn out to be the last libel action to be heard by a jury, the comedian Frankie Boyle was awarded £54,450 which he donated to the charity Reprieve, when the

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Daily Mail had called him a racist comedian. Boyle's point was that he used racist language in his jokes such as, a "*whole bunch of Pakis being killed*" not because he was a racist but, on the contrary, because he wished to expose racism and people who spoke in such terms.

The jury agreed with him and the Mirror's claim that these were meant as a comment and/or were justifiable statements failed. There have been two libel actions heard by juries in 2012 and both have been won by claimants against the media. Jury actions are, for all intents and purposes, likely to be abolished by the upcoming changes in UK defamation law – a move likely to assist media defendants.

Contempt of Court - The Bellfield Murder Case

There have been two principal developments. In the proceedings brought in relation to the Bellfield murder case about which I earlier wrote in this column the penalty has been determined by the court in *Attorney General v MGM and Associated Newspapers* [2012] EWHC 2029. Each paper was fined £10,000 which was said to be at "the very bottom end of the scale" and had to share a contribution of £25,000 towards the Attorney General's costs.

The thinking of the Law Commission at present seems to be that there may be some virtue in such orders, but that the obligation should not be on the media to police their archive but that matters should be dealt with by the defence who would have to raise it in court and obtain the appropriate order.

What happened in that case was that Bellfield had been convicted of the murder of a schoolgirl called Milly Dowler – the girl whose telephone was posthumously hacked into by News of the World journalists. While the jury were considering a second trial relating to the attempted abduction of another girl called Rachel Cowles, the newspapers had published prejudicial background material which led to the jury being discharged. The newspapers in an error of judgment had published material which the Judge had ruled was inadmissible underlines the need to comply with the strict liability rules relating to what can be published until a case is concluded. A conviction can be reported but not all the background material if it is likely to involve a serious risk of causing substantial prejudice to the trial.

Law Commission Proposals for Reform of Contempt Laws

Following the debacle when the Attorney General of Northern Ireland tried to take action against a former government minister, Peter Hain for comments he had made about a Northern Irish Judge being, in his view, "*off his rocker*" in relation to certain of the rulings he had made, which the Northern Irish Attorney General considered was contempt in the form of scandalising the court, there was a proposal in the UK House of Lords to introduce legislation in the Crimes and Courts Bill to formally abolish the offence of scandalising the court which, until the Attorney General of Northern Ireland brought his wisdom to bear on the matter, everyone had thought was extinct.

This had led to a complete review of the law of contempt which is enshrined in the Contempt of Court Act 1981. That legislation was brought in after the ruling obtained by The Sunday Times in the European Court of Human Rights effectively overturning the injunction that had been obtained against the newspaper over its reporting of the Thalidomide deformed babies scandal and the related litigation against the drugs company. This had resulted in the passing of the Contempt of Court Act 1981 but, of course, since then there have been enormous changes in media and the delivery of information.

The three matters which are being considered in the Law Commission review, and it will be noted that responses are required by the end of February 2013, are firstly to remedy a lacuna in the law whereby the legislation which permits certain courts to require that media who cause a criminal trial to be terminated as a result of prejudicial publicity to bear the costs of the aborted trial should be extended to the Divisional Court which in fact hears nearly all contempt of court applications, but does not currently have these powers – seemingly as a result of an oversight in the enabling legislation.

The result may be that in addition to the payment of legal costs in cases such as Bellfield, the media may face having to pay any wasted legal costs in a trial where they are found to be in contempt of court. Secondly, in addition to the general

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overall review of the law of contempt of court, the Law Commission will consider whether jurors who disobey the very clear instructions not to do their own research on the internet should actually face criminal prosecution.

At present, they can be prosecuted for contempt of court and a juror called Ms Dallas was recently sentenced to six months imprisonment when she was found to have obtained – and used – inadmissible material relating to the trial as a result of a prohibited internet search. There is such legislation in Australia and the likelihood is that such legislation will eventually be introduced in the United Kingdom.

The third issue of concern to the press is whether the sort of order made in the case of Harwood (by Mr Justice Fulford) whereby a prejudicial report was ordered to be taken down from a newspaper archive during a trial should be extended. The thinking of the Law Commission at present seems to be that there may be some virtue in such orders, but that the obligation should not be on the media to police their archive but that matters should be dealt with by the defence who would have to raise it in court and obtain the appropriate order.

Keir Starmer, has produced important guidelines when consideration is being given as to whether to charge journalists or those working with journalists.

The dangers of such a course are obvious. In high profile cases, defence lawyers will feel duty bound to raise all matters of potential prejudice and the media could be put to considerable expense in having to comply with such orders and/or making representations in relation to such orders. If it were to become a criminal offence for jurors to do such internet research and/or to misuse what they discovered, it would not appear that *Harwood* orders would be necessary. It is all too easy to underestimate the ability of juries to exclude from their considerations prejudicial material and judges can give suitable directions to juries to decide the matter only upon the evidence they hear in court. This is something which the media need to keep closely under review and to make representations on.

Guideline on the Prosecution of Journalists

The Director of Public Prosecutions (DPP), Keir Starmer, has produced important guidelines when consideration is being given as to whether to charge journalists or those working with journalists. A decision will be a three-stage process. Firstly, assessing the public interest served by the conduct in question, for example, did it involve an investigation of a miscarriage of justice or investigating someone failing to comply with a legal obligation or did it relate to the commission of a criminal offence or involve raising some important matter of debate of public interest or disclosing an important matter of public interest which was being concealed.

Secondly, the DPP will look at the overall criminality and thirdly, it will weigh up the two factors and matters such as the consequences of the conduct for any victim of the misconduct, the motivation of the journalist – was it, for example, purely mercenary or did it have some public interest element and what impact may it have had on the administration of justice – for example, did it jeopardise the conviction of some third party?

Libel Damages

The maximum libel damages at present are of the order of £275,000. It is proposed that general damages should be increased by 10% after 1 April 2013 pursuant to the Legal Aid, Sentencing and Punishing of Offenders Act 2012 which is aimed at providing some recompense for the fact that claimants will no longer be able to recover the cost of any Conditional Fee Agreement or After the Event insurance which may enter into. The question of libel damages was considered by the Court of Appeal in two cases heard jointly *Cairns v Modi* and *KC v MGN Limited* [2012] EWCA Civ 132.

In the Cairns case, a cricketer who had been accused by a leading Indian cricket official of being involved in the criminal conduct of match-fixing recovered a total of £90,000 damages in respect of tweets which had only been provably seen by 65 publishees, but which a court felt should also be seen in conjunction with the fact that the allegations had simultaneously been published on a cricket online website where it had been seen by at least 1,000 people (they had wisely settled for £7,000 damages). £15,000 for damages reflected the very aggressive way in which the case had been conducted by the defence.

Exactly how many people ultimately see what is tweeted is difficult to assess and the numbers involved can turn out, in

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the end, to be quite substantial. The court thought that there was a "percolation phenomenon" which had to be reflected in the award of damages, which really meant that although not that many tweets could be proved, word would get around among the cricketing community. These were, in the view of the court, very serious allegations and the court recognised there was no scientific way of fixing damages and the Court of Appeal did uphold the award of £90,000.

However, in the KC case the newspaper had published the very serious allegation that the claimant, who was the natural father of a baby child who had died as a result of injuries inflicted by other relatives, had been falsely accused himself of having been convicted of a separate case of serious child abuse. The newspaper had recognised at the outset that it had made a mistake and the claimant had retained his anonymity so that his identity would only have been known to a very limited number of people.

The judge had nevertheless at trial considered that the appropriate level of damages was £150,000 which was, by virtue of the offer of amends, to be reduced by 50% to £75,000. The Court of Appeal thought this was too high and that the starting figure should have been £100,000 which was then discounted to £50,000. These were unusual cases in that one involved anonymity and the other only a limited number of publishees and the indication is that the court will nevertheless uphold fairly substantial awards of damages where the underlying allegation is a very serious one.

Developments in Privacy Law

The spate of privacy actions evident a couple of years ago has now been reduced to a trickle. The fact that claimants will now be expected to bring their cases to trial and cannot simply muzzle the media by obtaining an interim injunction and then doing nothing is likely to prove a significant deterrent for some claimants. Mr Justice Tugendhat considered a review of such cases in *JIH v News Group Newspapers* [2012] EWHC 2177. There he made clear that the court would expect actions to be pursued and the court would also review any settlement where anonymity orders were sought or documents were to be withheld from the public domain by confidentiality orders. Such matters involved a derogation from open justice and freedom of speech and the court needed to be satisfied that such orders were required for the purposes of law before they were granted and the court would look carefully at any settlement which provided for the continuity of anonymity.

The case are clearly going to exercise case management powers in privacy actions and the court will interfere with its own motion, even where the claimant may wish for confidentiality to be maintained and the defendant may not wish to involve itself in further legal expenses and may therefore be disposed to settle matters. The court will, however, review the matter from the point of view of this being an infringement of the Article10 rights of third parties.

On 27 September 2012, the second set of privacy injunction statistics were published covering a period January to June 2012. The numbers are really relatively small. There were nine new applications for privacy injunctions but only a couple of these related to the media and there were nine applications to continue injunctions.

In contrast the phone hacking claims continue apace. There are 154 cases before the court. 81 have settled but the police have given disclosure of phone hacking to 620 other potential claimants.

The publication in France and Italy of highly intrusive long lens photographs of the Duchess of Cambridge sunbathing has produced two fairly thoughtful analyses of the applicable law, which were published in Inforrm available here and here.

The penalties in France provided for up to 1 years imprisonment and large fines, but in practice finds are no more than €30,000. It will be interesting to see if any deterrent penalty is imposed. In Italy, there is provision for periods of imprisonment up to 5 years and going to jail in Italy appears to be voluntary if you have a halfway decent lawyer, but the penalties tend to be financial, and the article suggests that one could see a penalty of up to €250,000.

Education Act 2011

As of 1 October 2012, a provision to protect school teachers has come into force in that teachers are entitled to anonymity when allegations of sexual abuse and related offences are made by pupils at the school at which they are employed until proceedings are brought against them or unless the teacher himself consents to the publication of the material or an application is made to the Magistrates Court

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for this restriction to be lifted in the interests of justice. Media who disobey the law face a fine of up to £5,000.

Disclosure Orders Against Third Parties

The case of *Rugby Football Union v Viagogo* 2012 UK FC 55 has just been decided in the Supreme Court. Essentially, the decision followed the *Norwich Pharmacal* case, which laid down the guiding principles where someone wishing to bring a civil claim could make an application to the court to obtain documents from a third party in order to enable him to obtain the necessary evidence to bring action against the wrongdoer. It is a cause of action which has become increasingly important when persons wish to find out the identity of a third-party posting damaging material on the Internet under the cloak of anonymity.

In the *Norwich Pharmacal* case the court pinpointed three requirements before such an order could be made. The wrong must have been carried out or arguably carried out, there must be a need for such an order to enable action to be taken against the ultimate wrongdoer and the person against whom the order is sought must have been mixed up in the wrongdoing in the sense that they had facilitated it and they must be able to provide information likely to lead to redress being obtained.

In the *Rugby Football Union* case, the RFU wish to discover from the ticket agency, the identity of third parties who appeared to be selling the tickets to the agency in breach of their contract with the RFU. The question was whether the granting of a *Norwich Pharmacal* order was a "*necessary and proportionate response in all the circumstances,"* Lord Kerr noted that the main purpose of the remedy was to do justice and that this would involve "*a careful and fair weighing of all relevant factors*" (at paragraph 17 of the judgment). These include:

(i) The strength of the possible cause of action contemplated by the applicant.

(ii) The strong public interest in allowing an applicant to vindicate his legal rights.

(iii) Whether the making of the order will deter similar wrongdoing in the future.

(iv) Whether the information could be obtained from another source.

(v) Whether the respondent knew or ought to have known that he was facilitating arguable wrongdoing.

(vi) Whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result.

(vii) The degree of confidentiality of the information sought.

(viii) The privacy rights under article 8 of the ECHR of the individuals whose identity is to be disclosed.

(ix) The rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed.

(x) The public interest in maintaining the confidentiality of journalistic sources.

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Federal Court Denies Fox's Motion for a Preliminary Injunction Enjoining Dish Network's Commercial-Skipping DVR

The District Court for the Central District of California has denied a motion brought by the Fox Broadcasting Company seeking to block Dish Network's new DVR service that enables subscribers to entirely skip the commercials of the four major broadcast networks' primetime schedules. *Fox Broadcasting Co. Inc. v. Dish Network, L.C.C.,* 12-cv-4529 (C.D. Cal. Nov. 12, 2012) (Gee, J.).

The Dish Network's "Hopper" is a set-top DVR that allows subscribers to automatically record the primetime programs of the four major broadcasting networks without commercials vis-à-vis the DVR's "AutoHop" technology. ABC, CBS, Fox and NBC have sued Dish Network, claiming the service violates the networks' contractual agreements with Dish and infringes their copyrights under direct, contributory, vicarious and inducement theories of liability.

Dish argues, in large part, that its technology is protected under the Supreme Court's decision in *Sony Pictures, Inc. v. Universal Studios, Inc.,* 464 U.S. 417 (1984), which held that Sony was not contributorily liable for consumer copying of television programs with Sony's Betamax VCR – where most of that consumer copying was found to be in the nature of home "time-shifting," which the Court held to be a fair use.

Dish argues, in large part, that its technology is protected under the Supreme Court's decision in Sony Pictures, which held that Sony was not contributorily liable for consumer copying of television programs with Sony's Betamax VCR – where most of that consumer copying was found to be in the nature of home "time-shifting," which the Court held to be a fair use.

Fox was the first of the broadcasters to move for a preliminary injunction, and have its application decided. The Central District of California denied the motion, notwithstanding its finding that a couple of Fox's copyright and contract claims – but not others – were likely to succeed on the merits.

Judge Dolly Gee held that Fox was not likely to succeed on the merits of its direct and secondary copyright infringement claims, or its contract claims, that related to those copies made by the Hopper DVR, itself, under the *Sony Pictures* precedent permitting user time-shifting, and the Second Circuit's decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.,* 536 F.3d 121 (2d Cir. 2008), which held that the user of a remote storage DVR, and not the company offering the DVR service, was the party responsible for copying for the purposes of a direct infringement claim.

Where the Court did find a likelihood of direct infringement and breach of contract, perhaps unexpectedly, was in the so-called "quality assurance" (QA) copies that Dish Network makes every night to check that AutoHop is functioning correctly in eliminating the commercials. Those copies are not distributed to users, but are used by Dish Network technicians to send software updates that correct the commercial marking process on subscribers' Hopper DVRs.

Notwithstanding this finding, Judge Gee concluded that Fox had failed to establish that it would be irreparably harmed as a result of those copies. The Court expressed the view that (1) "the extent of harm caused by the QA copies is calculable in money damages"; and (2) "the record does not show that the harms flow from the QA copies themselves." Accordingly, the Court denied Fox's Motion for a Preliminary Injunction. Fox has appealed the ruling to the Ninth Circuit.

Complete analysis and context for this ruling, as well as the dispute involving the Aereo internet streaming service, will be covered in an article in the upcoming *MLRC Bulletin* to be published in December as part of our year-end review of Significant Developments.

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Federal Trade Commission Recommends Best Practices for Using Facial Recognition Technology

By Michael Schiffer

In an effort to stay ahead of the technology curve, the Federal Trade Commission (the "FTC") recently issued a staff report on advertisers" use of facial recognition technology ("FRT").

As the FTC explains, FRT can take a number of different forms, from merely recognizing that there is a face in a photo, to uncovering age, gender and other similar general characteristics from a photo, all the way to actually putting names to faces, a la the Sci-Fi movie, "Minority Report." FRT may be employed in social media contexts (e.g., tagging photos of friends), digital billboards (e.g., serving targeted ads) or privacy protection mechanisms (e.g., authenticating permitted users).

The FTC interest in FRT is focused on protecting consumer privacy, while promoting innovation. Namely, the Report reminds advertisers to:

- Focus on "privacy by design," taking into account the sensitive nature of information collected via FRT, how it will be stored, how it will be safeguarded, and how it will be disposed;
- Be transparent about FRT practices, and provide consumers with appropriate notice;
- Obtain affirmative express consent before collecting any data when (a) using data in a materially different manner than originally contemplated; and (b) generally, allowing identification of previously anonymous individuals.

The Report offers some concrete recommendations. Where a store"s digital sign identifies even just a consumer"s age or gender for targeted ads, advertisers should provide "walk-away" notice, literally advising consumers to turn around before entering the scanned section of the store, or the store as a whole. Social media providers should not collect or store any biometric data of non-users of their service, because there would be no way to offer practical choice to non-users. The FTC also noted that a (yet to be designed) mobile app allowing consumers to put a name to any and all scanned faces in range of the phone would raise significant privacy concerns.

FRT has clearly been an FTC focus, as the Report follows up on a December 2011 FTC workshop, as well as the testimony of an FTC Associate Director before the Senate Judiciary Committee on the topic. In one respect, the Report is merely an extension of the principals set forth in the FTC"s March 2012 report, "Protecting Consumer Privacy in an Era of Rapid Change." Nonetheless, FRT has provided the FTC with another arena in which to emphasize its focus on privacy even, as one dissenting FTC Commissioner lamented, when many of the potential uses are merely theoretical at this point.

In terms of enforceability, the Report merely provides guidance to those acting in the field, and is not intended to trump existing legal requirements, or serve as a template for law enforcement actions.

Michael Schiffer is counsel at Frankfurt Kurnit LLP in New York, NY.

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MLRC's 2012 Annual Meeting

MLRC's Annual Meeting was held on November 14, 2012 at the Grand Hyatt Hotel in New York.

Board of Directors Election

Susan Weiner (NBC Universal), Chair of the Board of Directors, called the meeting to order. The first order of business was the election of Directors. Four Directors were nominated to be reelected to two-year terms:

David S. Bralow, Tribune Company
Karole Morgan-Prager, The McClatchy Company
Mary Snapp, Microsoft Corporation
Susan E. Weiner, NBC Universal

Lynn B. Oberlander, The New Yorker Magazine, was nominated to join the Board as a new Director.

The five nominees were unanimously approved by those present together with the member proxies submitted to MLRC.

Five Directors were elected last year and will be entering the second year of their two-year terms. They are: Mark H. Jackson, Dow Jones & Company; Marc Lawrence-Apfelbaum, Time Warner Cable; Eric N. Lieberman, The Washington Post Company; Kenneth A. Richieri, The New York Times Company; and Kurt A. Wimmer, for the Newspaper Association of America.

Finance Committee's Report

Kurt Wimmer delivered the Finance Committee Report in the absence of Finance Chair Karole-Morgan-Prager. Mr. Wimmer directed the members' attention to MLRC's 2012 Financial Report prepared by MLRC accountants pursuant to the requirements of New York law. He highlighted the strength of MLRC's finances.

The financial report is prepared on an accrual basis. Sandy Baron noted that MLRC is discussing with its accountants changes to the electronic record-keeping to reflect the cash system actually used by MLRC.

Executive Director's Report

Sandy Baron thanked the Board of Directors for their work and welcomed Lynn B. Oberlander as the newest Director. She acknowledged Elizabeth Ritvo service as DCS President in 2012 and welcomed incoming President Bob Latham. Chuck Tobin has been nominated to join the DCS Executive Committee as Treasurer.

Sandy reviewed MLRC's 2012 activities. She highlighted the MLRC/Southwestern Media and Entertainment Law Conference in Los Angeles in January, The MLRC/Stanford Digital Media Conference with Stanford Law School and its Center for Internet and Society in Palo Alto in May, and the MLRC/NAA/NAB Media Law Conference in Virginia in September. MLRC also organized sessions for in-house counsel on managing websites held in New York in the Fall and in Washington, D.C. in March.

MLRC's 2012 publications included three volumes of the 50-State Survey. Oxford University Press, the publisher of the three volumes, will not act as publisher after the second book in 2013. Research will be done to

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decide whether to self-publish or seek another publisher in 2013. Self-publishing is a more viable option now than it was in the past. MLRC also plans to create digital e-book version of the Surveys.

The Bulletin is published three times a year. In 2012 this included the Trials and Damages Report, on set of articles on digital related issues, and a forthcoming New Developments issue.

The MediaLawLetter was published every month and the MediaLawDaily was published everyday. Sandy encouraged those who have briefs or opinions worth sharing with members to please send those to MLRC. Analytics of the MediaLawDaily show that members value litigation source documents.

MLRC also publishes a MediaDaily intended for non-lawyer executives at media member companies. The MediaDaily includes business, tech, and labor news that business colleagues might find of interest. Media members are encouraged to distribute this widely to non-lawyers in their companies.

Sandy also highlighted publications produced by Defense Counsel Section Committees. Notably, the Employment Committee updated its "Basic Guide to Employment Defamation and Privacy Law" which is intended for non-lawyers. Additionally, it published "Legal Considerations for U.S. Media Companies Who Send Employees Into 'Harm's way,'" which has become one of the most popular publications based on downloads. Sandy thanked all committees for their hard work.

MLRC has also increased its coverage of international topics, integrating international media law issues into all conferences, as conference chairs have found these to be substantial issues of interest.

Along the same lines, the MLRC will host its first conference on Latin American media law issues on March 11 in Miami. Libel, privacy, newsgathering, compliance, and IP, both substantive and transactional, will be covered. Planners hope to have a keynote speaker on the state of free media in Latin America as well as an additional speaker on the state of Spanish language media in the United States. Adolfo Jimenez and Charles Tobin of Holland & Knight, as well as Lynn Carrillo at NBC Universal, have worked to organize and program the conference.

Other conferences in 2013 include the 10th annual Entertainment & Media Law Conference at Southwestern on Jan. 17 and the MLRC/Stanford Digital Media Conference on May 16 and 17. The London Conference will take place Sept. 24 and 24, 2013 at Stationers' Hall.

Sandy thanked the Board for developing a topic for the pre-Dinner Forum on Disruptive Technologies and New Television Business Models and thanked Mary Snapp for moderating the panel.

She thanked the law firms and corporations that provided underwriting for the conferences, and those that supported the MLRC by attending the Annual Dinner. MRLC's conferences are made affordable because of these sponsorships.

Sandy thanked the MLRC staff, as well as giving particular thanks to Bob Hawley who worked at MLRC for nearly two years on secondment from the Hearst Corporation. Over the summer, Bob retired to South Carolina, but is still working with MLRC, putting together events for in-house lawyers as well as contributing research on FOIA issues and Sunshine Laws.

Sandy finally thanked all members, for ideas, intellectual efforts, and participation in conferences and publications.

Defense Counsel Section Report

DCS President Elizabeth Ritvo thanked the organization for its work. She noted the importance of

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committees, especially in developing the next generation of MLRC leadership. A new committee on media trademark and copyright issues will begin in January. Tim Jacoby of the Washington Post and Maya Windholz of NBC Universal will co-chair the committee.

Report on MLRC Institute

Maherin Gangat reported on MLRC Institute projects and began by thanking Dow Jones for funding for the Institute Fellow position.

The Speaker's Bureau has completed nearly 200 presentations, sending speakers out into the community to talk on First Amendment issues, particularly reporter's privilege, online publishing, and censorship. She noted that the Institute is thinking of adding privacy to the list of topics covered.

Additionally, the Institute is working on a new video project targeted at high school students. Students will be invited to submit videos on a particular subject area as part of the contest. The marketing and organization of the contest is still being planned, but a question or hypothetical around cyber-bullying will likely be the topic when the project rolls out next year.

The Institute also maintains an online catalog of suits dealing with online speech, updated on a regular basis. The site contains about 200 entries to date.

The Citizen Media Law Project at Harvard's Berkman Center for Internet & Society has proposed joining the Institute site with its own database. The hope is to merge data within the next year, with aid from grant money to create a new domain name.

Additionally, the Institute maintains a Facebook page where it posts a story of the week of interest to students.

Maherin thanked the Institute Board for its help in moving the Institute and its project forward.

New Business: International Media Lawyer's Project

Dave Heller reported on MLRC's 30th Anniversary initiative, the MLRC International Media Lawyers Project, to reach out to foreign lawyers, particularly those in countries facing severe free speech challenges. The aim of the project is to extend membership to selected lawyers who can benefit from MLRC resources and networks. This year lawyers from Thailand and Mexico were added to the MLRC membership. Dave encouraged members with questions about legal issues in Argentina, Malaysia, China, Philippines, Ukraine, Mexico, or Thailand to reach out to him to connect with lawyers in these countries.

New Business: Increasing Annual Meeting Attendance

James Borelli of CNA raised the issue of encouraging more attendance at the Annual Meeting, noting that attendance has fallen over the last few years. Susan Weiner noted that there might be ways to advertise or promote the meeting differently to increase attendance. She sought more input from members regarding the meeting and also suggested reviewing language in the proxy statements to clarify that members are encouraged to attend.

There being no other new business, Susan Wiener thanked everyone for attending and adjourned the meeting.

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