For exclusive use of MLRC members and other parties specifically authorized by MLRC. © 2013 Media Law Resource Center, Inc.

520 Eighth Avenue, North Tower, 20th Floor, New York, New York 10018 (212) 337-0200



Reporting Developments Through February 25, 2013

LIBEL & PRIVACY

5
7
8
9
10
12
13
15
16
17
-

Page 2	February 2013	MLRC MediaLawLetter
Wisc. App.	Law Firm Loses Privacy Suit Over Key Word Advertising	
	Plaintiff Sued Competitor for Misappropriation / Right of Publicity for Bu Harbush v.Cannon & Dunphy	iying its Name
NEWSGATH	IERING	
	The Paparazzi & The First Amendment	
	"Steven Tyler Act" Moves Ahead in Hawaii S.B. 465	
INTELLECT	TUAL PROPERTY	
7th Cir.	Seventh Circuit Addresses Trademark Confusion Arising From Mov	
	Court Avoids Relying on Rogers Test; Focuses on Absence of Actual Con Eastland Music Grp., LLC v. Lionsgate Entm't, Inc.	fusion
INTERNATI	ONAL	
	The Other Side of the Pond: Developments in UK and European Mee	lia Law22
	The Defamation Bill and Leveson, Contempt of Court and Archives, Liab	ility of ISPs and More
ETHICS		
	Media Lawyers Under the Spotlight	
	The Leveson Report and Media Lawyers	

MLRC UPCOMING EVENTS

LEGAL ISSUES CONCERNING HISPANIC AND LATIN AMERICAN MEDIA March 11, 2013, Miami, FL

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

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

MLRC ANNUAL DINNER & FORUM November 13, 2013, New York, NY

www.medialaw.org

RETURN TO TABLE OF CONTENTS



Media Law Resource Center University of Miami School of Communication and School of Law March 11, 2013 | University of Miami

LEGAL ISSUES CONCERNING HISPANIC AND LATIN AMERICAN MEDIA Cross Border Libel Issues for a Digital World

Privacy and Newsgathering in Latin America

Cross-Border Compliance Issues

Anti-Piracy and Digital Copyright Law Cross Borders

Keynote Address: Manny Garcia, *El Nuevo Herald*

Lunch Address: Emilio Romano, President of Telemundo

MLRC's first conference on Legal Issues Concerning Hispanic and Latin American Media is designed to provide lawyers from North America and Latin America a unique opportunity to meet and educate one another on the issues that arise in cross-border content creation, newsgathering, and distribution.

> www.medialaw.org email: latinamerica@medialaw.org

CURRENT SCHEDULE

9:15 to 9:30 Welcome

9:30 to 10:00 Keynote: Manny Garcia, Executive Editor, El Nuevo Herald

10:00 to 11:15 **Cross Border Libel Issues for a Digital World Johnita P. Due**, (moderator) CNN **Gary Bostwick**, Bostwick & Jassy **Andrés Cavelier**, FastrackMedia **Maria Diaz**, Thomson Reuters

The panel will explore libel law in Latin American jurisdictions under civil and criminal codes, emerging issues of liability for user generated content, the risks US broadcasters and publishers face when distributing their material in Latin America, and the challenges of cross border litigation.

11:30 to 12:45 **Privacy and Newsgathering in Latin America George de Lama**, (moderator) Answers Media, LLC **Adolfo Jimenez**, Holland & Knight LLP **Emilio Beccar-Varela**, Estudio Beccar Varela, Buenos Aires **Margarita Escudero**, Tinoco, Travieso, Planchart & Nuñez, Caracas

The panel will explore consent laws for recording in public places, the different concepts of reasonable expectation of privacy under civil and criminal laws, Inter-American Court case law on privacy rights of public figures, liability for publishing lawfully obtained information, and emerging data privacy and right to be forgotten doctrines.

12:45 to 2:00 Lunch with Speaker Emilio Romano, President of Telemundo

2:00 to 3:15 **Cross-Border Compliance Issues Lisa Hughes**, (moderator) NBCUniversal **Sira Veciana-Muino**, Sony Pictures Television Networks, Latin America and Brazil **Sally Ng**, Universal Networks International **Carlos Garcia Perez**, Office of Cuba Broadcasting

The panel will explore business ethics and corporate compliance concerns for publishers and broadcasters distributing content in Latin America, including risk assessment and counseling about anticorruption laws, data protection, and other clearance quagmires.

3:30 to 5:00 Anti-Piracy and Digital Copyright Law Cross Borders Gustavo I. Lopez, (moderator) Discovery Latin America / US Hispanic Ana Salas Siegel, Fox Latin America Channels Ernesto Luciano, Yahoo! Hispanic Americas José Sariego, HBO Latin America Group

The panel will explore the challenges publishers and broadcasters face in protecting content from piracy, copyright and fair use issues, and protections for third-party web platforms.

5:00 - 6:00 **End of Conference Reception** Sponsored by The McClatchy Foundation, *The Miami Herald* and *El Nuevo Herald* MLRC Gratefully Acknowledges the Support of

Holland & Knight

McClatchy

The Miami Herald

el Nuevo Herald

Conference Planning Group

Lynn Carrillo, NBC Telemundo Adolfo Jimenez, Holland & Knight Chuck Tobin, Holland & Knight Sandra S. Baron, MLRC Dave Heller, MLRC

Location

University of Miami School of Communication, Wolfson Building (Shoma Hall), located at 5100 Brunson Drive, Coral Gables, FL 33146.

Registration

The program fee for the conference is \$125. You can register online at MLRC's website: www.medialaw.org.

CLE

MLRC is applying to have the Conference approved for 6-7 hours of Florida CLE credit.

Questions?

If you have any questions about the conference or registration, e-mail: latinamerica@medialaw.org

February 2013

Jury Returns Defense Verdict In Radio Shock Jock Trial

Insults Were Not Actual Statements of Fact

By Jim Lake

A radio shock jock's verbal blasts at another station's onair host were not defamatory, a Florida jury decided. Schnitt v. Clem, (Fla. Cir. jury verdict 1/30/13) (Arnold, J.).

Tampa radio personality Todd "MJ" Schnitt and his wife sued Bubba "the Love Sponge" Clem over Clem's on-air rants. According to the Schnitts' complaint, Clem called Schnitt "a lying piece of crap," "a snitch," and "a real modern day stool pigeon," among other things. Clem also

said he "would not allow his kids alone with" Schnitt, claimed Schnitt had been "stealing money for years," and called Schnitt's wife a "whore."

Libel Trial

The trial revealed a long history of animosity between the two Tampa radio personalities. Schnitt and Clem worked together at the same media company in the 1990s, until Clem left to join another broadcaster. Clem made his comments as the host of a popular morning program, while at the time Schnitt had a top-rated afternoon show.

After nine days of testimony and three hours of deliberations, jurors apparently agreed with Clem's attorneys that his verbal assaults could

not reasonably be understood to state actual facts about the Schnitts. "No one goes to the Bubba the Love Sponge morning show to learn an objective fact," attorney Joseph Diaco said in his closing argument, according to The Tampa Tribune.

Schnitt's attorneys disagreed. "The First Amendment does not protect this kind of speech," lawyer Phil Campbell told the jury. "It doesn't protect outright lies.... It doesn't give us the right to hurt somebody through lies and innuendos."

Defendant Bubba Clem at trial. Jurors apparently agreed with Clem's attorneys that his verbal assaults could not reasonably be understood to state actual facts about the Schnitts.

Juror comments indicated they saw Clem's barbs as mere name-calling that didn't merit a lawsuit. "I think anybody that runs and cries and hides in their house because someone calls them a name kind of needs to grow up, you know, develop a thicker skin, especially if you're in the public eye," alternate juror Alana Wishire told the Tribune. "I'm a nurse and I have a thicker skin than that."

The jury's forewoman, Kristy Craig, agreed. "I'm not a fan, to be honest, of either party," she told St. Petersburg's

> Tampa Bay Times newspaper. But, she added, "I love that I can hate the antics of Bubba the Love Sponge. I love that he can say all that sexist, worthless drivel to 400,000 radio listeners. I love that I can change the station."

Florida Case on Humor & Hyperbole

The jury's verdict was consistent with appellate precedent recognizing that attempts at humor and rhetorical hyperbole are not actionable. The classic illustration of this rule is Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6 (1970), in which the Supreme Court found that the characterization of a developer's negotiating stance as "blackmail" was "no more than rhetorical hyperbole, a

vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable."

Florida courts reached a similar result in a case involving a defamation claim against the wife of Hall of Fame baseball player Cal Ripken Jr. Kelly Ripken told Ladies Home Journal about her husband's surprise upon finding a woman in a house the woman had agreed to rent to Ripken during spring training. "I told Cal, 'She was planning to spend the night with you!' " Morse v. Ripken, 707 So. 2d 921 (Fla. 4th (Continued on page 6)



February 2013

MLRC MediaLawLetter

(Continued from page 5)

DCA 1998). "The intent of the statement was to be humorous, and it did not invite serious examination of [the homeowner's] moral behavior," the Florida appellate court explained.

Similar arguments were presented prior to trial in the *Schnitt* litigation. Partial summary judgment was granted concerning Clem's statements that a car dealership promotion by Schnitt was "the biggest failure" and "didn't sell one car." Those statements, the trial court found, were not defamatory. Otherwise defense motions for summary judgment were denied. Post-trial motions are pending, including Schnitt's request for a new trial.

The Supreme Court of Canada in 2008 issued a ruling similar to the Tampa jury verdict. The Canada litigation involved a Vancouver radio host's criticism of a family values advocate as displaying the kind of bigotry more commonly associated with Hitler. "Public controversy can be a rough trade, " the Canadian justices explained, "and the law needs to accommodate its requirements." *WIC Radio Ltd.v. Simpson*, 2008 SCC 40, [2008] 2 SCR 420 (Can. 2008).

Jim Lake is a member of Thomas & LoCicero PL in Tampa. His firm is not involved in the Schnitt litigation. Plaintiff was represented by C. Philip Campbell, Jr., Shumaker, Loop & Kendrick LLP, Tampa. Defendant was represented by Joseph Diaco, Adams & Diaco, Tampa.

Media Law Resource Center University of Miami School of Communication and School of Law

March 11, 2013 | University of Miami

LEGAL ISSUES CONCERNING HISPANIC AND LATIN AMERICAN MEDIA Cross Border Libel Issues for a Digital World

Privacy and Newsgathering in Latin America

Cross-Border Compliance Issues

Anti-Piracy and Digital Copyright Law Cross Borders

Keynote Address: Manny Garcia, *El Nuevo Herald*

Lunch Address: Emilio Romano, President of Telemundo

February 2013

Virginia Jury Awards \$17,000 to Veteran Accused of Lying About Service Medals

Private Figure Plaintiff Sued WTKR Over News Report

A Virginia jury recently returned a verdict for the plaintiff in a private figure libel suit against Virginia broadcaster WTKR. *Gsell v. Local TV Virginia, LLC*, CL11-2642 (Va. Cir. jury verdict 1/29/13). The jury awarded a modest \$17,000 in actual damages and the parties settled before final judgment was entered.

Background

The plaintiff George Gsell is an Air Force veteran who served for a year in Vietnam and at the Air Force Academy as a refrigeration and air-conditioning technician. Upon his retirement in 1977, his service record (a DD-214 form) reflected that he had won several service medals of valor, including three Distinguished Flying Crosses and the Air Force Cross (an award so rare that it has been awarded to fewer than 200 people in Air Force history). More recently, plaintiff drove a car with a Virginia license plate identifying him as the winner of the Air Force Cross.

Gsell, however, was never actually awarded those medals, but it is unclear how they ended up on his 1977 service record form, which has recently been corrected by the Air Force.

At the end of April 2010, WTKR News Channel 3 conducted an investigation, and aired a television report that exposed the inaccuracy of Gsell's claim, and accused him of lying about his service record, and arguably implying that he had falsified records.

Reporter Dan Tordjman accused Gsell of, inter alia, "lying," and stated that the DD-214 "document had to be bogus" and that "The Stolen Valor Act makes it a federal crime for anyone to claim they've won an award when they haven't." A similar written story was published on WTKR's website.

Gsell sued WTKR, Tordjman, and a local newspaper, the Daily Press, which ran a related story. Plaintiff dismissed the claim against the Daily Press before trial.

Libel Trial

Plaintiff was deemed a private figure. The Honorable Leslie L. Lilley presided. At trial plaintiff argued that he honestly believed that he had been awarded the service medals at issue because they appeared on his DD-214 form, and that he had no role in falsely adding them to his military record.

The defendants argued that it was unreasonable for plaintiff to form such a belief, given that he had not served in combat, but rather, as a refrigeration and air-conditioning mechanic, and that the Air Force never told him (other than in the DD-214) that he had been awarded the medals of valor. Still, the defense could not prove that plaintiff had deliberately tampered with his service record.

The jury found for the plaintiff, presumably believing that the WTKR story falsely implied plaintiff had falsified his service record (the jury verdict form did not require the jury to specify which of the news report's statements had been false). However, the jury concluded that plaintiff had not demonstrated actual malice, and thus, no presumed or punitive damages were awarded; only actual damages in the amount of \$17,000. The parties settled the case before the trial judge entered the award as a final judgment.

Conrad M. Shumadine & Brett A. Spain, Wilcox & Savage, P.C., Norfolk, VA, represented WTKR and Dan Tordjman. Kevin E. Martingayle, Stallings & Bischooff, P.C., Virginia Beach, VA, represented Plaintiff.

Florida Court Grants Default Libel Judgment With Broad Speech Injunction

Order Bans Paper From Publishing Anything About Plaintiffs

A Florida federal court this month granted a default libel judgment in favor of the Prime Minister of Haiti and a South Florida businessman against the *Haiti-Observateur* newspaper and its operator. <u>Baker v. Haite-Observateur</u>, No. 12-CV-2330 (S.D. Fla. Feb. 6, 2013) (Ungaro, J.).

The default judgment is notable because it appears that plaintiffs sought no monetary damages in their motion for default, but instead asked for and were granted a broad injunction permanently restraining the newspaper's operator "from publishing future communications to any third-parties concerning or regarding the Plaintiffs in either their professional, personal or political lives." Order at para. 6.

Plaintiff Laurent Lamothe is the current Prime Minister of Haiti. Plaintiff Patrice Baker is a Haitian-American businessman in South Florida. The *Haiti-Observateur* is a Brooklyn-based newsweekly serving the Haitian community

in the U.S., Canada and Caribbean. The newspaper's website states that it has a weekly circulation of 75,000. It is available in hardcopy and online. According to the complaint,



defendant Leo Joseph operates and publishes the newspaper; and it has several thousand online readers in South Florida.

At issue were articles written in French published in

August and September 2012. The first was headlined "La Haitel en vente pour 25 millions\$? The second, read "Global Voice et SOWCI ensemble pour ruiner la TELCO." Both articles concern the sale of Haitian telecom company, Haitel.

Plaintiffs <u>filed suit for defamation</u> on September 10, 2012. They alleged the articles falsely implied they used their government connections to profit from the sale of the telecom company and were published with actual malice. The defendants did not answer the complaint, although the filing of the lawsuit was picked up by the press. After defendants failure to answer the plaintiffs moved for a default judgment. The affidavit in support of the default judgment merely restates

the allegations from the complaint that the

articles are false and published with actual malice. Plaintiffs were represented by J. Ronald Denman and Miguel Armenteros, Perlman, Bajandas, Yevoli & Albright, P.L., Miami, FL.

MLRC MediaLawLetter Committee

Michael Berry, Co-Chair Russell T. Hickey, Co-Chair Dave Heller, Editor Robert D. Balin Michael Berry Katherine M. Bolger Robert J. Dreps

Judith Endejan Rachel E. Fugate Michael A. Giudicessi Charles J. Glasser Karlene Goller Shelley M. Hall Russell T. Hickey David Hooper Leslie Machado Michael Minnis Deborah H. Patterson Bruce S. Rosen Indira Satyendra

February 2013

Minnesota Supreme Court Holds Online Speaker Entitled to Summary Judgment Another Case for the "Tool" Kit

By Leita Walker

In an opinion issued at the end of January, the Minnesota Supreme Court ruled unanimously that online statements about the behavior of a doctor, including the statement that he was a "real tool," were not actionable. <u>McKee v. Laurion</u>, No. A11-1154, 2013 WL 331558 (Minn. Jan. 30, 2013).

In reaching this conclusion, the Court addressed various issues, including the doctrine of substantial truth, whether the statements were defamatory, and the opinion defense.

Background

McKee arose after defendant Dennis Laurion perceived his father's doctor to be rude and insensitive and posted about his interaction with the doctor on a "rate-your-doctor" website. The doctor sued for defamation *per se* and interference with business, citing six specific statements:

- Dr. McKee said he had to "spend time finding out if you [Kenneth Laurion] were transferred or died."
- Dr. McKee said, "44% of hemorrhagic strokes die within 30 days. I guess this is the better option."
- Dr. McKee said, "You [Kenneth Laurion] don't need therapy."
- Dr. McKee said, "[I]t doesn't matter" that the patient's gown did not cover his backside.
- Dr. McKee left the room without talking to the patient's family.
- A nurse told Laurion that Dr. McKee was "a real tool!"

On summary judgment, the district court granted defendant's motion and dismissed the doctor's claims with prejudice, holding that the statements lacked defamatory meaning and that the statements were either protected opinion

or substantially true or too vague to convey a defamatory meaning. The Court of Appeals affirmed dismissal of the interference claim but reversed on the defamation claim. It concluded that the statements were factual assertions and not opinions, that there were general issues of material fact as to their falsity, and that they tended to harm the doctor's reputation.

Minnesota Supreme Court Ruling

The Minnesota Supreme Court reversed, holding "none of the six statements is actionable either (1) because there is no genuine issue of material fact as to the falsity of the statements or (2) because the statements are not capable of conveying a defamatory meaning that would harm respondent's reputation and lower him in the estimation of the community." *McKee*, 2013 WL 331558, *1.

With regard to the statements defendant claimed the plaintiff made about survival rates and the hospital gown, the court held that those statements were substantially true because the "gist" or "sting" of each party's version of what was said was the same. *Id.* at *3.

As to the remaining statements—that the doctor said the patient did not need therapy, that he did not take time to talk to the family, and he was a "real tool"—the court held that the statements were not defamatory.

With regard to the "tool" statement in particular, the court held that this was "pure opinion" because it "cannot be reasonably interpreted as stating a fact and it cannot be proven true or false." *Id.* at *6.

The court rejected the argument that because defendant claimed a nurse told him the doctor was a tool the statement was provably false and therefore actionable. It stated that "attributing the statement to an unidentified nurse does not add defamatory meaning to the statement." *Id*.

Leita Walker is an associate in the Minneapolis office of Faegre Baker Daniels LLP. Marshall H. Tanick and Teresa J. Ayling of Hellmuth & Johnson, PLLC, Edina, MN, represented the plaintiff. John D. Kelly and David L. Tilden of Hanft Fride, P.A., Duluth, MN, represented the defendant.

Washington Court Affirms Dismissal of Libel Claim Against Seattle TV Station Allegedly False Statements Did Not Change Broadcasts' Gist

By Bruce E.H. Johnson and Ambika K. Doran

On January 14, 2013, a Washington appellate court affirmed dismissal of a defamation lawsuit brought against a Seattle television station, primarily on the basis that any allegedly false statements in the challenged broadcasts did not change the gist of those that were admittedly true. *See* U.S. Mission Corp. v. KIRO TV, Inc., 292 P.3d 137 (2013).

Background

The defendant, KIRO-TV, had broadcast and published on its website two stories about the plaintiff, charity United States Mission Corp. ("Mission"). The stories focused on

Mission's local halfway house, noting its placement on a list for recently released King County jail inmates, Mission's requirement that residents solicit money door-to-door in nearby neighborhoods, and KIRO's discovery that some of those residents were felons. Mission alleged that the stories defamed it by suggesting it deliberately sought out felons to live in its houses and intimidate neighbors into donating money.

Court Rulings

The trial court granted KIRO's motion for judgment on the pleadings (applying a summary judgment standard because both sides had offered additional evidence), and the Court of Appeals affirmed. Noting that the defamatory nature of speech "must be apparent from the words themselves," the court reiterated that a libel claim "may not be based on the negative implication of true statements." In addition, it reasoned, not every statement in a broadcast need be literally true; instead, "a defendant need only show that the statement is substantially true or that the gist of the story, the portion that carries the 'sting,' is true," which presents a question of law for the court.

The court found the stories did not suggest that Mission "deliberately" seeks out violent criminals to make money and threaten people; it only featured neighbors who themselves felt threatened.

The court found that the gist of KIRO's stories was true, even though KIRO had reported that Mission "recruits" felons and sends "bevies" of felons into neighborhoods, statements, it found, that may have been false. It noted:

When considered as a whole, the gist of KIRO's stories is that U.S. Mission is among the places to which recently released inmates from the county jail, including felons, are referred for transitional housing; that some of residents of U.S. Mission are or have been persons with felony or non-felony convictions; that residents of U.S. Mission,

including recently released inmates, are required to solicit donations in order to continue living there; and that U.S. Mission takes residents into neighborhoods so they can solicit donations. US Mission does not deny the truth of these assertions.

neighbors who neighbors who themselves felt threatened.

The opinion further noted that KIRO did not suggest that a "significant proportion" of solicitors have criminal records as violent felons; rather, the stories did not discuss that proportion at all. Finally, to the extent that the stories allegedly implied that Mission did not have a religious mission, one of the appellant's theories of liability, the court held that such "a statement of opinion cannot be defamatory."

The court also rejected Mission's arguments that several statements in the stories were literally false, including, for example, that KIRO's reporter had gone undercover to "reveal the motives and tactics of the United States Mission"; public records showed certain inmates moved to Mission's *(Continued on page 11)*

February 2013

(Continued from page 10)

Seattle home after getting out of prison; Mission's operators drove residents, some criminals and transients, to neighborhoods to solicit donations; and neighbors reported they felt threatened by the solicitors, who, they said, did not mention religion. Finally, it rejected Mission's claim that the headline "Jailhouse Used to Find Door-to-Door Solicitors" was defamatory.

Finally, the Court of Appeals declined to consider the trial court's decision to defer any ruling on KIRO's alternative motion, brought under Washington's new anti-SLAPP statute, RCW 4.24.525. Mission had argued the law was unconstitutional but the trial court declined to address these

novel issues, because the claims could not survive a motion for judgment on the pleadings.

In this appeal, plaintiff United States Mission Corp. was represented by James E. Lobsenz and Lydia A. Zakhari of Carney Badley Spellman, P.S., Seattle, and defendant KIRO TV, Inc. was represented by Bruce E. H. Johnson and Ambika K. Doran of Davis Wright Tremaine LLP, Seattle. An amicus brief was submitted by the Reporters Committee for Freedom of the Press, Washington Newspaper Publishers Association, and Allied Daily Newspapers of Washington, represented by Gregg P. Leslie of The Reporters Committee for Freedom of the Press and Jessica L. Goldman of Summit Law Group PLLC, Seattle.

Join MLRC and Stanford Law School's Center for Internet and Society LEGAL FRONTIERS IN DIGITAL MEDIA

Into the Breach: Managing Data Security Incidents

What Is Your Exposure? Understanding Key Issues in Privacy Class Actions

Getting it Right: What Obligations Do New Media Have in the Search for Truth?

Digital Copyright Mashup

Balancing Innovation and IP Protection in New Forms of News Distribution

Digital Media Venture Capital 2013

For all the details, including curriculum, schedule, registration, and lodging, please go to our <u>Conference website</u>.

Registration: \$295

MLRC MediaLawLetter

Lindsey Lohan Lawsuit Against Rapper Pit Bull Dismissed

A New York federal district court this month dismissed a lawsuit filed by actress Lindsey Lohan over the use of her name in a popular hip hop song. <u>Lohan v. Perez aka</u> <u>"Pitbull" et al.</u>, 11 CV 5413 (E.D.N.Y. Feb. 21, 2013) (Hurley, J.). The court easily found that the song was protected First Amendment speech, the use was not commercial, and, even if so, the brief mention of the actress's name was incidental.

Although Lohan failed to state a claim, the court denied defendants' motion for Rule 11 sanctions. The plaintiff's attorney was, however, fined for submitting a motion copied from blogs and Internet sites. Although the fine was a relatively minor \$750, the court noted that publicity about the errant filing would bite the lawyer more.

unjust enrichment, emotional distress and injunctive relief. Defendants removed the case to federal court based on diversity jurisdiction.

District Court Decision

The court first held that it could consider the song lyrics even though plaintiff did not attach them to her complaint. The lyrics were "integral to the complaint."

On the merits, the court began by agreeing with the defendants that New York's misappropriation law, Civil Rights Law Sec. 50-51, does not apply to works of art. "Pure First Amendment speech in the form of artistic expression ... deserves full protection, even against [another individual's]

Background

Lohan sued rapper Armando Perez, aka "Pit Bull," and a host of music producers and distributors, over a song entitled "Give Me Everything," which was a number one single on Billboard's June 2011 charts. The song mentioned Lohan a single time in the following verse:

> Take advantage of tonight Cause tomorrow I'm off to Dubai to perform for a princess But tonight, I can make you my queen

> And make love to you endless

This is insane: the way the name growin'

Money keep flowin'

Hustlers move aside

- So, I'm tiptoein', to keep flowin'
- I got it locked up like Lindsay Lohan

Lohan brought suit in New York State court in November 2011 alleging the use of her name violated Sections 50-51 of the state's Civil Rights Law by using her name for advertising purposes. Lohan also pled additional claims for



statutorily-protected privacy interests." *Quoting Hoepker v. Kruger*, 200 F. Supp. 2d 340, 350 (S.D.N.Y. 2002).

Next the court agreed that Lohan's name was not used for advertising or trade within the meaning the New York statute. The fact that the song was presumably created and distributed to make money did not render it commercial under the law.

Finally, Lohan's misappropriation claim also failed because the use of her name was incidental. It was mentioned only once, was not in the title or refrain, "and appeared entirely

incidental to the theme of the song."

As to the remaining claims, the unfair competition claim failed because it was nothing more than a recasting of Lohan's failed privacy count.

The claim for intentional infliction of emotional distress failed because the conduct at issue was not extreme and outrageous as a matter of law.

Lindsey Lohan was represented by Stephanie Ovadia, East Meadow, NY. Defendants were represented by Audrey Pumariega and Marcos Jimenez, McDermott Will & Emery LLP, Miami; and Sarah Gibbs Leivick, Kasowitz Benson Torres & Friedman LLP, NY.

February 2013

Vermont Federal Court Applies Anti-SLAPP Law to Strike Complaint

By Navah Spero

The Vermont federal district court recently applied the state's anti-SLAPP statue to strike a complaint filed against a college and two journalism students. <u>Haywood v. St.</u> <u>Michael's College</u>, No. 2:12-CV-164, 2012 U.S. Dist. LEXIS 177468 (D. Vt. Dec. 14, 2012),

Background

Plaintiff John Haywood, a candidate for president of the United States in the 2012 New Hampshire Democratic primary, sued St. Michael's College (the "College") and two students for libel after they wrote and published a profile of him on the College's website on January 4, 2012.

The students reviewed Mr. Haywood's website, interviewed him, and interviewed his associates in North

Carolina prior to writing the profile. The students' journalism professor published the profile on the College's website. Mr. Haywood alleged that the profile was libelous and contained false statements about his policy positions on several topics, including taxes, healthcare, foreign policy, global warming, and early childhood education. Mr. Haywood argued that the profile harmed his reputation in his home

state of North Carolina and caused him to lose the primary to President Obama on January 10, 2012.

Each defendant filed a motion to dismiss under Federal Rule of Procedure 12(b)(6) for failure to state a claim upon which relief can be granted and a motion to strike the complaint under Vermont's Anti-SLAPP Statute, <u>12 V.S.A. §</u> <u>1041</u>. The court granted all of the defendants' motions. This was the first time Vermont's Anti-SLAPP statute was used to strike a complaint in a reported case.

Vermont's Anti-SLAPP Statute

Vermont's Anti-SLAPP statute permits a defendant to file a motion to strike when a lawsuit arises "from the defendant's exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the United States or Vermont Constitution." <u>12 V.S.A. § 1041(a).</u>

The statute applies to:

(1) any written or oral statement made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;

(2) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(3) any written or oral statement concerning an

issue of public interest made in a public forum or a place open to the public; or

(4) any other statement or conduct concerning a public issue or an issue of public interest which furthers the exercise of the constitutional right of freedom of speech or the constitutional right to petition the

government for redress of grievances.

12 V.S.A. § 1041(i).

The court must grant the motion to strike the claims unless the plaintiff can show that defendant's speech "was devoid of any reasonable factual support and any arguable basis in law" and caused "actual injury to the plaintiff." 12 V.S.A. § 1041(e)(1).

District Court Decision

The court first addressed the question of whether Vermont's anti-SLAPP statute was in conflict with the (Continued on page 14)

the question of whether Vermont's anti-SLAPP statute was in conflict with the Federal Rules of Civil Procedure.

The court first addressed

February 2013

MLRC MediaLawLetter

(Continued from page 13)

Federal Rules of Civil Procedure. The court recognized that at least one federal court has held that its state's anti-SLAPP statute conflicted with the Federal Rules, *Stuborn Ltd. Partnership v. Bernstein*, 245 F. Supp. 2d 312, 316 (D. Mass. 2003), but noted that the District Court in Vermont has already held that there is no conflict. *Bible & Gospel Trust v. Twinam*, 2:07-CV-17, 2008 U.S. Dist. LEXIS 103674 (D. Vt. July 18, 2008) (following the Ninth Circuit in holding that Vermont's Anti-SLAPP statute does not directly conflict with the Federal Rules of Civil Procedure and the state's interest outweighs the federal interest).

Next, the Court questioned whether the defendants' actions were the type of conduct protected by the statute. The Court looked at both the causes of action alleged by the plaintiff and the nature of the defendants' conduct. The Court noted that a defamation claim is often brought by plaintiffs seeking to suppress free speech. In addition, the Court found

that the nature of defendants' conduct satisfied 12 V.S.A. § 1041(i)(3): "(3) any written or oral statement concerning an issue of public interest made in a public forum or a place open to the public."

The written statement was made about a candidate in a presidential election on a public website. The Court held that defendants satisfied the burden of showing that the anti-SLAPP statute applied to their case.

As such, the Court shifted the burden to the plaintiff to demonstrate that (1) the profile lacked any factual basis and (2) that he suffered actual injury. In analyzing the first prong, the Court relied on cases interpreting Massachusetts' and California's anti-SLAPP statutes, which have held that to meet the first prong of the test, the plaintiff must show that his claim is legally sufficient.

Having already ruled that plaintiff's complaint should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted under both North Carolina and New Hampshire defamation law, the court concluded that plaintiff did not state a legally sufficient claim and therefore could not establish that the profile lacked any factual basis.

To the contrary, the profile closely resembled plaintiff's own website. The court also concluded that plaintiff failed to

establish any actual injury. Plaintiff lost the New Hampshire primary by a 116 to 1 ratio, making it highly speculative that the profile had any effect on the outcome.

In addition, the profile was only published on the College's website in Vermont, and the statement that allegedly caused the most harm in North Carolina was that plaintiff was running for president as a Democrat, a factually true statement.

The Court found that the plaintiff could not carry his burden and struck the complaint. In addition, the Court ordered the plaintiff to pay defendants' full attorneys' fees, as required by the statute. In other jurisdictions, plaintiffs have argued that they are only responsible for attorneys' fees incurred pursuing the motion to strike, an argument the *Haywood* Court rejected given the breadth of Vermont's other statutory fee-shifting schemes. *See e.g. L'Esperance v. Benware*, 2003 VT 43, ¶¶ 21-26, 175 Vt. 292 (affirming an award of attorney's fees for all fees incurred while pursuing

> claims under the Vermont Consumer Fraud Act and other related claims because all of the claims were based on the same general facts).

> *Haywood* is only the second case decided under Vermont's anti-SLAPP statute. The first was decided in 2008 and the underlying claim was copyright infringement. *Bible and Gospel Trust*, 2008 U.S. Dist. LEXIS 103674. The court there denied the motion to strike because the

complaint was narrowly tailored to defendant's copyright infringement and plaintiff could show actual damages based on that infringement. *Id.* at *11.

Taken together, these two cases demonstrate that Vermont's federal courts will freely apply the anti-SLAPP statute when presented with a complaint that seeks to deter public participation in public discourse. The federal court in Vermont will also broadly apply the attorney's fees provision in the statute to cover all fees incurred by defendants in the lawsuit up to the date of the decision striking the complaint.

Navah Spero is a lawyer with Gravel and Shea, Burlington, VT. Plaintiff acted pro se. Defendants were represented by W. Scott Fewell, Dinse, Knapp & McAndrew, P.C., Burlington, VT; and William B. Towle, Ward & Babb, South Burlington, VT.

Vermont's federal courts will freely apply the anti-SLAPP statute when presented with a complaint that seeks to deter public participation in public discourse.

No Personal Jurisdiction Over Colombian Newspaper Sued in Georgia for Libel

Served Ads on Website Insufficient to Exert Jurisdiction

In an interesting unpublished decision, the Eleventh Circuit affirmed that Georgia courts lacked personal jurisdiction over a Colombian newspaper sued for libel in the state. <u>Henriquez v. El Pais et al.</u>, No 12-11428 (11th Cir. Dec. 6, 2012) (Hull, Jordan, Anderson, JJ.) (per curiam).

Plaintiff argued that the online version of the newspaper available in Georgia contained advertisements for U.S. companies and therefore the foreign newspaper was transacting business in the state. The online advertisements, however, were placed by a third party ad server in Colombia. The Eleventh Circuit held that these served ads by themselves were insufficient to constitute doing business in Georgia for purposes of exercising jurisdiction.

Background

In 2010, Colombian newspaper *El Pais* published several articles about a child custody dispute litigated in Colombia between plaintiff and a Colombian surrogate mother. Plaintiff sued the newspaper in federal court in Georgia, alleging that the articles falsely reported on the Colombian litigation and implied, among other things, that he abducted the children and had an affair with the surrogate mother. Last year a federal district court dismissed for lack of personal jurisdiction. *See <u>Henriquez v. El Pais, et al.</u>* (N.D. Ga. Feb. 21, 2012) (Story, J.).

Personal Jurisdiction Analysis

The Georgia long-arm statute, in relevant part, extends to nonresidents 1) who transact any business within the state and the cause of action arises from the transaction; or 2) nonresidents who regularly conduct or solicit business in the state. See Ga. Code. Ann. § 9-10-91(1), (3).

Plaintiff had submitted copies of the newspaper's webpages featuring ads from U.S. companies, such as Comcast, Sprint, Allstate, and Publix. Some of the ads linked to Georgia locations of those companies. Plaintiff also

submitted information about the Colombian Internet advertising company Pautefacil.com and alleged that the newspaper and Pautefacil shared revenue anytime Georgia residents clicked on the ads.

Affirming dismissal, the Eleventh Circuit first held that there was no jurisdiction under the first prong because the plaintiff's "defamation claims arose out of the defendants' publication of defamatory news articles on their websites, not the defendants' placement of advertisements from U.S. companies on their websites." Second, the Court held there was no evidence that the served ads amounted to conducting regular business in Georgia.

> Their only alleged contact with Georgia consisted of displaying advertisements of various companies on their Internet websites, including advertisements of a company based in Georgia. There is no allegation, much less evidence, that the defendants secured these advertisements directly from companies in Georgia or through any contact (telephone call, letter, or any type of communication) with any company in Georgia. Just the opposite, the defendants obtained the advertisements from Pautefacil.com, a Colombian ad server or advertising company.

The Court concluded that the accessibility and display of advertisements on the newspaper's website does not, by itself, mean that the newspaper had any contact with Georgia.

Thus, plaintiff failed to show that the newspaper transacted, solicited or derived substantial revenue from goods used or services rendered in Georgia.

Plaintiff acted pro se. The defendants were represented by Christopher Moorman, Moorman Pieschel, LLC, Atlanta, GA.

MLRC MediaLawLetter

Reporting That Prisoner "Testified Against" an Associate Not Defamatory

The New Hampshire Supreme Court this month affirmed dismissal of a state prisoner's defamation complaint against the Nashua Telegraph newspaper for reporting that he "testified against" a criminal accomplice. <u>Sanguedolce v.</u> <u>Wolfe</u>, No. 2012-217 (N.H. Feb. 25, 2013). The Court held that even if false the statement was not defamatory as a matter of law.

However, in a more confusing section of the opinion, the Court held that the plaintiff should have been allowed to amend his complaint to add a claim for negligent publication. The Court therefore remanded the case for additional proceedings on that issue.

Background

In 2011, the plaintiff pleaded guilty to burglary and was sentenced to three to eight years in prison. An older criminal accomplice was convicted of more serious home invasion crimes and sentenced to 21 years in prison. The Nashua Telegraph wrote about the case and erroneously reported that plaintiff "testified against" his accomplice.

Plaintiff sued the newspaper and reporter Andrew Wolfe for defamation, arguing that the false statement portrayed him as a "rat," "tattletale," "snitch," a perjuror, or someone who "cut a deal" in exchange for leniency.

He cited law review articles and other sources to demonstrate the "low esteem in which even respectable groups in our society hold informants." The trial court dismissed the defamation complaint. The court also denied plaintiff's motion to amend and add a claim for negligent publication, finding the defamation and negligence claims were "one and the same."

Supreme Court Decision

On the issue of defamatory meaning, the New Hampshire Supreme Court looked at case law from around the country and found a widespread agreement that allegations of cooperation with law enforcement are not defamatory as a matter of law. *See, e.g., Agnant v. Shakur*, 30 F. Supp. 2d 420, 422, 424 (S.D.N.Y. 1998) (reference to plaintiff as "a snitch named Haitian Jack" not defamatory; *Waring v.* *William Morrow & Co., Inc.,* 821 F. Supp. 1188, 1189 (S.D. Tex. 1993); *Clawson v. St. Louis Post-Dispatch*, 906 A.2d 308, 316 (D.C. 2006) (collecting cases).

Adding to this precedent, the Court noted:

We readily adopt the rule and rationale of these decisions. It may be that some elements in our society would look unkindly upon those who willingly authorities in cooperate with the apprehending or convicting a criminal. Prisoners, in particular, may harbor these sentiments. The prevailing view among law -abiding citizens, however, is that such conduct reflects good moral character, respect for the rule of law, and a willingness to place the interests of truth, justice, and the social order above one's own self interest or petty loyalties.

Negligent Publication Claim

The Court, however, went on to hold that the trial court erred in denying plaintiff's motion to amend and add a claim for negligent publication. The defamation and negligence claims were not the same, the Court concluded. The proposed amendment argued that the newspaper owed a duty of accuracy to the people mentioned in its articles, and that as a proximate result of the newspaper's error, plaintiff was assaulted and beaten by other inmates.

Without expressing an opinion on the viability of the claim, the Court found that the amendment should have been allowed under New Hampshire's liberal amendment rules.

Moreover, the Court noted that it has recognized negligent publication under "special circumstances." *Citing Remsburg v. Docusearch*, 149 N.H. 148, 155 (2003) (allowing wrongful death claim to proceed against data broker).

Plaintiff was represented by Lawrence Vogelman and Kirk Simoneau, Nixon, Vogelman, Barry, Slawsky & Simoneau, P.A., of Manchester, NH. The newspaper defendants were represented by Richard Gagliuso, Gagliuso & Gagliuso, Merrimack, NH.

February 2013

Illinois Appeals Court Protects Identify of Yelp! Reviewer

Negative Review of Plaintiff Was Opinion; Court Denies Pre-suit Disclosure

An Illinois appellate court affirmed denial of a motion for pre-suit disclosure to obtain the identity of a Yelp reviewer who posted a harsh online review of an apartment building management company. *Brompton Building, LLC v. Yelp!*, No. 1-12-0547, 2013 Ill. App. Unpub. LEXIS 145 (Ill. App. Jan. 31, 2013) (Epstein, Smith, Pucinski, JJ.). Looking at plaintiff's review in context, the Court agreed that it was a statement of opinion; and, alternatively, not reasonably of and concerning plaintiff.

Background

Plaintiff Brompton Building, LLC (Brompton) is the owner of a Chicago apartment building. Non-party Beal Properties was the managing agent. At issue was a Yelp review written by "Diana Z. Chicago, IL."

Diana Z. wrote a lengthy review criticizing Beal's management of the building, complaining about the late receipt of a rent check, late charges, and overall rudeness. The review only mentioned plaintiff once. In the course of the review, Diana Z. wrote that "Beal Properties is illegally charging tenants late fees for their rent."

Brompton sought pre-suit disclosure of Diana Z.'s identity arguing the review was defamatory and tortiously interfered with Brompton's prospective economic advantage. The trial court denied the motion, finding that the review "does not meet the criteria of defamatory material." *Citing, e.g., Stone v. Paddock Publications, Inc.*, 961 N.E.2d 380 (III. App. 1st 2011).

In *Stone*, the appellate court quashed a motion for pre-suit discovery to obtain the identity of a pseudonymous online poster. The *Stone* court held that plaintiff failed to make a prima facie showing to support a libel claim because the statement at issue was either not factual or subject to an innocent construction. The court affirmed that Illinois follows a motion to dismiss standard and not a higher summary judgment standard in protecting anonymous online speech.

Addressing the issue of anonymity, the *Stone* court notably observed:

Encouraging those easily offended by online commentary to sue to find the name of their "tormenters" would surely lead to unnecessary litigation and would also have a chilling effect on the many citizens who choose to post anonymously on the countless comment boards for newspapers, magazines, websites and other information portals. Putting publishers and website hosts in the position of being a "cybernanny" is a noxious concept that offends our country's long history of protecting anonymous speech.

Appellate Court Decision

The appellate court began by reviewing the *Stone* decision at length. The court concluded:

"When Diana Z.'s posting is reviewed in its entirety, the challenged comments appear to be in the nature of opinions, not statements of fact. Similarly, Diana's comments regarding the allegedly illegal charging of late fees are more in the nature of conclusory speculation than factual statements."

Moreover, even if the statements about illegal fees were factual, they could only reasonably be understood to be about the former managing agent, non-party Beal; and not plaintiff. Diana Z. wrote, for example, that she created her Yelp account "just to rate Beal Properties." Thus the motion for pre-suit discovery was properly denied.

Law Firm Loses Privacy Suit Over Key Word Advertising

Use of Firm's Name Was Not Commercial "Use" Within Meaning of Privacy Statute

The Wisconsin Court of Appeals this month held that key word advertising is not a commercial use within the meaning of Wisconsin's privacy statute. <u>Harbush v. Cannon &</u> <u>Dunphy, S.C.</u>, No. 2011AP1769 (Wisc. App. Feb. 21, 2013) (Lundsten, Higginbotham, Blanchard, JJ.).

Background

The parties are competing personal injury law firms in Wisconsin. In 2009, the defendant firm bid on the names of the competing firm (Harbush and Rottier) on the Google, Yahoo! and Bing search engines. When either of the names was searched, a link to the Canon & Dunphy firm would appear as a sponsored link.

Plaintiffs sued alleging invasion of privacy under Wisconsin Stat. Sec. 995.50 (2)(b), a provision modeled after New York State's misappropriation law. The Wisconsin statute provides that an invasion of privacy includes:

> The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.

The trial court granted summary judgment to defendant. The court appeared to accept that key word advertising could fall within the purview of the statute, but found that plaintiffs' privacy was not "unreasonably invaded."

Court of Appeals Decision

The Court of Appeals affirmed on different grounds, centering on the meaning of the word "use" in the statute. Plaintiffs argued that keyword advertising was the use of a name under the law insofar as it was an attempt to exploit the value of a name. Defendants argued that the statute requires use that is "visible to the public in the sense that the used

name or image is found in or on the defendant's product or solicitation for services."

The Court found both sides' reading of the statute reasonable as a matter of statutory construction, but it found that all the relevant misappropriation case law involved a name or image that was "a visible part of some sort of promotion or product."

The non-visible key word advertising at issue here was not the "use" of a name within the meaning of the Wisconsin statute.

The Court also analogized key word advertising to traditional "proximity advertising," such as buying billboards near a competitor.

"[Lo]cating an advertisement or business near an established competitor to take advantage of the flow of potential customers or clients to the established business is not a practice the legislature intended to prohibit by adopting WIS. STAT. § 995.50(2)(b). This strategy undeniably takes advantage of the name of the established business and its ability to draw potential customers, but the strategy does not 'use' the name of the business in the same way as putting the name or image of the business in an advertisement or on a product."

Plaintiffs asked the Court to consider keyword advertising cases brought under trademark law. But the Court declined, finding that plaintiffs had insufficiently briefed or argued how that law would inform construction of the Wisconsin's privacy statute. The Court also declined to consider an Israeli key word advertising case, purportedly finding such advertising to be an invasion of privacy. The Court found it was open question whether the foreign decision "and the broader legal context, is sufficiently comparable to American jurisprudence and the particular law we must interpret."

The Paparazzi & The First Amendment *"Steven Tyler Act" Moves Ahead in Hawaii*

By Mickey H. Osterreicher

In mid-February the Hawaii Senate Judiciary Committee approved an amended <u>"anti-paparazzi" bill</u> that creates a civil cause of action for constructive invasion of privacy when a person obtains any type of visual image, sound recording, or other physical impression of another person under circumstances in which that person has a reasonable expectation of keeping private their personal life under certain conditions.

Hawaii <u>SB 465</u> is named the "Steven Tyler Act" in tribute to the lead singer for the rock group Aerosmith, whose lawyer helped draft the bill which is similar to a <u>1999 California law</u> that also addresses privacy rights and committing "a trespass in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person."

While the bill was ostensibly drafted to protect celebrities from prying paparazzi its language is broad enough so that it may be applied to anyone. It was for that apparent reason that the Committee Chair, Clayton Hee, replaced some of the bill's contents with language closer approximating the California statute.

The Judiciary Committee received <u>testimony</u> from the Governor and others in support of the bill, while the Attorney General opposed the bill as "vague and overly broad." The Committee also heard from Tyler himself as well as Mick Fleetwood (of Fleetwood Mack) during a hearing held on February 8, 2013. Ironically, prior to testifying in support of their right to be left alone, the two aging rock legends posed for pictures with legislators before a bevy of photographers.

The National Press Photographers Association (NPPA), supported by 14 media organizations sent a <u>letter in</u> <u>opposition</u> "concerned that the bill as drafted tramples upon the First Amendment rights of citizens and journalists" and also because "SB 465 imposes civil penalties of alarming breadth and burdens substantially more speech than is necessary to advance a compelling government interest." The letter went on to say, "while we recognize the right of privacy, we oppose a broadening of those protections by abridging the clearly established tenents of First Amendment Jurisprudence."

In addition the group stated "the definition of 'commercial purposes' fails to recognize acts of valid newsgathering and in fact penalizes publishers and broadcasters along with visual journalists and innocent tourists."

The Motion Picture Association of America, Inc. (MPAA) also submitted a <u>Memorandum In Opposition</u> to the bill, stating that it "would have a chilling effect on free speech and violates the First Amendment."

In addition to the anti-paparazzi measure, California also amended it <u>Vehicle Code Sec. 40008</u> in 2010 to add enhanced penalties for other traffic violations committed "with the intent to capture any type of visual image, sound recording, or other physical impression of another person for a commercial purpose."

In the only case in which that law has been applied, the trial court judge dismissed charges against photographer Paul Raef finding that the law was overly broad and violated the First Amendment. Despite an appeal by prosecutors California Superior Court Judge Thomas Rubinson refused to reconsider his ruling. That appeal will now be heard by a full appellate court.

Following on these attempts to throw the First Amendment baby out with the Paparazzi bathwater, a Vermont legislator recently <u>introduced a bill</u> that would "make it illegal to take a photograph of a person without his or her consent, or to modify a photograph of a person without his or her consent, and to distribute it."

In another example of legislative stupidity gone wild a Georgia State Representative has proposed a bill, <u>HB 39</u>, making it illegal to edit an image in such a way "that a person commits defamation when he or she causes an unknowing person wrongfully to be identified as the person in an obscene depiction."

Expect to see other well-meaning but ill-conceived bills coming to a legislature near you all-too-soon.

Mickey H. Osterreicher is of Counsel to the law firm of Hiscock & Barclay and serves as general counsel to the National Press Photographers Association (NPPA). He drafted the NPPA letter sent in opposition to SB 465.

Seventh Circuit Addresses Trademark Confusion Arising From Movie Title

Court Avoids Relying on Rogers Test; Focuses on Absence of Actual Confusion

By Steve Mandell, Steve Baron, and Elizabeth Morris

The Seventh Circuit recently affirmed a Northern District of Illinois decision to dismiss a trademark case involving a claim that a movie title infringed upon the name of a musical group. The Court skirted Second Circuit precedent

concerning the protection of titles under the Lanham Act and focused on the absence of actual confusion about the film's source. *Eastland Music Grp., LLC v. Lionsgate Entm't, Inc.*, No. 12-2928 (7th Cir. Feb. 21, 2013) (Easterbrook, Flaum, Rovner, JJ.).

Background

Plaintiffs Eastland Music Group ("Eastland") and Raynarldo Whitty, Eastland's manager, registered the trademark PHIFTY-50 for Eastland's rap group duo. Plaintiffs also claimed a common law trademark in the term "50/50," which they used to promote the duo, both online and on different products.

In 2011, defendants Lionsgate Entertainment, Summit Entertainment, and Mandate Pictures released 50/50, a film about the main character's 50% chance of surviving cancer. Defendants never used the PHIFTY-50 mark.

After Defendants refused to stop their use of "50/50," Plaintiffs filed suit in the Northern District of Illinois (Case no. 11-cv -8224), alleging two counts of trademark

infringement and federal unfair competition and four state law claims for common law unfair competition, unjust enrichment, and violations of the Illinois Uniform Deceptive Trade Practices Act and the Consumer Fraud and Deceptive Business Practices Act. Plaintiffs claimed that Defendants' use of 50/50 created confusion and was likely to continue creating confusion because Defendants' movie title was identical to Plaintiffs' mark.

Defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the First Amendment

barred the federal and state claims. They also asserted that even though Plaintiffs had not included a copy of the film with their complaint, the district court could consider the film in its analysis because the movie was central to Plaintiffs' complaint. In response, Plaintiffs asserted that the First Amendment defenses should not be considered at the pleading stage and are more appropriate for summary judgment.

The District Court's Dismissal

District Judge George Lindberg dismissed both federal claims and declined to exercise jurisdiction over the remaining state law claims. The district court primarily relied upon *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). Under the *Rogers* test, titles of artistic works are protected and cannot be barred by the Lanham Act unless the title "is explicitly misleading and devoid of any artistic relevance." *Woodard v. Jackson*, No. 03 C 844, 2004 WL 771244, at *7 (S.D. Ind. Mar. 25, 2004).

The district court concluded that the

title 50/50 did not infringe on Plaintiffs' rights. First, 50/50 has obvious artistic relevance in the film; at the beginning of the movie, the protagonist exclaims that he has a "50/50" chance of surviving a rare form of spinal cancer, with the *(Continued on page 21)*



RETURN TO TABLE OF CONTENTS

February 2013

(Continued from page 20)

remainder of the film focused on whether he will beat those odds. Second, Plaintiffs failed to plead any likelihood of confusion between the movie, on the one hand, and Plaintiffs' musical exploits, on the other hand. The title 50/50 was not explicitly misleading as to source, particularly when the movie and its packaging material were clearly linked to the film's premises.

The district court rejected Plaintiffs' assertion that First Amendment arguments are inapplicable at the pleading stage. Although it acknowledged that Rule 12(b)(6) orders are not appropriate responses to defenses, "a plaintiff can plead itself out of court" by "admitting all the ingredients of an impenetrable defense." *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004). Moreover, cases can be dismissed to "avoid[] prolonged litigation that is destined, as a matter of law, not to succeed." *Woodard*, 2004 WL 771244, at *8.

In addition to dismissing the federal court claims, the district court also dismissed Whitty for lack of standing, due to Plaintiffs' failure to plead that he owns or is the registrant or assignee of the mark at issue. The district court also declined to exercise supplemental jurisdiction over the state law claims, effectively terminating the federal case.

Seventh Circuit Appeal

The Seventh Circuit affirmed the district court's decision in an opinion written by Judge Easterbrook. The Court explicitly avoided relying on *Rogers* under the principle that courts should avoid confronting constitutional issues unless absolutely necessary.

Instead, the Seventh Circuit held that the complaint failed at the threshold because "it does not allege that the use of '50/50' as a title has caused any confusion as to the film's source -- and any confusion about the film's source would be too implausible to support costly litigation." *Eastland Music Grp., LLC*, Case no. 12-2928, Slip Op. at 3. According to the Court, had the accused film been called "Phifty-50" (Plaintiffs' registered mark), Plaintiffs would not have been required to plead confusion or that they had achieved secondary meaning in their claimed common law mark, 50/50.

Moreover, even assuming that Plaintiffs could claim a trademark right in the phrase "50/50," they would be junior users. Based on various Wikipedia references cited in the Court's opinion, "50/50" had been used in titles of other films and songs long before Eastland ever existed.

Finally, citing Supreme Court precedent, the Court noted that [t]he title of a work of intellectual property can infringe another author's mark only if the title falsely implies that the latter author is its origin." *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). Because Plaintiff did not and could not allege that consumers treat it as the producer or source of the film 50/50, Plaintiffs could not sustain a claim.

Issues Raised by Eastland's Trademark Analysis

The Seventh Circuit's decision leaves some questions unanswered. Notably, it appears that the Court imposed on the trademark plaintiffs the obligation to allege actual confusion as opposed to merely "likelihood of confusion," which is the well-recognized standard under the Lanham Act. Because the Seventh Circuit never determined whether Plaintiffs had a valid common law right in the mark "50/50," it is not clear when a plaintiff must meet this new standard.

The Court only said that Plaintiffs must show actual confusion for "50/50" because, in ordinary usage, it is a suggestive or descriptive phrase.

Potentially borderline marks (*i.e.* marks that lean toward being characterized as descriptive) must be subjected to a higher pleading threshold in order to survive an *Iqbal* and *Twombly* analysis.

Also, the Court was quick to affirm the dismissal of Plaintiff's claim on its registered mark, Phifty-50, because Defendants used 50/50, which did not look like Phifty-50. Curiously, however, the Court did not engage in a full analysis of Plaintiff's Phifty-50 mark's sight, *sound*, and meaning. Clearly, the marks sound identical, but, for reasons that remain unknown, this factor did not seem to weigh into the Court's reasoning.

We expect the lower courts will be seeing, hearing about, and trying to discern the meaning of *Eastland* for some time to come.

Steven Mandell and Steven Baron are partners and Elizabeth Morris is an associate at Mandell Menkes LLC, Chicago. Plaintiffs Eastland Music Group, LLC and Raynarldo Whitty are represented by Ronald DiCerbo and Gerald Willis, Jr., of McAndrews, Held & Malloy, P.C., Chicago. Defendants Lionsgate Entertainment, Inc., Summit Entertainment, LLC, and Mandate Pictures, LLC are represented by Tom Ferber of Pryor Cashman LLP, New York and Joseph Bonavita of Gould & Ratner LLP, Chicago.

The Other Side of the Pond: Developments in UK and European Media Law

The Defamation Bill and Leveson, Contempt of Court and Archives, Liability of ISPs and More

By David Hooper

The attempts to change the law of libel in the United Kingdom have now reached the stage of the third and final reading in the House of Lords having taken place on 25 February 2013. The Bill now goes back to the House of Commons. However, the legislation has been inadvertently hijacked by a series of amendments introduced by Lord Puttnam, better known as the director of *Chariots of Fire* and the *Killing Fields*.

During the committee stage in the House of Lords, he introduced his amendments on 5 February, which were carried by the very large majority of 272-141. These really played upon the feeling of their Lordships that the press had had it too good for too long. Effectively, Lord Puttnam wanted to graft the recommendations of Leveson onto the

Defamation Bill. The result was a weird confection of changes, which included the compulsory arbitration service paid for the newspaper industry favoured by Leveson, together with Leveson's suggestions about the introduction of exemplary damages.

Lord Puttnam's approach seemed to be that passing this amendment would put an

end to all the shilly-shallying about bringing the Leveson recommendations into effect. The problem with that thinking was that Leveson was not reforming the law of libel, although he seems to view himself as a man who can fix everything, a judicial odd job man. As someone who was by training a criminal lawyer, he was scarcely well-qualified to do so, but rather he here was investigating abuses by certain journalists, particularly in relation to breaches of privacy. The Leveson proposals are essentially aimed at the conduct of the press and preventing breaches of privacy, they are not suitable for tacking lock stock and barrel onto a Defamation Bill.

One of the more spectacular suggestions of Lord Puttnam in his amendments carried to the claim in the House of Lords was the proposal that a higher level of damages or exemplary damages could be awarded if the newspaper had failed to submit controversial stories to the Press Regulator for approval. Clearly, champions of freedom of speech such as Wilkes had lived in vain as far as their Lordships were concerned. One of the peers who had supported Lord Puttnam's bizarre amendments was a former politician and journalist, Lord Fowler, who persuaded the majority in the House of Lords that pre-approval of controversial stories by the Regulator was not consistent with the obligations of this country to uphold freedom of speech under Article 10. That amendment was dropped, when the third reading, which carried all Lord Puttnam's other amendments, passed unopposed.

The government has indicated that it is not prepared to accept Lord Puttnam's amendments. Lord McNally, the

Minister of Justice, noted that the concession introduced by Lord Fowler "made an unacceptable position marginally better." The attempt to introduce the Leveson proposals in the Defamation Bill could have holed the legislation below the waterline. The amendments appear to wish to legislate for prior notification of stories to their

subjects which Leveson favoured, but which the European Court of Human Rights in the Mosley case found inconsistent with Article 10.

The Prime Minster has indicated that the Bill might be dropped if the Puttnam amendments stay in place, but it is more likely that there may be an all-party agreement as suggested by the Shadow Deputy Prime Minster, Harriet Harman. If such agreement can be reached, it is likely that the Defamation Bill will pass through its final stages in the House of Commons in March and will become law later in the year, either in the summer or perhaps likely in the autumn.

(Continued on page 23)

Lord Puttnam wanted to graft the recommendations of Leveson onto the Defamation Bill. The result was a weird confection of changes

February 2013

(Continued from page 22)

At present, it looks as if the regulatory body will be established under Royal Charter. The aim is to find a mechanism, which is free of political control and will prevent the regulatory body being controlled by political appointees. The matter is complicated by the fact there may be a majority in the House of Commons who would ultimately be willing to support the Lord Puttnam amendments. After the exposure of MPs' abuse of expenses combined with the phone hacking scandal, there is a depth of hatred or distrust of the press amongst politicians

It is worth bearing in mind that there are legitimate concerns by the media about the detail of the Leveson proposals. In outline, the changes to the Data Protection Act that Leveson proposes seem destined to make it more likely that journalists will be acting illegally when obtaining or retaining personal information. His proposals would considerably raise the burden of proof on journalists to justify

holding background material about individuals and would almost certainly result in additional expense for the media in terms of litigation and compliance coupled with the appointment of a number of compliance officers.

Equally, there are concerns in the media that the suggestions that Leveson makes for changes to the Police and Criminal Evidence Act will make it easier for the police to access

journalistic source material and to search news floors. It will considerably lower the bar for the police obtaining such material and fly in the face of recent case law and has been criticised as "*placing a policeman in the newsroom*."

Equally of concern to the media are Leveson's proposals for the award of exemplary damages against news publishers who do not sign up to the regulatory regime. The whole introduction of exemplary damages would have the potential for increased cost in terms of litigation, whether or not the newspaper, in writing a particular story, complied with the soon to be finalised Press Code. There are also concerns about the Leveson proposals for compulsory arbitration. The regional press are particularly concerned about the costs this would involve, and the likelihood of an increased volume of costs, all of which would be funded by the media, when they feel that the present system does enable them to resolve complaints without recourse to litigation. There is therefore considerable controversy about the Leveson proposals. The attempt by the Lord Puttnam amendment to introduce Leveson lock, stock and barrel has raised a whole spectre of uncertainty about the reform of the law of defamation.

In this, the criticism of the Puttnam amendments are supported by the advice of three leading QCs in the field, Lord Pannick, Anthony White and Desmond Browne. They have criticised the exemplary damages proposals as being objectionable in principle as "n relation to the awarding of exemplary damages. They observe their chilling effect on freedom of speech was obvious and unjustifiable.

Contempt of Court Update: Suspending Archive Material

As indicated in an earlier column, the Law Commission is reviewing the British Law of contempt of Court. Particularly controversial is the question of whether stories in newspaper

At present, it looks as if the regulatory body will be established under Royal Charter. The aim is to find a mechanism, which is free of political control and will prevent the regulatory body being controlled by political appointees. archives should be removed during the course of criminal proceeding where they might prejudice the jury, as was felt to be the case with regard to stories about earlier disciplinary proceedings where a police officer was on trial for manslaughter and Mr Justice Fulford made such an Order.

The Law Commission has been considering a proposal whereby media organisations will only be obliged to remove stories from their archives if

they had been specifically identified by the Order of a judge. There certainly seems to be no suggestion that the media would have to police their archives of their own initiative. However, the dangers of this are self-evident.

It could well become routine for judges to order removal of articles without a proper balancing exercise and media organisations could be faced with Orders from Crown Courts across the country. It tends to suit those conducting criminal trials to restrict media coverage for fear of possible prejudice and appeals. However, the cost of sending legal representatives to persuade hostile Courts to lift such Orders could be considerable.

The law and practice on this subject is well-advanced in Australia and a very powerful submission has been made to the Law Commission by Peter Bartlett outlining the practice (Continued on page 24)

RETURN TO TABLE OF CONTENTS

February 2013

MLRC MediaLawLetter

(Continued from page 23)

in Australia. There, the Courts rely on very detailed directions given to jurors and it can be a criminal offence to conduct unauthorised internet research while serving on a jury. Peter Bartlett has also drawn the Law Commission's attention to jurisprudence in Australia which makes it clear that the Courts will not make Orders which are in effect unenforceable bearing in mind the extreme difficulty or in many cases impossibility of taking the offending reports down from the internet.

Internet Service Providers as Publishers?

The issue of when ISPs might become publishers was considered in *Tamiz v Google Inc* [2013] EWCA Civ 68 by the Court of Appeal. Some defamatory comments had been posted on the blog, 'London Muslim', which was hosted by Blogger, the internet blogging service

owned by Google.

Mr Tamiz sought to hold Google Inc in California liable for the defamatory comments published in the UK during the period between the notification to Google of the complaint about the material (of which they had previously been unaware) and it being voluntarily taken down by those running the London Muslim blog. Tamiz argued that Google acquired a responsibility for the continued publication once it was fixed with knowledge of the complaint

on the basis of its provision of the platform which enabled the internet user to create their independent blog

The claim had been comprehensively dismissed by Mr Justice Eady at first instance (2012) EWHC 449. The Court of Appeal upheld the judgment of Mr Justice Eady on the basis that it would be an abuse of process to permit the case to proceed, this being a strike-out application on the grounds of jurisdiction.

Although the offending material had been posted in April, Mr Tamiz had not sent his Letter of Claim detailing his complaint until two months later. By mid-August, the offending article had been voluntarily removed by the owner of the blog. The Court recognised the impossibility of Google exercising editorial control over the content of the blogs it hosts, which in the aggregate contain more than half a trillion words, with 250,000 new words added every minute.

The Court viewed Google as providing a platform for blogs, together with design tools and, if required, a URL, by its Blogger service which it makes "available on terms of its own choice and it can readily remove or block access to any blog that did not comply with those terms."

However, the Court of Appeal did not agree with the finding of Mr Justice Eady that the role of Google as a platform provider was "*a purely passive one*" and that "*an ISP which performs no more than a passive role in facilitating postings on the Internet cannot be deemed to be a publisher at law.*" The Court viewed Google as providing a platform for blogs, together with design tools and, if required, a URL, by its Blogger service which it makes "*available on terms of its own choice and it can readily remove or block access to any blog that did not comply with those terms.*"

The involvement of Google which in view of the court, "facilitates publication of the blogs" was "not such, however, as to make it a primary publisher of the blogs." The Court was dealing with the case on an interlocutory basis to see whether the various defences were arguable. It concluded that it was at least arguable the Google should be "seen as a publisher responding to requests for downloads rather than a

> mere facilitator playing a passive instrumental role". In the Court's view "the provision of a platform for the blogs is equivalent to the provision of a notice board."

> The issue was therefore whether Google "might be inferred to have associated itself with, or made itself responsible for, the continued presence of the material on the blog and thereby to have become a publisher of the material" if defamatory material had been allowed to remain on a Blogger blog after Google had been notified of

the presence of the material and had been afforded a reasonable period of time to deal with a complaint. The Court of Appeal felt that point was arguable, and took a somewhat different view to Mr Justice Eady.

The Court of Appeal upheld Mr Justice Eady's ruling on the ground that it was highly improbable that a significant number of people would have read the offending pieces between the time of notification and its removal. The Court of Appeal unfortunately, notwithstanding hearing considerable argument in court, did not adjudicate on Mr Justice Eady's ruling on the effect of Regulation 19 Electronic Commerce (EC Directive) Regulations 2002, which had indicated that an ISP was entitled to sufficient detail of the complaint in order to determine whether it was unlawful- that is to say legally indefensible as opposed to defamatory (which is the lower *(Continued on page 25)*

February 2013

Page 25

(Continued from page 24)

standard under Section 1 Defamation Act 1996), which is a powerful protection and defence for ISPs.

The Court considered (but did not decide the merits) that the complainant could raise arguments as to whether or not an ISP became a publisher by analogy with the old case law dating back to the notice board in the golf club in *Byrne v Dean* [1937] 1KB 818 and one of the earliest internet cases in the UK, *Godfrey v Demon Internet* [2001] QB 2001. Certainly, the Court accepted that the ISP was entitled to a reasonable time within which to act to remove the defamatory comments. The opportunity to determine these issues fully was not taken up by the Court and there may very well be further litigation in relation to the effect of Section 1 Defamation Act 1996, and Regulation 19 concerning ISPs, in particular what a reasonable time to respond might be and what exactly will constitute "notice" to an ISP such as to make it potentially liable for libellous material.

Costs

There are a number of changes coming into effect on 1 April 2013 in relation to the potential recovery of legal costs by successful Claimants. It will be recollected that in the UK the normal rule is that the successful party who are awarded their legal costs normally should recover about 70% of

the legal costs they have expended. The very high level of costs of litigation, including particularly, of course, defamation, was the subject of very extensive review by a Lord Justice of Appeal Sir Rupert Jackson.

His suggested reforms come into effect on 1 April. The key aspect from a Defendant's viewpoint is that Conditional Fee Agreements (CFA) and After the Event Insurance (ATE) are in principle – but with an important qualification – no longer recoverable from Defendants if the claim is successful. Instead under the Damages -Based Agreement (DBA) Regulations 2013 and the Conditional Fees Agreement Order 2012 which the Minister of Justice laid before Parliament on 22 January 2013 and in exercise of the powers granted under section 44-46 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (widely known as LASPO) CFAs and ATE premiums will no longer be recoverable from Defendants.

Essentially DBAs introduce contingency fees in a form which will be more recognisable to American litigators. The amount of costs which the Claimant's solicitors can recover is however capped at 25% of the damages in a personal injury claim and 50% in other claims. It should of course be noted that damages are considerably lower in the UK than in the USA so the bunting being laid out by Claimant lawyers is of a rather more sober nature than their American counterparts. CFAs are to have a maximum success fee of 100% but they will not be recoverable from Defendants. It is paid out of the damages recovered but they may only represent 25% of the damages recovered in personal injury cases and 50% in other litigation.

In effect this will make CFAs considerably less attractive to Claimant lawyers. It had been envisaged that these new rules would apply to defamation and privacy actions like other litigation (except for commercial claims seeking damages of over £2m which are not affected by the Regulations which would not app-ly to privacy or defamation

> cases because the level of damages is well below the limit). However, after the publication of the Leveson report these changes regarding CFAs and recovery of ATE have been put on ice. As regards defamation and privacy claims (as opposed to other forms of litigation), probably until the autumn of 2013 by which time the decisions concerning Leveson will have been

taken.

There are a number of changes

coming into effect on 1 April

2013 in relation to the potential

recovery of legal costs by

successful Claimants.

This seems to be an entirely political decision for which no justification other than expediency can be seen. The other provisions of the *Jackson* reforms such as much stricter supervision by the Courts of cost budgets which has already been in operation in regard to defamation cases under a pilot scheme *will* apply to privacy and defamation claims.

An important opportunity to reduce the level of legal costs in defamation claims has been lost. It was never going to be part of the Defamation Act changes but rather part of the general court rules. Panic seems to have set in as a result of the Leveson report and some spirited lobbying by the Claimant lawyers and the Hacked Off lobby group.

The decision in <u>Henry v News Group Newspapers</u> (2013) EWCA civ 19 produced a result which likewise represents a lost opportunity to reduce the cost of defamation proceedings. This was a case where a social worker had successfully sued (Continued on page 26)

February 2013

MLRC MediaLawLetter

(Continued from page 25)

the newspaper for serious allegations concerning her supervision of a young child who had died as a result of the abusive treatment he had received from his relatives.

During the proceedings the Claimant had lodged her cost budget in accordance with Practice Direction 51 under the Defamation Proceedings Pilot Scheme. The Claimant's lawyers had exceeded their budget by the small matter of £268,000. The issue was whether the Costs Judge had been correct in disallowing these costs in his interpretation of PD51.5.6 (2) ("*The Court will not depart from such approved budgets unless it is satisfied that there is a good reason to do so*").

To the surprise of some the Court held that notwithstanding the mandatory language of the scheme, the Claimant should be allowed to recover these costs on the basis that the Court should take account of all the circumstances and in effect apply a broad brush approach.

The Costs Judge had indicated that absent the costs budget these costs would have been recoverable on normal principles as being reasonable and proportionate.

The Court of Appeal was evidently impressed by the fact that the Judge had thought the costs were proportionate and they considered that there had been no particular prejudice on the facts of the case arising out of the failure to comply

with the budgeting rules and that in this regard the parties were on an equal footing. The Court seems to have been influenced by the disagreeable nature of the libel and a feeling that it would be unjust to leave the Claimant and her advisers substantially out of pocket. However, it was a factspecific case and the regime under the *Jackson* changes will result in Courts reviewing much more closely the level of legal cost at regular intervals. Parties who fail to keep within their budgets or at any rate to return to the Court to ask for an adjustment of the budget will do so at their peril.

Other Developments

The Court of Appeal will not be ruling on the decision of Mr Justice Tugendhat in <u>Trimingham v. Associated</u> <u>Newspapers</u> 2012 EWHC 1296 about which I wrote about last year in this column. This raised the issue of whether a

series of articles about the lifestyle of Ms Trimingham with particular emphasis on her bi-sexuality, spikey hair and chunky footwear could amount to harassment.

She had come in to the public eye when she ran off with her boss, the politician Chris Huhne and became somewhat more of a public figure. She has dropped her appeal and coincidentally Chris Huhne is headed for jail for perverting the course of justice when he persuaded his wife (currently on trial for her part in the points-swapping saga) – before dumping her – to take the driving penalty points on her licence when he was caught speeding so that his licence was not suspended. It is no part of these columns to be a morality tale but this is perhaps a candidate for the *schadenfreude* column.

<u>Edward RocknRoll v News Group Newspapers</u> (2013) EWHC 24 was a decision of Mr Justice Briggs in the English Chancery Division as to whether photos of reasonably private youthful indiscretions which had found their way on to

Facebook could be protected under the UK law of privacy. Edward RocknRoll was not named by the vicar that way. He was the nephew of Sir Richard Branson and perhaps even more famous for having married Kate Winslet in December 2012. He had featured in a *Hello!* Interview in 2009 and was involved in his uncle's Virgin Galactic business.

His problem was that in a moment

of youthful exuberance at a 2010 party he had been photographed partly-naked in poses which were described as "*embarrassing*." The photos have been taken with his consent and featured on a friend's Facebook of which there appeared to be 1500 members. The newspaper had got hold of the photographs seemly not off Facebook but from some third party.

RocknRoll did, the Judge ruled, have a reasonable expectation of privacy. Although he had consented to the taking of the photographs, he did not consent to them being published to the world at large in a tabloid newspaper. He was not by English standards a public figure nor had he sought publicity and the photographs were not apparently easily accessible. The Judge felt he had no substantial public profile and that the photographs did not contribute to any

(Continued on page 27)

The Court seems to have been influenced by the disagreeable nature of the libel and a feeling that it would be unjust to leave the Claimant and her advisers substantially out of pocket.

February 2013

(Continued from page 26)

useful "public debate" (notwithstanding the fact that others may have felt that they contributed to general merriment).

Damages (1)

In <u>Miller v Associated Newspapers</u> (2012) EWHC3721 Mrs Justice Sharp awarded £65,000 to a businessman who complained of a very prominent article in a national newspaper entitled "*Met Boss in new cash for a friend storm*." The Judge held that the article was not suggesting that Miller had corruptly exploited his friendship with the Metropolitan Police Commissioner, but rather that there were reasonable grounds to suspect that he was the willing beneficiary of improper conduct and cronyism in relation to the award of contracts to his company.

She concluded that the paper failed to justify those allegations and awarded £65,000 on the basis that the paper had published a series of prominent articles. There were five in all, on which he sued although there were some on which he did not sue – perhaps for good reason. The Judge also took into account the failure of the newspaper to apologise and the robust (but perfectly proper) manner in which it pursued its attempt to justify the allegations.

Damages (2)

In <u>Cruddas v Adam</u> 2013 EWHC145 the former Conservative Party Treasurer was awarded £45,000 damages in respect of 12 tweets and 9 blogs by a lobbyist called Mark Adam who accused him of misusing his position to sell influence and access. Rather unwisely Mr Adam had said "*I* will repeat this by Tweeting until you cough, get banged up or sue me for libel." The Judge, Mr Justice Eady, indicated that damages would have been higher but many may have thought these tweets and blogs were "*just silly and not to be taken seriously*".

Italian Statistics

A report in the <u>Guardian of 20 February 2013</u> brings welcome news that however bad things are in your jurisdiction, they are almost certainly worse in Italy. The article references a 2012 report by EU Commissioner Nils Muizieks of the <u>European Commission of Human Rights</u> which is currently being reviewed, if not exactly acted upon by the Italian Ministry of Justice.

There were 2.8 million court cases in 2011. Italy has 240,000 lawyers, the most of any EU country.

There is a backlog of 5.5 million civil cases, which take on average seven – eight years and a backlog of 3.4 million criminal cases which take on average five years, often allowing the statute of limitations to kick in.

There is a backlog in the top appeal court, which handles 80,000 cases a year. $\notin 46$ million compensation is paid out annually to people wrongly jailed.

The Commissioner condemned a "long-standing systemic problem" and noted that "the duration and magnitude of the problem was exceptional." An unhappy picture for all except the much convicted Prime Minister Silvio Berlusconi, it might be thought.

David Hooper is a partner at RPC in London.

©2013 MEDIA LAW RESOURCE CENTER, INC.

520 Eighth Ave., North Tower, 20 Fl., New York, NY 10018 | 212-337-0200 | www.medialaw.org

BOARD OF DIRECTORS

Chair: Susan E. Weiner; Board Members: David S. Bralow, Mark H. Jackson, Marc Lawrence-Apfelbaum, Eric Lieberman, Karole Morgan-Prager, Lynn B. Oberlander, Kenneth A. Richieri, Mary Snapp, Kurt Wimmer, DCS President: Robert P. Latham

STAFF

Executive Director: Sandra Baron; Staff Attorneys: Maherin Gangat, David Heller, Michael Norwick Production Manager: Jacob Wunsch; MLRC Administrator: Debra Danis Seiden MLRC Fellow: Lindsey Davis; MLRC Institute Fellow: Dorianne Van Dyke

Ethics Corner: Media Lawyers Under the Spotlight

By Peter Bartlett

I volunteered to prepare an article on media ethics following the publication of the Leveson Report and two reports in Australia (The Finkelstein Report and the Convergence Review) into the culture, practices, ethics and the regulation of the media. Much has been published about the ethical issues that led to the setting of the Leveson Inquiry and its recommendations.

As a media lawyer acting for the media, I not surprisingly looked at the Leveson Report in the context of media lawyers. Little has been written on this aspect. To some degree I regret that I did. A number of the lawyers referred to are good friends of mine. On that basis this paper is rather difficult to write but after significant reflection I think that there are some useful lessons to be

learnt.

A leading media lawyer and friend to many of us, Alistair Brett, was subjected to some tough questioning in the Leveson Inquiry. Alistair, then legal manager at The Times was approached by a reporter and asked if he could talk 'off the record' confidentially as he wanted to pick Alistair's brain on something and needed legal advice. The reporter advised Alistair that he had established the identity of a police

blogger after he had hacked into an email account. Alistair was furious and suitably abused the reporter and extracted an undertaking that it would not happen again. While Alistair thought that the reporter had breached some statute, he thought that there may be a defence.

Leveson was highly critical that the reporter's admission of hacking was excluded from the reporter's statement to a subsequent hearing before Mr Justice Eady when the police blogger sought an injunction against the paper. Alistair admitted that the statement 'certainly doesn't give the full story'.

Leveson made it clear that he was concerned that the 'closeness of that relationship' between a media lawyer and the media company he worked for over a 'very, very long time' may have led to 'blindness'.

Alistair thought that the hacking issue was irrelevant to the 'clear cut forensic legal issues' he was dealing with. He thought that as the reporter had subsequently obtained the information by legitimate means, there were strong grounds to publish an article.

Alistair was clearly in a difficult position. The reporter told him about the hacking in a confidential, off the record discussion. What are the obligations of a media lawyer to the media company and the courts in those circumstances?

As the reporter is facing charges, Leveson did not include any observations about this in his final Report other than to say that on the basis of the evidence 'it would certainly be possible to draw a number of important conclusions about what happened at The Times and about internal governance

and legal risk management'. (Volume 1, paragraph 1.33)

Alistair in his Witness Statement sets out his position:

'65. With hindsight and the extraordinary revelations as to what had or was happening over the road at News Group Newspapers, I now concede that I may have concentrated too hard on the right of free speech, the discrete legal

issues surrounding [the] application to the court, the public interest and not enough on [the reporter's] earlier behaviour. All I do know is that the law of privacy was burgeoning at the time and I genuinely believed that for a police officer, who was breaching police regulations to be able to use the law of privacy/confidence to silence a newspaper which was acting as a "blood hound and a watchdog"... would be totally wrong. I also felt very strongly that the fact that someone may have done something wrong or improperly on one occasion should not prevent

(Continued on page 29)

As a media lawyer acting for the media, I not surprisingly looked at the Leveson Report in the context of media lawyers. Little has been written on this aspect. To some degree I regret that I did. A number of the lawyers referred to are good friends of mine.

February 2013

Page 29

(Continued from page 28)

them from doing the same thing totally correctly on another occasion. ...

67. Furthermore... given the circumstances in which [the reporter] approached me I considered it to be inappropriate for me to tell any person that he had committed a criminal offence (other than his manager) unless it was absolutely necessary for me to do so. As I have said, I thought that this was irrelevant to the issues before the court.

68. ... to have so instructed counsel would have been a serious breach of confidence imposed on me by a young journalist working

on a public interest story. ... it would have made my position at The Times newspapers impossible, because journalists would not have come to me for legal advice in the future if they felt that I would then disclose their activities to a court, especially when they had genuinely believed they were acting in the public interest.'

Julian Pike, acting for News of the World, gave evidence that he and Mr Crone, the legal manager at News Group Newspapers, were concerned that two claimants' lawyers were not respecting confidentiality agreements relating to phone hacking settlements. According to the Report (Volume 2, paragraph 4.32) they concluded that the right course of action was to try to prevent the lawyers from acting in subsequent cases.

> 'One of the tools in this campaign was to be surveillance, to identify the nature of the relationship between the two solicitors that might lend circumstantial support to the allegation that they were exchanging confidential information. Mr Pike said that he was aware that the NoTW had put [the lawyer] under surveillance. He defended the decision

Leveson made it clear that he was concerned that the 'closeness of that relationship' between a media lawyer and the media company he worked for over a 'very, very long time' may have led to 'blindness'.

to do so, saying that he would do the same again in the same circumstances.'

Leveson LJ was highly critical. (Volume 2, paragraph 4.35)

Tom Crone

Much has been written about Mr Crone, and the Leveson Inquiry. I wish to focus on a small part.

Mr Crone is reported making the observation that 'privacy considerations had become more important as case law on privacy develops'. (Volume 2, paragraph 2.52) This is something we would all agree with. The Report then goes on to criticise Mr Crone in a way that I am not entirely sure is justified.

'It is notable that, in the case of... Mr Crone... this increased caution with respect to privacy was driven by the development of laws surrounding privacy, and not by the requirements of the Editors Code or any general ethical considerations or changes in what the reading public were willing to support.'

Later in the Report it is noted that Mr Crone remembered considering privacy issues in relation to [Max] Mosley.

'Mr Crone's view at the time was that if Mr Mosley was told in advance about the story there was a good chance that a prepublication injunction would be granted. For this reason, and to guard against leaks, he advised against notifying Mr Mosley.' (Volume 2, paragraph 3.14)

Again Lord Justice Leveson comes out with a harsh finding:

'It seems clear that there was no systematic consideration of the propriety of invading Mr Mosley's privacy (or that of the other parties to the event), other than in the context of how to ensure that Mr Mosley was not put in a (Continued on page 30)

February 2013

MLRC MediaLawLetter

(Continued from page 29)

position to exercise his right to privacy by seeking an injunction to prevent publication.' (Volume 2, paragraph 3.15)

Who Oversees Ethics in a Media Company

The Report notes that:

'*Mr* Crone told the Inquiry that he had no role in ensuring ethical [or, it would appear, even legal] behaviour within the companies.

I'm not a guardian of ethics, really... my job was really to advise on legal risk, the law

relating to a particular situation that the newspaper was in or was thinking of getting in.' (Volume 2, paragraph 6.2)

When pressed on the point he said, 'I don't know who would be identified as the person most involved with compliance and ethics'.

This is an important issue for any media company. Ethical dilemmas arise constantly. For example:

- will that argument prejudice a police investigation?
- should these children be identified ?
- the issues around publishing details of a suicide
- public interest issues
- privacy issues

The list goes on and on.

Clearly editors, news directors, journalists and many others in the media company need to be aware of their ethical obligations. Mr Crone is correct in saying his duty is to advise on the legal risk. Our role as media lawyers is to advise on the law and the legal risks. That said, where we have a good working relationship with editorial executives and journalists and where we form a view that there is an ethical issue, it is in my view right and proper for us to raise those issues. Whether the editor takes a similar view is up to the editor.

I have raised such issues a number of times during my career. Sometimes the issue I raise has not previously been fully considered by the editor. They have appreciated the fact that I raised it. We have sometimes discussed the issue at length and reached a consensus view. Editors often appreciate hearing a different point of view. It assists them to avoid the ethical pitfalls.

There is a growing relationship between ethics and libel. We have seen the development of the Reynolds' principles in

> the United Kingdom and also other jurisdictions looking at whether the journalist has acted responsibly, when considering a qualified privilege defence. Thus in Australia the courts will look at issues like the extent to which the matter published distinguishes between suspicions, allegations and proven facts, whether the publisher needed to publish expeditiously, any ulterior motive of a source, whether adequate attempts were made to obtain and publish a response to the allegations and many other issues.

These issues have an ethical component.

Observations

Few people would embrace the thought of getting into the witness box and undergoing stiff cross examination. A number of media lawyers faced very stiff cross examination in the strong gaze of the media during the Leveson Inquiry. It is not for me to publicly pass judgement on the actions of others. It is perhaps a useful exercise for all of us to reflect on what we may have done faced with those same circumstances.

<u>Peter Bartlett</u> is a partner at Minter Ellison in Australia.

Our role as media lawyers is to advise on the law and the legal risks. That said, where we have a good working relationship with editorial executives and journalists and where we form a view that there is an ethical issue, it is in my view right and proper for us to raise those issues.