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MEDIALAWLETTER

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¡ Bienvenidos a Miami ! – MLRC Holds First Latin American-Hispanic Media Law Conference

By Chuck Tobin, Adolfo Jimenez and Lynn Carrillo

There is no such country as "Latin America". The system of laws, and the consistency of their enforcement, differs vastly from place to place in the region.

Venture there only with help of a knowledgeable local lawyer.

And rest assured: American journalists and programmers have their sights sharply set on the market.

These are a few of the takeaway messages from the inaugural Latin American-Hispanic Media Law Conference, held on March 11 at the University of Miami College of Communication. Organized under the leadership of the Media Law Resource Center, and sponsored by the Holland & Knight law firm, The McClatchy Foundation, The *Miami Herald* and *el Nuevo Herald*, the one-day conference brought together 75 inhouse lawyers from U.S.-based Spanish-language entertainment and news programmers, outside counsel from Latin America and the U.S., and academics.

El Nuevo Herald Executive Editor Manny Garcia opened the day with timely reminders of the growing reach of the Spanish-language press.

President Obama's re-election strategy included special staff visits to the newspaper to discuss access to the campaign, while Republican challenger Mitt Romney made no contact at all. Garcia described the multicultural talent of his reporting staff as a unique ability to "parachute-drop in and figure things out." He vividly described their work on a series on child-sex trafficking in Latin America, where reporters got close enough to overhear European tourists

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Por Chuck Tobin, Adolfo Jimenez y Lynn Carrillo

No existe un país llamado "América Latina". El sistema de leyes y la uniformidad de su aplicación difieren ampliamente de un lugar a otro en la región.

Aventúrese solamente con la ayuda de un abogado local con conocimiento de cualquiera de los países del continente.

Y tenga la seguridad de que los periodistas y programadores estadounidenses tienen la vista bien enfocada en el mercado.

Estos son algunos de los mensajes importantes de la inauguración de la Conferencia Latino Hispano-americana sobre Derecho y los Medios de Comunicación celebrada el 11 de marzo en la Escuela de Comunicaciones de la Universidad de Miami. Organizada bajo la dirección del Centro de Recursos Legales de los Medios de Comunicación, y auspiciada por el bufete Holland & Knight, The McClatchy Foundation, The *Miami Herald* y *el Nuevo Herald*, la conferencia de un día de duración reunió a 75 abogados de la industria del entretenimiento y programaciones de noticias en español con sede en los EE.UU.,

a abogados de América Latina y de este país, así como a académicos.

El Director Ejecutivo de *El Nuevo Herald*, Manny García, comenzó el evento con recordatorios oportunos sobre el alcance cada vez mayor de la prensa en español. La estrategia para la reelección del Presidente Obama incluyó visitas especiales de su equipo al periódico para hablar sobre el acceso a la campaña, mientras el adversario

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Keynote speaker Manny Garcia, *el Nuevo Herald*



Cross Border Libel Issues for a Digital World (l. to r.): Johnita P. Due, CNN; Maria Diaz, Thomson Reuters; Gary Bostwick, Bostwick & Jassy; Andrés Cavalier, FastrackMedia.

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solicit young girls in the Dominican Republic, while an *el Herald* photographer captured these approaches in digital images.

CNN Assistant General Counsel/Chief Diversity Advisor Johnita Due moderated a sobering discussion of cross-border libel issues, including the risks to journalists in the region. Maria Diaz, Thomson Reuters Senior VP/Principal Legal Counsel, stressed that "the safety of our journalists is our primary concern," and cautioned that legal systems in Latin America are not a monolith. In Colombia, for example, criminal libel is still on the books but prosecutors encourage defendants to settle the cases privately with complainants, while Argentina no longer has criminal libel claims. Los Angeles attorney Gary Bostwick, with Bostwick & Jassy, noted that he always enlists a local lawyer before he counsels U.S. clients operating in the region. Andres Cavalier, whose company FastrackMedia develops Spanish-language web content, noted that 145 million Facebook users live in Latin America, yet most countries there have no special protections against libel claims for these platforms.

George de Lama with Answers Media next led a discussion on privacy and newsgathering that highlighted the dichotomy between strong enforcement mechanisms for individual privacy rights and, in some countries, sharp retaliation against critical voices. Argentine lawyer Emilio

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republicano, Mitt Romney, no hizo contacto alguno. García describió el talento multicultural de su equipo de reporteros como una habilidad única comparable a "tirarse de un paracaídas para aparecer en la escena y descifrar lo que ocurre". Describió vívidamente el trabajo de ellos en una serie sobre el tráfico sexual de menores en América Latina, donde los reporteros se acercaron a los turistas europeos lo suficiente como para oírlos solicitar muchachitas en la República Dominicana, mientras que un fotógrafo de *el Herald* capturó las escenas en imágenes digitales.

La asistente de la Consejería Legal/Jefe de la Consejería en Diversidad de CNN, Johnita Due, moderó un debate enriquecedor sobre temas de difamación internacional, e incluyó los riesgos que corren los periodistas de la región. María Díaz, Vicepresidenta Principal/Consejera Legal Principal de Thomson Reuters, enfatizó que "la seguridad de nuestros periodistas es nuestra prioridad", y advirtió que los sistemas legales de América Latina no son monolíticos. En Colombia, por ejemplo, la difamación a nivel criminal está aún en los libros, pero los fiscales instan a los acusados a arreglar los casos privadamente con los demandantes, mientras que Argentina ya no tiene casos criminales por difamación. El abogado de Los Ángeles, Gary Bostwick, de Bostwick & Jassy, expresó que él siempre contrata a un abogado local antes de representar a clientes de los Estados Unidos que

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Privacy and Newsgathering in Latin America (l. to r.): George de Lama, Answers Media, LLC; Emilio Beccar-Varela, Estudio Beccar Varela, Buenos Aires; Margarita Escudero, Tinoco, Travieso, Planchart & Nuñez, Caracas; Adolfo Jimenez, Holland & Knight LLP.

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Beccar-Varela noted his country's constitution expressly guarantees the right of privacy, and that criminal sanctions for violation are now "diminished," but that civil sanctions remain a significant threat. Case in point: former Argentine President Carlos Menem's success in the Argentine courts in pressing a privacy claim against a magazine for reporting on his love child. Venezuelan lawyer Margarita Escudero with Tinoco Travieso also spoke about claims of "habeus data" in her country -- a legal right to learn about, view, correct, and, if a violation of privacy, destroy personal information contained in

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Lunch featured an enlightening interview of Telemundo CEO Emilio Romano, left, conducted by NBC Universal-Telemundo VP/ Business Affairs Lynn Carrillo.

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operan en la región. Andres Cavalier, cuya compañía Fastrack Media produce contenido en español para la web, añadió que 145 millones de usuarios de Facebook viven en América Latina y, sin embargo, la mayoría de los países del área no tienen una protección especial contra reclamaciones por difamación en esas plataformas.

George de Lama, de Answers Media, después encabezó un debate sobre la privacidad y la obtención de noticias, donde destacó la dicotomía entre los fuertes mecanismos de aplicación de la ley con respecto a los derechos de privacidad individual, y señaló la fuerte represalia contra las voces críticas en algunos países. El abogado argentino Emilio Beccar-Varela acotó que la constitución de su país garantiza expresamente el derecho a la privacidad, y que las sanciones criminales por violarlas han "disminuido" actualmente, pero que las sanciones civiles continúan siendo una amenaza significativa. Un ejemplo claro de esto es el del ex presidente de Argentina Carlos Menem, quien triunfó en los tribunales de su país en una demanda de privacidad contra una revista por reportar un hijo suyo fuera de matrimonio. La abogada venezolana Margarita Escudero, de Tinoco Travieso, también habló sobre las reclamaciones de "habeus data" en su país, que significa el derecho legal a enterarse, ver, corregir, y en el caso de una violación de la privacidad, destruir información personal contenida en bases de datos públicas y privadas. El

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Cross-Border Compliance Issues: (l. to r.) Lisa Hughes, NBCUniversal; Sira Veciana-Muino, Sony Pictures Television Networks; Sally Ng, Universal Networks International; Carlos Garcia Perez, Office of Cuba Broadcasting.

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public and private databases. Miami lawyer Adolfo Jimenez, with Holland & Knight, noted that while in the U.S. the burden of proof falls on the proponent of restriction or punishment of the press, in most Latin American regimes the burden falls on the journalist to show compliance with the law.

Lunch featured an enlightening interview of Telemundo CEO Emilio Romano, conducted by NBC Universal-Telemundo VP/Business Affairs Lynn Carrillo. Noting that Mexican immigrants and Mexican-Americans make up 69% of the Spanish-language domestic audience, boosting the company's competitiveness in Mexico is a top priority. The biggest challenges in getting there: creating quality content; managing intellectual property rights in new productions; policing the rights against piracy, and leveraging NBC Universal's and Telemundo's platforms for new content. In exploring new businesses in Latin America, Romano said the company has remained careful to adhere to business standards in the U.S., which means closer due diligence and longer contract closure periods than some other cultures are accustomed to. He acknowledged that this has cost the company some opportunities, but maintained that as a U.S. company, "we are trying to do our very best to export our principles." And with 16 Telemundo stations and a cable channel operating in the U.S., Romano said the company strives in news programming "not to replicate English-language

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abogado de Miami Adolfo Jiménez, de Holland & Knight, añadió que si bien en los Estados Unidos la carga de la prueba recae en el proponente de la restricción o castigo a la prensa, en la mayoría de los regímenes latinoamericanos, la carga recae en el periodista que debe demostrar su cumplimiento con la ley.

Durante el almuerzo se presentó una reveladora entrevista con el Presidente y Director General de Telemundo, Emiliano Romano, llevada a cabo por la Vicepresidenta de Asuntos Comerciales de NBC Universal-Telemundo, Lynn Carrillo. Puesto que los inmigrantes mexicanos y los mexicanos-americanos constituyen el 69% de la audiencia nacional hispanohablante, estimular la competitividad de la compañía en México es una alta prioridad. El mayor reto para lograrlo es llegar a esta audiencia con la creación de un contenido de calidad, el manejo de los derechos de la propiedad intelectual en las nuevas producciones, la creación de políticas de derechos de autor contra la piratería, y tomar ventaja de las plataformas de NBC Universal y de Telemundo con un contenido nuevo. Al explorar nuevos negocios en América Latina, Romano dijo que la compañía mantiene la precaución de adherirse a los estándares comerciales de los Estados Unidos, lo cual significa normas más estrictas para las gestiones y períodos más largos de los contratos con respecto a los que estarían acostumbrados en otras culturas. Reconoció que eso le ha costado a la compañía algunas

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Anti-Piracy and Digital Copyright Law Cross Borders (l. to r.): Gus Lopez, Discovery Latin America; Ana Salas Siegel, Fox Latin America Channels; Jose Sariego, HBO Latin America; Ernesto Luciano, Yahoo! Hispanic Americas.

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reporting," but instead to focus on issues of unique interest to the immigrant community.

A discussion of cross-border compliance issues, led by NBC Universal VP/Chief Compliance Officer Lisa Hughes, followed, covering topics such as privacy on websites, promotions, and product placement. Sira Veciana-Muino, Executive Director at Sony Picture Television Networks/Latin American and Brazil, spoke of the importance of frequent retraining of business employees operating in the region, to stay on top of staff turnover and changes in regulations. Sally Ng, Director, Business and Legal Affairs at Universal Networks International, emphasized the need to communicate that compliance is a part of the company's business mission in Latin America, and that the lawyers' job is to help the team bring programming to market while remaining in compliance with local laws. Carlos Garcia Perez, Executive Director at the Office of Cuba Broadcasting -- which operates Radio and TV Martí and sends U.S. -based news programming into Cuba. Perez spoke of the unique challenges his agency faces in navigating the U.S. regulations in order to pay correspondents on the ground in Cuba, while protecting them from being jailed by the Cuban authorities.

The final panel of the day, focusing on anti-piracy and digital copyright issues, was moderated by Gustavo Lopez,

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oportunidades, pero que al mantenerse como una compañía de los Estados Unidos, "tratamos de hacer todo lo posible para exportar nuestros principios". Y con 16 estaciones de Telemundo y un canal de cable funcionando en los Estados Unidos, Romano dijo que la compañía se esfuerza en la programación noticiosa "no para reproducir los reportajes en inglés", sino más bien para enfocarse en temas de interés específico para la comunidad inmigrante.

A continuación tuvo lugar un debate sobre temas de cumplimiento entre países, conducido por la Vicepresidenta y Funcionaria Principal de Cumplimiento de NBC Universal, Lisa Hughes, en la que se cubrieron asuntos como la privacidad en los sitios web, promociones y colocación de productos. Sira Veciana -Muino, Directora Ejecutiva de Sony Picture Television Networks para América Latina y Brasil, habló de la importancia de mantener una capacitación continua para los empleados de las empresas que operan en la región, a fin de mantenerse al tanto del movimiento de personal y de los cambios en las regulaciones. Sally Ng, Directora de Asuntos Comerciales y Legales de Universal Networks International, destacó la necesidad de comunicar que el cumplimiento es parte de la misión comercial de la empresa en América Latina, y que la labor de los abogados es ayudar al equipo a llevar programas al mercado que cumplan con las leyes locales. Carlos García Pérez, Director Ejecutivo de la oficina Cuba

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VP and Regional Counsel, Discovery Latin America. Ernesto Luciano, General Counsel, Yahoo! Hispanic Americas, advised that Chile is the first Latin American country to develop a DMCA-like safe harbor regulation. Unlike in the U.S., however, a court order is required before service of a takedown demand, disappointing claimants because of the longer process but pleasing the ISPs because, in their view, judicial oversight provides more balance. Ana Salas Siegel of Fox Latin America described the steps her company takes to protect content and the significant investment it represents. Jose Sariego, Senior VP, Business and Legal Affairs, HBO Latin America, called for a change in the mindset of the general population on the issue of piracy. He told of the alliance programmers have formed with trade groups that have enlisted the U.S. Trade Representative in pushing the Bahamian government to rescind laws that were hospitable to cable pirates.

This conference has established an important dialog among lawyers for Spanish-language media companies and counsel in the U.S. and Latin America. The organizers and sponsors are hopeful that the conference will become a regular event on everyone's professional calendar.

Chuck Tobin is a partner and Chair of Holland & Knight's National Media Practice Team and is with the firm's Washington, D.C. office. Adolfo Jimenez is a partner and South Florida Litigation Practice Group Leader with the Miami office of Holland & Knight LLP. Lynn Carrillo is VP/Business Affairs with NBC Universal-Telemundo and is based in Hialeah, FL. The Latin American-Hispanic Media Law Conference was the product of two years of discussions and planning among Carrillo, Jimenez and Tobin, along with Sandy Baron and Dave Heller with the Media Law Resource Center.

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Broadcasting, que opera Radio y TV Martí, y manda a Cuba programación noticiosa con base en los EE.UU, habló de los importantes retos que enfrenta su agencia al orientarse sobre las regulaciones de los EE.UU. para poder pagar a los corresponsales en Cuba, y al mismo tiempo protegerlos para que las autoridades cubanas no los encarcelen.

El último panel del día, enfocado en los temas de antipiratería y derecho de autoría digital, fue moderado por Gustavo López, Vicepresidente y Abogado Regional de Discovery Latin America. Ernesto Luciano, Abogado General de Yahoo! Hispanic Americas, informó que Chile es el primer país latinoamericano en desarrollar regulaciones de estructura de seguridad (safe harbor) similares a DMCA (Digital Millenium Copyright Act). Sin embargo, a diferencia de los Estados Unidos, se requiere una orden de un tribunal antes de notificar una demanda de cierre, lo cual desalienta a los demandantes debido a que el proceso es más largo, pero complace a los proveedores de servicio de Internet (ISP) puesto que, en su opinión, el control judicial ofrece más equilibrio. Ana Salas Siegel, de Fox Latin America, describió los pasos que da su compañía para proteger el contenido y la importante inversión que ello representa. José Sariego, Vicepresidente Principal de Asuntos Comerciales y Legales de HBO Latin America, se mostró partidario de un cambio en la mentalidad de la población en general con respecto al tema de la piratería. Habló de la alianza que han formado los programadores con grupos comerciales que ha logrado persuadir al Representante de Comercio de los Estados Unidos a ejercer presión sobre el gobierno de Bahamas para rescindir las leyes que favorecerían a los piratas del cable.

Esta conferencia ha establecido un diálogo importante entre abogados de compañías de medios de comunicación en español y abogados de los Estados Unidos y América Latina. Los organizadores y auspiciadores esperan que la conferencia se convierta en un evento regular en el calendario profesional de todos.

**The Conference was presented with the support of
Holland & Knight, The McClatchy Foundation,
The Miami Herald and el Nuevo Herald**

The Show Must Go On: New York Appellate Court Stays Unconstitutional Prior Restraint

By Rachel F. Strom

On March 21, 2013, after an emergency appeal, New York's Appellate Division, Third Department stayed an extraordinary temporary restraining order that would have prevented Lifetime Television Network from broadcasting a made for television movie entitled "Romeo Killer: The Christopher Porco Story" (the "movie") . [*Porco v. Lifetime Entertainment Services, Inc.*](#), (N.Y. App.).

The movie premiered on March 23, 2013, as planned, but the appellate court must still rule on whether the TRO should be vacated in its entirety. And, the lower court still apparently plans to proceed with a preliminary injunction hearing in late April.

The Movie

In 2006, Christopher Porco was convicted by a jury of murdering his father and severely maiming his mother with an axe while they slept. He is now serving a sentence of fifty years in prison, and has exhausted all appeals. The case against Porco received extensive news coverage at the time and was also the subject of a one hour program on *48 Hours Mystery* broadcast by CBS and an episode of the TruTV series *Forensic Files*.

Romeo Kill Productions Ltd. and Michale Jaffe Films Ltd. produced the movie about Porco's story and licensed the movie to Lifetime, which scheduled its national television premier in the United States for Saturday, March 23, 2013. The movie tells the story of the murder, the investigation of Porco and his trial. It dramatizes the story by using

"composite characters" in some cases and much of the dialog is necessarily made up by the script writers, although it seeks to be true to the publicly-known story of the murder, investigation and trial.

Prior Restraint Halting the Broadcast

Having learned of the production of the movie, in late December Porco wrote to Lifetime claiming the use of his name in connection with the "fictionalized" movie violated his rights under N.Y. Civil Rights Law § 51 ("Section 51"),

which creates a civil cause of action for the use of an individual's name or likeness for purposes of trade or advertising without consent. Section 51 expressly authorizes both money damages and injunctive relief.

After Lifetime declined Porco's request to halt production of the movie, on January 29, 2013, Porco initiated a lawsuit against Lifetime, in far upstate Clinton County, New York, asserting a single claim for a violation of Section 51 based on the movie. In February he sought a temporary restraining order to halt the

movie's premiere, and his motion was forwarded by the court to Lifetime for a response, even though the complaint had yet been served. On March 7 Lifetime served its opposition papers to the motion for a temporary restraining order. And on March 11 Porco served his reply papers.

Although Porco has not seen the movie or the screenplay upon which it is based, his complaint alleged in conclusory

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Although Porco has not seen the movie or the screenplay upon which it is based, his complaint alleged in conclusory terms that it is a "substantially fictionalized account . . . about plaintiff and the events that led to his incarceration."

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terms that it is a “substantially fictionalized account . . . about plaintiff and the events that led to his incarceration.” In fact, the essential elements of the movie are true and accurate, and based on court and police records, interviews with persons involved, and historical and other documents.

Nevertheless, in the afternoon of Tuesday, March 19, 2013, four days before the movie’s premiere, the New York court granted Porco’s Order to Show Cause and enjoined the national broadcast of the movie pending a preliminary injunction hearing that it scheduled for more than a month later, on April 26, 2013. In the interim, the court ordered Lifetime to deliver to Porco a copy of the script of the yet-to-be-broadcast movie so he could determine the extent to which the movie is fictional. Although aware that Lifetime had yet to be served with a summons and complaint, the court issued this extreme relief against Lifetime because it was “not persuaded” that monetary damages would be sufficient to redress a violation of Porco’s statutory rights under Section 51, and ordered the prior restraint solely on Porco’s unsubstantiated allegation that the movie was fictionalized.

The Emergency Appeal

Early the next morning, Wednesday, March 20, 2013, Lifetime filed and served a notice of appeal of the temporary restraining order with the trial court, and then immediately filed an emergency motion asking the Third Department, Appellate Division in Albany to stay or vacate the order.

In its motion, Lifetime argued that the March 19 order was a patently unconstitutional prior restraint that violates the First Amendment to the United States Constitution and Article 8, Section 1 of the New York State Constitution. Lifetime laid out the standards for issuing a prior restraint and explained that, under U.S. Supreme Court precedent, there is a “virtually insurmountable barrier” against the issuance of just the sort of prior restraint on a media outlet granted by the trial court here. Lifetime further argued that, despite this demanding burden, the trial court granted plaintiff’s request for a prior restraint based solely on its observation that an injunction was an available statutory remedy under the Civil Rights Law, and that it was “not persuaded” that monetary

damages would be sufficient to redress any alleged harm to plaintiff.

The sole authority relied on by the lower court, [*Durgom v. Columbia Broadcasting Sys.*, 29 Misc. 2d 394 \(Sup. Ct., N.Y. Cty. 1961\)](#), is a fifty-two year old case from New York County in which the constitutional issues were apparently not raised by the parties and not addressed by the court. The statutory authority for injunctive relief contained in Section 51, Lifetime argued, does not allow entry of a prior restraint that violates “the constitutional principles of freedom of the press.” See [*De Gregorio v. CBS, Inc.*, 123 Misc. 2d 491, 495 \(Sup. Ct. N.Y. Cnty 1984\)](#).

The Appellate Division requested oral argument on March 21, 2013 and arranged with the prison warden to have Porco attend the argument by phone. During an hour long argument, Porco claimed that Section 51 was completely

consistent with the First Amendment, and had been accepted as a valid statute by the U.S. Supreme Court in *Time v. Hill*, 385 U.S. 374 (1967). Porco also argued that the very restrictive reading of Section 51 adopted by the New York Court of Appeals in *Messenger v. Gruner + Jahr Printing & Publ’g*, 94 N.Y.2d 436 (2000) applied by its own terms only to the use of photographs and not to claims for fictionalization such as he was advancing. Porco stressed that the New York courts repeatedly have permitted Section 51 claims for substantial fictionalization in cases such as [*Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 221](#)

[*N.E.2d 543 \(1966\), vacated sub nom. Julian Messner, Inc. v. Spahn*, 387 U.S. 239 \(1967\)](#) and *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 103 N.E. 1108 (1913). Later that afternoon, the Appellate Division stayed the temporary restraining order pending a decision on Lifetime’s motion to vacate and set a motion date of April 10. Porco was given until April 5 to serve his opposition papers. In the meantime, the entry of the stay allowed Lifetime to televise the movie on March 23, as scheduled.

David A. Schulz, Cameron A. Stracher and Rachel Strom of Levine, Sullivan, Koch & Schulz, LLP, New York City, represented Lifetime with assistance in Albany from Michael Grygiel of Greenberg Traurig. Christopher Porco proceeded pro se.

Lifetime argued that the March 19 order was a patently unconstitutional prior restraint that violates the First Amendment to the United States Constitution and Article 8, Section 1 of the New York State constitution.

Commercial Distribution of News Content on the Web by Media Monitoring Service Not a Fair Use

Court: “The world is indebted to the press...”

By Collin J. Peng-Sue and Alison B. Schary

On March 20, 2013, the Honorable Denise L. Cote of the U.S. District Court for the Southern District of New York issued a sweeping decision in favor of The Associated Press (“AP”), finding Meltwater News, an online media monitoring service, liable for copyright infringement and dismissing Meltwater’s defenses, including its claim of fair use. [*The Associated Press v. Meltwater*](#), No. 12-1087 (S.D.N.Y.). In so holding, the Court embraced the principle that granting individual consumers free access to news content on the Internet does not mean that others can commercially distribute that news content.

AP, one of the oldest and most highly regarded news organizations in the world, filed suit against Meltwater in February 2012, accusing it of copyright infringement and related claims. Meltwater is a commercial media-monitoring service that provides its paying customers with daily “News Reports” containing excerpts – including the headline and lede – from news articles scraped from the Internet on topics selected by the customer. It has more than 4,000 customers and its parent company earned over \$100 million in revenue in 2010.

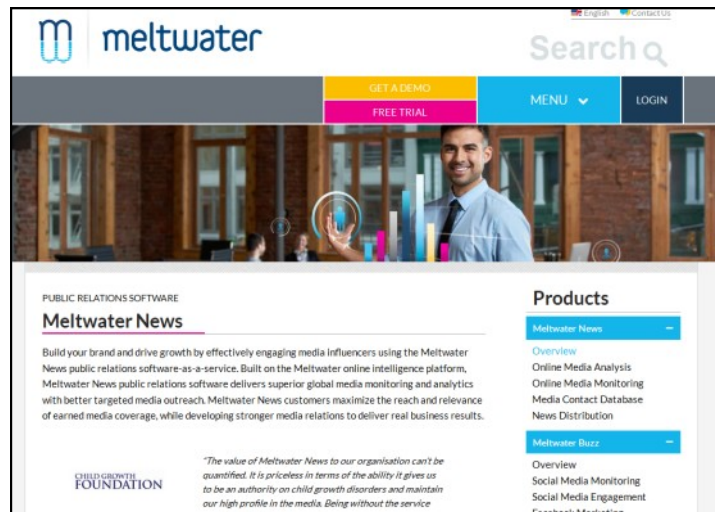
After a period of expedited discovery, the parties submitted cross-motions for summary judgment on Meltwater’s liability for copyright infringement. Meltwater, relying heavily on the Ninth Circuit’s decisions in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) and *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007), argued that it operated as an Internet search engine, and that its use of AP content was therefore protected by the fair use doctrine. Meltwater also claimed there were triable issues of

fact on its affirmative defenses of implied license, equitable estoppel, laches, and copyright misuse that prevented granting summary judgment in favor of AP.

The case generated substantial interest from *amici*, who recognized the potential impact of this decision on the media industry. A consortium of news organizations (the New York Times Company, Advance Publications, Inc., Gannett Co., Inc., the McClatchy Company, and the Newspaper Association of America), and one of Meltwater’s own competitors (BurrellesLuce, which licenses content from AP),

filed an *amicus* brief in support of AP, while the Electronic Frontier Foundation and Public Knowledge submitted a brief in support of Meltwater. The Computer & Communications Industry Association submitted an *amicus* brief, purportedly in support of neither party, asking the Court to take into account the effect of its ruling on the operation of “legitimate online services.”

In the March 20 Opinion, Judge Cote



Meltwater was “a classic news clipping service,” whose use of content was neither transformative nor fair.

rejected Meltwater’s fair use defense. Applying the first statutory factor, the purpose and character of the use, she first undertook a careful examination of the nature of Meltwater’s use of news content in its service, and concluded that Meltwater was “a classic news clipping service,” whose use of content was neither transformative nor fair. As she noted, “Meltwater copies AP content in order to make money directly from the undiluted use of the copyrighted material; this is the central feature of its business model and not an incidental consequence of the use to which it puts the copyrighted material.” Judge Cote further noted the public interest weighed heavily against a finding of fair use:

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Paraphrasing James Madison, the world is indebted to the press for triumphs which have been gained by reason and humanity over error and oppression. Investigating and writing about newsworthy events occurring around the globe is an expensive undertaking and enforcement of the copyright laws permits AP to earn the revenue that underwrites that work. Permitting Meltwater to take the fruit of AP's labor for its own profit, without compensating AP, injures AP's ability to perform this essential function of democracy.

In response to Meltwater's argument that it was like other search engines that "transform the work they take from Internet news sites by using that content for a new purpose, that is, as an integral part of an information-location tool," Judge Cote first observed that interests of news reporting and search engines are not necessarily at odds, and are in fact complementary. As she said, "The Internet would be far poorer if it were bereft of the reporting done by news organizations and both are enhanced by the accessibility the Internet provides to news gathered and delivered by news organizations." And, in fact, Judge Cote assumed for purposes of her opinion that a search engine as defined by Meltwater—"a system that by design and operation improves access to information that is available on the Internet"—*would* be transformative.

Turning to the evidence before her, however, Judge Cote concluded that Meltwater had failed to meet even its own definition of a search engine; rather than improving *access* to AP's copyrighted content, Judge Cote found that Meltwater acted as a *substitute* for that content. The Court pointed to evidence that "customers rarely clicked -through to the underlying AP article. It occurred just 0.08% of the time. In her deposition, a Meltwater executive testified that a click-through rate of 0.05% would be consistent with her expectations." Judge Cote also noted that Meltwater had, in fact, marketed itself as a substitute, rather than a service that functioned as a search engine:

Judge Cote also rejected as a matter of law Meltwater's additional defenses to copyright infringement based on implied license, estoppel, laches, and copyright misuse.

Meltwater's own marketing materials convey an intent to serve as a substitute for AP's news service. Meltwater describes its Meltwater News products as "News at a glance" and "News brought to you." They trumpet that "Meltwater News continuously tracks news sources, updating its database continuously throughout the day so searches return fresh, relevant content," and advertise that "your news is delivered in easy to read morning and/or afternoon reports."

Further, Meltwater had deliberately "chosen not to offer evidence that Meltwater News customers actually use its service to improve their access to the underlying news stories that are excerpted in its news feed," even though AP had "repeatedly requested additional data about Meltwater's click -through rate in anticipation of any argument by Meltwater that Meltwater News directs traffic to the original websites for the news articles." Thus, although Meltwater argued that "its U.S. subscribers clicked-through to the underlying story millions of times during just the first six months of 2012," it could not put that number in context by disclosing the overall click-through rate, and, indeed, was precluded from doing so by failing to respond to AP's discovery requests.

Without evidence to bolster its search engine argument, Meltwater found itself relying on *Kelly* and *Perfect 10*, which Judge Cote found were entirely distinguishable. She observed that both those cases addressed "a search engine engaged in a transformative purpose" (i.e., pointing users to the original content, rather than supplanting the need for the original). Judge Cote also noted that both those cases involved photographs, which by their nature are indivisible," while the text at issue here presented a different case.

The Court further found that calling oneself a "search engine" did not create a presumption of fair use; rather, Meltwater had an "independent burden to prove that its specific display of search results for its subscribers qualifies as a fair use." As she put it, "using the mechanics of search engines to scrape material from the Internet and provide it to

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consumers in response to their search requests does not immunize a defendant from the standards of conduct imposed by law through the Copyright Act, including the statutory embodiment of the fair use defense.”

Continuing with the analysis, the Court found that the second factor (the nature of the copyrighted work) was “at most neutral on the question of fair use” because AP’s works were factual, and that the third factor (the amount and substantiality of the copying) weighed heavily in favor of AP because Meltwater’s taking had been both quantitatively and qualitatively significant, particularly based on Meltwater’s inclusion of the lede, or opening portion of the article, in its News Reports.

As for the fourth factor (the effect of the use on the potential market or value of the work), the Court found that Meltwater’s use had, in fact, harmed the market for AP’s content: “By refusing to pay a licensing fee to AP, Meltwater not only deprives AP of a licensing fee in an established market for AP’s work, but also cheapens the value of AP’s work by competing with companies that do pay a licensing fee to use AP content in the way that Meltwater does.” (emphasis original).

Judge Cote also rejected as a matter of law Meltwater’s additional defenses to copyright infringement based on implied license, estoppel, laches, and copyright misuse. In support of its implied license defense, Meltwater had argued that by not employing robots.txt protocols to affirmatively block Meltwater – and requiring that its members and licensees do the same – AP had granted Meltwater an implied license to scrape and re-sell AP content published on the Internet, regardless of any copyright notices or terms of use explicitly limiting commercial use of AP content.

After first recognizing that an implied license required “a meeting of the minds between the licensor and licensee,” the Court rejected Meltwater’s argument, observing its failure to “point to any interaction with AP from which it could be inferred that there was a meeting of minds between the parties that AP was granting Meltwater a nonexclusive license to extract and re-publish excerpts of its news stories that appeared on the Internet.”

In rejecting Meltwater’s implied license defense, Judge Cote was also aware of the larger impact a contrary finding would have on content providers. In particular, Judge Cote focused on Meltwater’s robots.txt argument. The robots.txt protocol was designed “to instruct cooperating web crawlers

not to access all or part of a website that is publicly viewable. If a website owner uses the robots.txt file to give instructions about its site to web crawlers, and a crawler honors the instruction, then the crawler should not visit any pages on the website.” Contrary to Meltwater’s argument, the Court held that failure to employ the robots.txt protocol did not grant an implied license because, if that were the case, it would impermissibly shift the burden to copyright holders to affirmatively police the use of their content, rather than requiring infringing parties to show that content was properly used.

Moreover, it would remove any flexibility content providers had in regulating the means by which they provided their content. As she stated, the implied license advocated by Meltwater “would reach to every web crawler with no distinction between those who make fair use and those who do not, or between those whose uses may be publicly observed and those whose uses are hidden within closed, subscriber systems.” Nor would the copyright holder be able to communicate “which types of use the copyright holder is permitting the web crawler to make of the content or the extent of the copying the copyright holder will allow” (emphasis original). And, recognizing Meltwater’s underlying “search engine” argument, Judge Cote noted that “when a crawler is making a fair use of a website’s content, it does not need to resort to the implied license doctrine; where it does not, then the website’s failure to use the robots.txt protocol to block its access will not create an implied license.”

The Court also dismissed Meltwater’s equitable estoppel defense, repeating that AP had no duty to restrict access to its content via paywall or robots.txt exclusion before bringing suit, and that there was no evidence that AP or its licensees had granted Meltwater permission to infringe. To the contrary, Judge Cote found that certain evidence—such as website terms of use, AP’s litigation against a Meltwater competitor, and its efforts to protect content from online misappropriation—indicated that Meltwater was (or should have been) on notice that its infringement was impermissible.

As for Meltwater’s laches claim, the Court found that because AP’s infringement claims were brought within the three-year statute of limitations, laches was not available as to AP’s damages claim or its claim for prospective relief. The Court did state that laches might be available to Meltwater with respect to AP’s claim for retrospective injunctive relief,

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and thus gave the parties an additional opportunity to address that point.

Finally, Judge Cote addressed Meltwater's copyright misuse defense. Although the Second Circuit has not recognized misuse as an affirmative defense, other circuits have described the defense as "arising from a copyright holder's attempt to use its copyright in a particular expression 'to control competition in an area outside the copyright.'" See *Lasercomb Am. v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990). The defense "is one that is applied 'sparingly'" and its focus "is on the improper stifling of competition."

In this case, Meltwater claimed that by participating in NewsRight, a joint venture between AP and other publishers formed in 2011 and publicly launched in 2012, AP had violated antitrust law. Judge Cote roundly rejected Meltwater's claim, noting that Meltwater had failed to show that AP had "improperly leveraged its copyrights to exert control over competition in the delivery of news." Instead, "every one of [AP's] competitors, whether a member of NewsRight or not, retains the power to issue its own licenses according to whatever pricing scale it chooses" and that "AP does not create the news, control access to the news, or have

any power to restrict any other party's entry into the business of reporting the news."

Plaintiff The Associated Press was represented by Elizabeth A. McNamara, Linda Steinman, Alison B. Schary, and Collin J. Peng -Sue of Davis Wright Tremaine LLP, New York City. Defendants Meltwater US Holdings Inc., Meltwater News US Inc., and Meltwater News USI Inc. were represented by David Kramer, Tonia Klausner, Brian Willen, and Catherine Grealis of Wilson Sonsini Goodrich & Rosati, Palo Alto, CA and New York City. Amici Curiae the New York Times Company, Advance Publications, Inc., Gannett Co., Inc., the McClatchy Company, the Newspaper Association of America, and BurrellesLuce were represented by Charles S. Simms, Proskauer Rose LLP, New York City. Amici Curiae Electronic Frontier Foundation and Public Knowledge were represented by Julie A. Ahrens, Stanford Law School, Center for Internet & Society, Stanford, CA (Corynne McSherry and Kurt Opsahl, Electronic Frontier Foundation, San Francisco, CA, and Sherwin Siy, Public Knowledge, Washington, DC, on the brief). Amicus Curiae Computer & Communications Industry Association was represented by Kathleen M. Sullivan, Quinn Emanuel Urquhart & Sullivan, LLP, New York City (Jonathan B. Oblak and Todd Anten on the brief).

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Video Content Sharer Sails into Safe Harbor as Ninth Circuit Rejects Copyright Holder Claims

By Judith A. Endejan

Music copyright holders were seriously thwacked by the Ninth Circuit in an Order and Opinion released on March 14, 2013 in [*UMG Recordings, Inc., et al. v. Shelter Capital Partners LLC*](#) (No. 09-55902). The court rejected strained interpretations of the safe harbor provision of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512(c) and warned copyright holders that they ignore the strict DMCA takedown notice protocol (17 U.S.C. § 512(c)(3)(A)(i-vi)) at their peril.

This 2013 decision supersedes an earlier opinion, 667 F.3d 1022 (9th Cir. 2011). The case started in September 2007 when Universal Music Group (“UMG”), a producer of music videos sued Veoh Networks (“Veoh”), the operator of a publicly accessible website that enables users to share videos with other users for direct, vicarious and contributory copyright infringement and for inducement of infringement.

UMG later added three of Veoh’s investors as defendants on theories of secondary liability.

The panel affirmed the district court’s holding that Veoh was protected by the safe harbor provision of the DMCA, §512(c), which limits a service provider’s liability for “infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.” Veoh offers video sharing services in two ways, through a stand-alone software application or through its website, Veoh.com. These services are provided free of charge.

Veoh’s conduct in the case provides a textbook example of how to qualify for the DMCA’s safe harbor.

- First, its Publisher Terms and Conditions instruct users to not submit any infringing material.
- Second, its Term of Use reiterates that users are not to upload videos that infringe copyright.
- Third, Veoh’s employees do not review user submitted video, title or tags before the video is made available.
- Fourth, Veoh adopted various technologies to automatically prevent copyright infringement on its system. (Hash-filtering software, taking audio “fingerprints” from video files and a policy terminating users who repeatedly upload infringing materials.)
- Finally, Veoh removed all material that was subject to DMCA takedown notices.

UMG’s arguments fell on deaf ears. First, UMG argued that Veoh could not qualify under the DCMA safe harbor because the

functions automatically performed by Veoh’s software when a user uploads a video do not fall within the meaning of “by reason of the storage at the direction of a user.” UMG contended that this statutory language meant that infringement must be proximately caused by the **storage** rather than caused by the **access** that the storage facilitates. UMG argued that Congress intended § 512(c) to protect only web hosting services. This violates common sense, according to the court, which said “UMG’s theory fails to account for the reality that web hosts, like Veoh, also store user-submitted materials *in order to make those materials accessible* to other internet users. The reason one has a

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website is so that others may view it.” The court held that Veoh satisfied the threshold requirement that the infringement be “by reason of the storage at the direction of a user of material” residing on Veoh’s system.

The court rejected UMG’s next argument that Veoh had knowledge or awareness of other infringing videos based upon facts *other than DMCA takedown notices*. UMG argued that Veoh must have had *general* knowledge that its services could be used to post infringing material. The court said “Finally, if merely hosting material that falls within a category of content capable of copyright protection, with the general knowledge that one’s services could be used to share unauthorized copies of copyrighted material, was sufficient to impute knowledge to service providers, the § 512(c) safe harbor would be rendered a dead letter.” The court said *specific* knowledge of particular infringing activity is required to establish actual knowledge. The burden is on the copyright holder to provide this specific information by following the notice and takedown protocol of the DCMA.

The court held that “merely hosting a category of copyrightable content, such as music videos, with the general knowledge that one’s services could be used to share infringing material, is insufficient to meet the actual knowledge requirement under § 512(c)(1)(A)(i).”

So, too, the court rejected UMG’s “red flag” argument, holding that Veoh’s general knowledge that it hosted copyrightable material and that its services could be used for infringement is insufficient to constitute a red flag. The court also rejected UMG’s claim that Veoh had the ability to investigate infringement and should have been charged with doing so. Service providers have no such investigative duty, the court said “If Veoh’s CEO’s acknowledgment of this general problem and awareness of news reports discussing it was enough to remove a service provider from DMCA safe harbor eligibility, then notice and takedown procedures would make little sense and the safe harbors would be effectively nullified.”

The court acknowledged there was a distinction between actual and red flag knowledge. It adopted the Second Circuit’s reasoning that “the actual knowledge provision turns on whether the provider actually or “subjectively” knew of specific infringement, while the red-flag provision turns on

whether the provider was subjectively aware of facts that would have made the specific infringement “objectively” obvious to a reasonable person.” *Viacom Int’l v. YouTube, Inc.*, 676 F.3d 19, 31 (2nd Cir. 2012).

The court didn’t buy UMG’s argument that Veoh lost safe harbor protection because Veoh had the right and ability to control the infringing activity because it could take down infringing materials. The court said that this ability “is necessary in order to satisfy the requirements of takedown under the DMCA and so could not possibly constitute the required proof of control.”

Based upon the foregoing analysis of “right and ability to control,” the court also rejected the vicarious liability claims. The Ninth Circuit again agreed with the Second Circuit that this term must mean that the service provider exerts substantial influence on the activities of users or engages in purposeful conduct.

Because secondary liability for copyright infringement depends upon actual infringement the court affirmed the dismissal of claims against the investor defendants that alleged vicarious infringement, contributory infringement and inducement of infringement.

Finally, the court addressed Veoh’s claim that the district court erred by refusing to grant costs and attorneys’ fees under FRCP 68.

The Ninth Circuit affirmed the district court’s decision that attorneys’ fees were not properly awardable under FRCP 68 because those fees would not have been properly awarded under the relevant substantive statute in the case which in this case was § 505. However, it did remand to the district to consider whether Veoh is eligible to assume FRCP 68 “costs.”

In this case, the Ninth Circuit read the DCMA to accomplish Congress’ purpose in enacting that law to prevent chilling innovation that could provide “substantial socially beneficial functions.” That’s why the safe harbor provisions were enacted, and the Ninth Circuit told copyright holders that a lot more is needed to prevent safe harbor safety than the strained statutory interpretations and generalized knowledge claims raised by UMG.

Judith A. Endejan is a partner at Graham & Dunn PC in Seattle, WA. A full list of counsel is contained in the linked opinion.

The court rejected UMG’s “red flag” argument, holding that Veoh’s general knowledge that it hosted copyrightable material and that its services could be used for infringement is insufficient to constitute a red flag.

Southern District Of Texas Dismisses Copyright Case Involving Romance Novel

Substantial Similarity Did Not Exist as a Matter of Law

By Steve Mandell, Steve Baron, and Elizabeth Morris

A Southern District of Texas judge dismissed a copyright case against a publisher of romance novels, holding as a matter of law, that the two works at issue were not substantially similar. To reach this conclusion, the Court read and analyzed both works which the defendant attached to its Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. In light of the dissimilarity between the works, the Court found that the plaintiff could not fix the flaws in the complaint by simply repleading, and dismissed the matter with prejudice. [*Rucker v. Harlequin Enters. Ltd.*](#), Civil Action No. H-12-1135 (S.D. Tex. Feb. 26, 2013).

Background

In late 2009, Plaintiff Kelly Rucker entered the Romance Writers of America (“RWA”) “2010 Spring into Romance” Contest. She submitted the first chapter and a brief synopsis of her unfinished novel, *How to Love a Billionaire*, which was selected as a finalist in the contest.

Rucker subsequently purchased *The Proud Wife*, a full-length novel published by defendant Harlequin Enterprises Limited (“Harlequin”). After reading the Harlequin book, Ms. Rucker concluded that *The Proud Wife* copied protectable elements of *How to Love a Billionaire*.

On April 13, 2012, Rucker filed suit against Harlequin in the Southern District of Texas, alleging direct, contributory and vicarious copyright infringement and seeking lost profits and injunctive relief. She asserted that Harlequin gained access to her work when one of its representatives judged the RWA contest. She also alleged forty purported instances of substantial similarity between the works.

Harlequin moved to dismiss the complaint, contending that Rucker’s barebones pleading failed to allege both

“factual copying” (that is, that there was access to *How to Love a Billionaire* and probative similarities between the works) and substantial similarity. Harlequin also submitted copies of both works to the district court, arguing that the court was permitted to consider them on a Rule 12(b)(6) motion because they were central to the complaint.

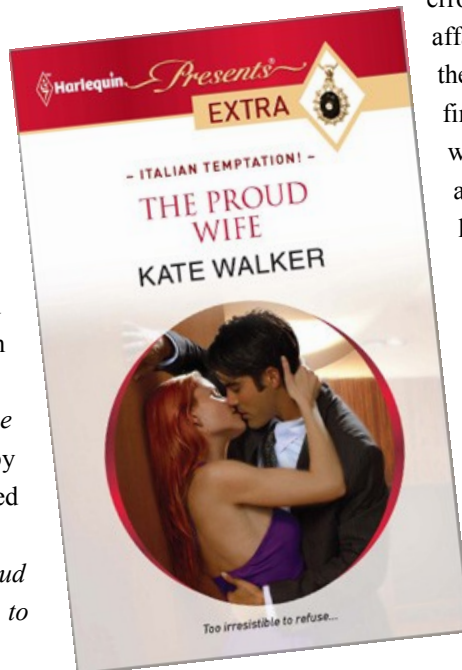
Synopses of the Works

In *How to Love a Billionaire*, a wealthy hotel magnate and his beautiful wife have become estranged after the wife, erroneously believing her husband is having an affair, miscarries their baby and runs away. As the first chapter opens, the two reunite to finalize their divorce. Their plans are derailed when they are kidnapped and held for ransom at a remote cabin. They escape, but the husband is injured; as his wife nurses him back to health, they realize they are still in love. They remain married, and the wife becomes pregnant once more.

In *The Proud Wife*, a Sicilian prince summons his estranged English wife back to Italy so they can finalize their divorce. They originally separated when the wife, believing she disappointed her husband after she miscarried their baby, leaves their home and returns to England. After the wife arrives in Italy, the couple

retreats to the cottage where they spent their honeymoon so they can work out the final details of their divorce. Although the two end up sharing an impassioned reunion, the wife goes back to England. One month later, the prince arrives unannounced at his wife’s home hoping to reconcile. He finds his wife finishing her own preparations to return to Italy to be with him. After they profess their love for one another and decide to stay together, the prince learns that his wife is pregnant with his child again.

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*(Continued from page 17)***District Court Decision**

On February 26, 2013, United States District Judge Lee H. Rosenthal dismissed Rucker's case with prejudice, finding no actionable similarity between the works. At the outset, the Court found that it was permitted to consider both works and therefore decide whether Rucker could plead a viable copyright infringement claim.

The Court evaluated the similarity of the total "concept and feel" of the works, emphasizing that only expression, and not ideas, could be protected. Therefore, "[t]he more a work is general and lacking in detail, the more likely the remaining ideas are to be broad, common, and unprotectable." (citation omitted) The Court's analysis focused on "the protectable elements in the works, determining whether there are articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events." (citation omitted)

Using this rubric, the Court found significant differences between the works. Although they shared a theme of "love overcom[ing] trials and tribulations," the "feel" of how this idea was expressed was quite dissimilar. For example, the actual dynamic in each couple's relationship differed considerably, including the impetus for estrangement and the circumstances leading to their respective reunions.

Moreover, any similarities were generic literary devices found in many romance novels, unprotected elements like characters, or *scenes-a-faire*, which are "incidents, characteristics or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic, what flows naturally from these basic plot premises." (citation omitted) The Court ultimately

Any similarities were generic literary devices found in many romance novels, unprotected elements like characters, or scenes-a-faire.

concluded that "Rucker's comparisons of scenes, events, and characters between her work and the Harlequin novel show that they are common in romance novels."

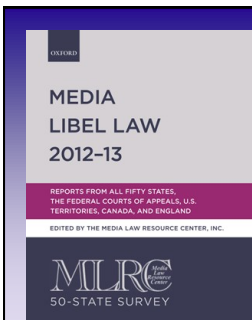
Notably, the Court rejected Rucker's argument that the works were substantially similar because they shared a similar sequence of events. Instead, the Court relied on a "side-by-side" analysis adopted by the Fifth Circuit where "[t]he question is whether the side-by-side comparison leads to the conclusion that a lay observer would find substantial, protectable similarity between the two works." *Gen. Universal Sys.* 379F.3d at 142; *Peel & Co.*, 238 F.3d at 395. Because "[t]he sequences and events Rucker describes do not convey the 'total concept and feel of the works,'" the protectable elements were not substantially similar. (citation omitted) The Court rejected Rucker's reliance on *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990), finding that the Ninth Circuit's extrinsic/intrinsic tests conflicted with the Fifth Circuit's side-by-side analysis.

Conclusion

Rucker v. Harlequin Enterprises Limited affirms that a court can find lack of substantial similarity at the pleading stage.

This holding encourages copyright defendants to attack infringement claims by motion to dismiss and attach the works in question, allowing the court to conduct a substantial similarity analysis. If successful, the approach can end a meritless case early in the litigation.

Steven Mandell, Steven Baron, and Elizabeth Morris of Mandell Menkes LLC, Chicago and Chip Babcock and Chevazz Brown of Jackson Walker L.L.P., Houston represented Harlequin Enterprises Limited. Plaintiff Kelly Rucker was represented by Paul Beik of Beik Law Firm, PLLC.



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Judge Quashes Subpoena Seeking Unused Footage from Ken Burns Documentary

By John Siegal and Peter Shapiro

On February 19, Magistrate Judge Ronald L. Ellis in the United States District Court for the Southern District of New York quashed a subpoena seeking outtakes from the documentary film *The Central Park Five* served by the City of New York on the filmmakers Ken Burns, Sarah Burns and David McMahon and their company, Florentine Films. [*In re McCray, Richardson, Santana, Wise and Salaam Litigation*](#), No. 03-9685, 2013 WL 604455 (S.D.N.Y. Feb. 19, 2013).

The decision reaffirms the continuing vitality of the qualified privilege for non-confidential source material in the Second Circuit, but more importantly offers a roadmap to appropriately limit the holding of *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011), where the Second Circuit refused to apply the qualified privilege to a documentary filmmaker who failed to establish that he was an “independent” journalist.

Background

The subpoena arose in the context of protracted civil litigation stemming from the 1989 assault and rape of the “Central Park Jogger.” In a controversial and racially charged criminal case, the main plaintiffs in the underlying civil litigation—Antron McCray, Kevin Richardson, Raymond Santana, Kharey Wise, and Yusef Salaam, who were all teenagers at the time—confessed to taking part in the attack and were subsequently convicted of the crime, each serving prison sentences of between seven and thirteen years.

In early 2002, convicted rapist Matias Reyes suddenly confessed to attacking the “Central Park Jogger” and claimed to have acted alone. DNA evidence confirmed that Reyes

was the sole contributor to the semen found at the crime scene. Later that year, after all of the plaintiffs had served the full terms of their sentences, the plaintiffs’ convictions were vacated on motion by District Attorney Robert Morgenthau by order of the New York Supreme Court.

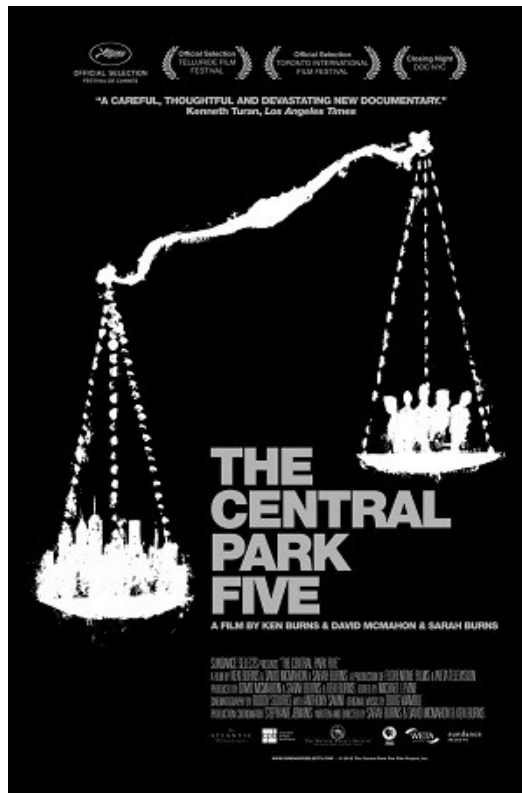
In 2003, the main plaintiffs and their families filed a \$250 million suit against the City, the New York City Police Department, the New York County District Attorney’s Office, and individual employees and officers asserting claims under 42 U.S.C. §§ 1981, 1983 and 1985 as well as state tort law, alleging that their confessions were coerced.

The Central Park Five documents the experiences of the five men originally convicted for participating in the rape of the “Central Park Jogger.” The film, which is largely told from their point of view (City officials steadfastly refused to cooperate with the filmmakers), places the case in the context of a city beset by a seemingly never-ending crime wave that had become a pressure cooker of racial animosity.

On September 12, 2012, on the eve of the film’s release (and at the commencement of the discovery phase of the underlying litigation), the City served a subpoena on the filmmakers and their company seeking “all documents” relating in “any way” to the subject matter of the

plaintiffs’ case. The filmmakers objected to the subpoena as overbroad and in violation of the reporter’s privilege under both the New York Shield Law and federal common law. In response, the City withdrew the original subpoena and issued an amended subpoena on October 2, 2012 seeking all “audio and/or video materials documenting interviews with” all of

(Continued on page 20)



The decision reaffirms the continuing vitality of the qualified privilege for non-confidential source material in the Second Circuit, but more importantly offers a roadmap to appropriately limit the holding of *Chevron Corp. v. Berlinger*.

(Continued from page 19)

the plaintiffs, their current and former counsel, any experts retained, and any witnesses to the events at issue.

After being unable to come to a resolution concerning the scope of the amended subpoena or the application of the reporter's privilege, the filmmakers moved to quash the amended subpoena. The filmmakers asserted that the City failed to overcome the reporter's privilege under both the New York Shield Law and federal common law, arguing that the subpoena was based solely on speculation, did not identify a specific significant issue of likely relevance in the case, was premature in that it made no showing that the information was unavailable from other sources and the City had not yet deposed the plaintiffs, and was substantially overbroad.

The City countered by arguing that the materials sought were "of course" relevant because in the film plaintiffs discuss events pertinent to their suit, portions of the interviews contained in the released version of the film conflict with prior testimony given by certain plaintiffs during hearings, and it was "plausible" plaintiffs' current or former counsel or plaintiffs themselves waived attorney-client privilege.

More significantly, invoking *Chevron Corp. v. Berlinger*, the City argued that the filmmakers were not entitled to the protections of the reporter's privilege because they were not independent journalists. The City made this assertion on the basis of some comments regarding the case made to the press and to the mayor by Ken Burns and on the fact that Sarah Burns had previously worked as a paralegal for the firm that formerly represented some of the plaintiffs.

Magistrate Judge Ellis's Decision

Magistrate Judge Ellis first examined whether the New York Shield Law or federal common law would govern the application of the reporter's privilege. He found that privileges asserted in actions involving both federal and pendent state law claims are governed by federal law principles. He then went on to note, however, that the court may consider the applicable state law and the policy that underlies it. Citing to *Von Bulow v. Von Bulow*, 811 F.2d

136, 144 (2d Cir. 1987), he found the New York Shield Law to be "congruent" with federal law in that both "reflect a paramount interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters."

The court then considered the threshold issue of whether the filmmakers were "independent journalists" entitled to the protections of the reporter's privilege. The City argued that because the filmmakers had a "longstanding sympathetic relationship" with the plaintiffs and had made statements to the press indicating that their intention in making the film was to urge the City to settle the case this case fit squarely with the facts in *Berlinger*.

In summarizing the facts of *Berlinger*, the court noted that documentary filmmaker Joseph Berlinger was solicited by an attorney representing a class of plaintiffs in litigation against

Chevron and its predecessor to make a film from their perspective and was asked by the attorney to remove a scene from the final version of the film. On the basis of these facts, Berlinger had failed to demonstrate his "independence." The court noted, however, that the Second Circuit had expressly stated that a journalist who has been solicited to write a story supporting a particular point of view is not foreclosed from asserting the privilege, providing that the journalist can show that s/he had editorial and financial control over the newsgathering process and had the intention

to publicly disseminate the information at the time it was gathered.

Noting that there was no dispute that there was never any financial relationship between the filmmakers and either the plaintiffs or their counsel, and that the City did not contest the filmmakers' testimony that they maintained full editorial control over the film, the court focused its inquiry on the filmmakers' intention to publicly disseminate the information at the time it was gathered. The court pointedly noted that "any statements occurring after the gathering of information by the filmmakers that advocate for Plaintiffs' position in this case are irrelevant for purposes of the reporter's privilege." It then chided the City for taking out of context a quote from Ken Burns saying that the purpose of the film was to put pressure on the City to settle the suit.

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Being solicited to make a film or a book or having a clear point of view regarding the subject of the work does not by itself disqualify a journalist from being able to assert the reporter's privilege.

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The court further rejected the City's claim that the filmmakers' newsgathering began before they had the intention to make the information public because Sarah Burns had worked as a paralegal at plaintiffs' counsel's former firm, authored a book on the case, and had written a college thesis on the case. The court stated, "The question to be answered is not when *any* fact gathering began but when *the information sought by the subpoena at issue was gathered*." Because the outtakes were created no earlier than 2008, the court found the City's arguments regarding Sarah Burns to be without merit. The court similarly found the City's claims of the filmmakers' lack of independence as a result of acknowledgments thanking the plaintiffs in the film and in Sarah Burns' book on the case to be baseless.

After finding that the filmmakers were entitled to assert the reporter's privilege, Magistrate Judge Ellis applied the test for non-confidential information articulated in *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 36 (2d Cir. 1999): the party seeking disclosure must demonstrate that the materials sought are (1) "of likely relevance to a significant issue in the case"; and (2) "not reasonably obtainable from other sources."

In applying the test, the court found that the City failed to identify a "significant issue" in the case that the subpoenaed materials would address. Magistrate Judge Ellis noted that the City conceded that it "already ha[s] evidence that prior sworn testimony by the main plaintiffs and the familial plaintiffs contrasts with the edited versions of events displayed in the film," and thus any statements contained in the outtakes would be merely cumulative. Moreover, any such statements would merely be impeachment material, which is "ordinarily not critical or necessary to the maintenance or defense of a claim."

He further found that the City failed to show likely relevance where it claimed that it was "plausible" that the

outtakes contained waivers of attorney-client privilege because it was based on "mere hypothesis." As to the second prong of the *Gonzales* test, Magistrate Judge Ellis held that the City "cannot show unavailability from other sources before deposing Plaintiffs."

Conclusion

The court's decision is important in clearly delineating the contours of the holding in *Berlinger*. Magistrate Judge Ellis clarified what was latent in the *Berlinger* opinion: Being solicited to make a film or a book or having a clear point of view regarding the subject of the work does not by itself disqualify a journalist from being able to assert the reporter's privilege. He crucially reaffirmed that the fundamental tests for journalistic independence are whether the journalist had the intent to publicly disseminate the specific information sought by the subpoena at the time of the newsgathering and whether the journalist maintained independent control of the journalism that resulted.

John Siegal and Peter Shapiro of Baker & Hostetler LLP represented Florentine Films, Ken Burns, Sarah Burns and David McMahon. Philip R. DePaul and Elizabeth M. Daitz of the Corporation Counsel of the City of New York represented the City of New York.

Elizabeth McNamara of Davis Wright Tremaine LLP and Bruce D. Brown, Gregg P. Leslie and Jack S. Komperda of the Reporters Committee for the Freedom of the Press represented a coalition of media companies as amici curiae in support of the motion to quash, and Andrew G. Celli, Jr. and Julia Fong Sheketoff of Emery Celli Brinckerhoff & Abady LLP, and Michael Donaldson of Donaldson & Callif, LLP represented a coalition of documentary filmmakers as amici curiae.

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Surge in Proposed “Ag-Gag” Legislation Continues

Following last year’s success in [Iowa](#) and [Utah](#), ten state legislatures have introduced “ag -gag” legislation this term. Though the details of the bills vary, the underlying purpose is the same: prevent photography or recording that exposes operations at farms or agricultural facilities.

The bills criminalize taking photos or videos, or lying on employment applications for purposes of gaining access to the facility as part of an undercover investigation. Some of the bills only create a reporting requirement—mandating that those who witness or record animal cruelty at these facilities report their observations to law enforcement within a specified time period, turning over all photographic or video evidence as well.

“Ag-gag” legislation became more popular in the last few years, but it is not an entirely new phenomenon. A series of states passed legislation pertaining to farm facilities in the 1990s. Though these older “animal interference” laws were more concerned with damaging farm facility property and liberating animals, three states enacted statutes dealing with photography or “remaining concealed” on the farm facility for investigation purposes. *See* Farm Animal and Research Facility Protection Act, [MT ST §81 -30-101-105 \(1991\)](#), The Farm Animal and Field Crop and Research Facilities Protection Act [K.S.A. § 47 -1825-1830 \(1990\)](#), and Animal Research Facility Damage, [ND ST §12.1-21.1-01-05 \(1991\)](#).

During the 2011-2012 term, at least nine states unsuccessfully attempted to pass “ag -gag” legislation. Below is a summation of this year’s pending efforts.



The bills criminalize taking photos or videos, or lying on employment applications for purposes of gaining access to the facility as part of an undercover investigation.

[Arkansas SB 14](#)

Creating The Offense of Interference with a Livestock or Poultry Operation

Background: Creates a Class A misdemeanor for making a sound or image recording on a livestock or poultry operation by leaving a recording device on the private property. Creates a Class B misdemeanor for obtaining access

to livestock or poultry facilities under false pretenses, for applying for employment at the livestock or poultry operation with the purpose to record the operation, for recording sounds and images while trespassing on the facility, or for knowingly making a false statement or representation as part of an application or agreement for employment at a livestock or poultry operation. Consent to record is a defense.

Status: Re-referred to the Senate Committee on Judiciary on February 26, 2013.

[California AB 343](#)

Animal cruelty; duty to report

Background: Requires that any person who willfully or knowingly photographs, records, or videotapes animal cruelty to provide a copy of the images or videotape to law enforcement within 48 hours.

Status: In committee (Committee on Agriculture); scheduled for a hearing on April 17, 2013.

[Illinois SB 1532](#)

An Act Concerning Animals

Background: Amends the Humane Care for Animals Act

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and provides that if the Department of Agriculture determines that a complaint made under the Act is false or unfounded, the Department may waive confidentiality of the complaint and refer the matter to the State Attorney for consideration of criminal charges.

Status: Second reading scheduled for April 10, 2013.

Indiana SB 373

*An Act to amend the Indiana Code
concerning criminal law and procedure*

Background: Makes it a Class A misdemeanor to knowingly or intentionally enter the property of another that is used for agricultural or industrial purposes, take a photo or video of anything on the property or operations on the property, and distribute the photo or video without written consent. The bill was amended in the Senate to exempt from prosecution anyone who turns over the video or photos to law enforcement within 48 hours. The exemption is lost if the material is shared with a party outside law enforcement, including a newspaper or television station.

Status: SB 373 passed the Senate in a 30-to-20 vote and was referred to the House on February 26, 2013. The Bill passed the House Agriculture Committee by a 9-3 vote on March 28.

Nebraska LB204

*An Act ... to change provisions relating to the reporting of
cruelty to animals ... to create the offense of damaging or
interfering with the operations of an animal facility*

Background: Changes reporting requirements for animal neglect or mistreatment, creating a Class III misdemeanor and requiring witnesses or participants to report abuse within 24 hours—any evidence, including photos or video, must be turned over. It also creates varying levels of misdemeanors for making a false statement or representation as part of an employment application for an animal facility – with the intent of damaging or interfering with facility operations.

Provides that nothing in the legislation should be construed to “prohibit any expressive conduct” protected by the First Amendment.

Status: In committee (Judiciary); public hearing held on March 13, 2013.

New Hampshire HB 110

*Requiring persons who record cruelty
to livestock to report such cruelty and submit
such recordings to a law enforcement agency*

Background: Revises current law to require any person who records livestock cruelty to report the activities to law enforcement and submit any unedited photographs or video to law enforcement within 24 hours of the recording’s creation.

Status: In committee (House Environment and Agriculture).

New Mexico SB 552

Livestock Operation Interference Act

Background: Creates the misdemeanor crime of livestock operation interference. A person is guilty of the crime if he: (1) knowingly or intentionally records a sound or image without permission of the livestock operation by leaving a recording device on the facility property; (2) obtains access to a livestock operation under false pretenses; (3) applies for employment at a livestock operation with the intent to record an image or sound; (4) knows at the time of accepting employment that the owner of the facility prohibits recordings, and records an image or sound from the livestock operation; or (5) knowingly or intentionally records an image or sound from a livestock operation while criminally trespassing.

Status: In committee (Senate Conservation Committee).

Pennsylvania HB 683

*An Act ...Amending Title 18 (Crimes and Offenses)
of the Pennsylvania Consolidated Statutes;
providing for interfering with agricultural operations*

Background: Establishes the criminal offense of interfering with agricultural operations as a felony. A person commits the offense if he (1) records without consent an image or sound from an agricultural operation by leaving a recording device on the property, or by transferring or sending images or sound from the agricultural operation over the Internet without consent; (2) obtains access to an agricultural operation under false pretenses; (3) enters an agricultural operation with the intent to obtain unlawful possession of or access to any information or data on

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operations at the facility; (4) applies for employment at an agricultural operation with the intent to record images or sound from the operation, knows at the time of accepting employment that the owner prohibits recording, and while employed by or present on the agricultural operation, records images and sound of the operation; or (5) records an image or sound of an agricultural operation while criminally trespassing.

Status: Referred to House Judiciary Committee on February 12, 2013.

Tennessee SB 1248 / Tennessee HB 1191

Animal Cruelty and Abuse

Background: Provides that any person who records by photograph or video a violation against livestock must, within 24 hours, report the violation to law enforcement and submit any unedited photos or videos. House bill amended on March 26 by the Agriculture and Natural Resources Committee to additionally provide that any violation is a Class C misdemeanor.

Status: House bill referred to Calendar & Rules Committee on March 26, 2013; Senate bill to be taken up by Judiciary Committee on April 2, 2013.

Wyoming HB 126

An Act relating to agriculture; establishing the offense of interference with an agricultural operation

Background: Creates a criminal misdemeanor for interference with an agricultural operation if a person (1) knowingly or intentionally records an image or sound from an agricultural operation without consent by concealing or placing a recording device on the premises; (2) knowingly or intentionally records an image or sound from an agricultural operation while criminally trespassing; (3) obtains access to an agricultural operation under false pretenses; or (4) records an image or sound from the agricultural operation while employed and present on the agricultural operation, having applied for employment with the intent to record an image or sound, and knowing at the time of accepting employment that the owner prohibits recording. Reporting – in good faith – observations of livestock cruelty to police or local government within 48 hours provides immunity from civil liability.

Status: In Committee.



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Dear Colleagues:

The Legislative Affairs Committee, co-chaired by Laurie Babinski of Baker & Hostetler and James McLaughlin of The Washington Post, is looking for new members to help us monitor and report on the 113th Congress for MLRC's members. The Committee's next call is scheduled for **Tuesday, April 9, 2013 at 2:30 pm EDT** – if you think you may be interested in joining the call (and better yet, participating in the Committee's work), please contact Laurie and/or Jim for details.

Our planned activities for this Congress include:

- Bi-monthly conference calls on the status of federal legislation affecting U.S. media companies;
- Regular updates to the membership on significant developments (e.g., newsletter and bulletin items);
- Substantive, in-depth analysis of important policy questions, such as last year's Committee "white paper" on federal anti-leaks proposals; and
- Where appropriate, helping to coordinate strategic responses on particular issues.

Additionally, we invite any and all suggestions as to particular projects that the Committee should take on or subjects that we should be tracking. Please do not hesitate to contact Laurie (lbabinski@bakerlaw.com) and Jim (mclaughlinj@washpost.com) with any such ideas, or to express interest in joining the Committee.

Thank you, and we look forward to keeping you apprised of developments in the new Congress.

Best,

Laurie Babinski and James McLaughlin
Chairs, MLRC Legislative Affairs Committee

Third Circuit Issues Decision Outlining State Of Mind Requirement in Public Official Defamation-By-Implication Cases

By Michael Berry

On March 8, 2013, the United States Court of Appeals for the Third Circuit issued a decision affirming a trial court's directed verdict in favor of a Virgin Islands newspaper in a libel suit brought by a former judge. *See Kendall v. Daily News Publ'g Co.*, 2013 WL 856433 (3d Cir. March 8, 2013). The decision, written by Judge D. Brooks Smith, addressed the nature of independent review in actual malice cases and the state of mind that plaintiffs who are public officials and public figures must show in cases alleging defamation by implication.

Ultimately, the court held that such plaintiffs must establish through clear and convincing evidence either that the defendant intended the defamatory implication or was reckless with respect to that implication – that is, the defendant “knew that the defamatory meaning was not just possible, but likely, and still made the statement despite [its] knowledge of that likelihood.” In this case, the court ruled, the plaintiff had failed to satisfy this constitutional burden.

The decision addressed the nature of independent review in actual malice cases and the state of mind that plaintiffs who are public officials and public figures must show in cases alleging defamation by implication.

Background

Throughout his tenure on the Virgin Islands Superior Court, Judge Leon A. Kendall criticized bail practices in the Virgin Islands, claiming that other judges violated criminal defendants' rights by requiring money bail. Consistent with his own views on the law governing bail, Judge Kendall routinely released defendants on personal recognizance or unsecured bonds.

The Virgin Islands Daily News and two of its reporters, Joy Blackburn and Joe Tsidulko, reported on some of his bail decisions and the fallout from those rulings. After one of the defendants that the Judge released on recognizance murdered a twelve-year-old girl and citizen groups responded by filing judicial complaints against him, Judge Kendall sued the

newspaper and both reporters, alleging that they defamed him in sixteen articles and one editorial.

At trial, the jury found in favor of one of the newspaper's reporters, but rendered a verdict against the Daily News and the other reporter. The presiding judge, however, granted the Daily News' motion for a directed verdict, ruling, among other things, that Judge Kendall had failed to prove actual malice by clear and convincing evidence. *See generally Kendall v. Daily News Publ'g Co.*, 53 V.I. 250, 2010 WL 2218633 (V.I. Super. Ct. May 27, 2010).

Judge Kendall appealed the directed verdict to the Virgin Islands Supreme Court, which affirmed the trial court's ruling in the first defamation decision that it had ever issued. *See Kendall v. Daily News Publ'g Co.*, 55 V.I. 781, 2011 WL 4434922 (V.I. 2011). In that decision, the Supreme Court held that Judge Kendall had not met his burden of establishing actual malice nor had he shown that the defendants intended the defamatory implications alleged in his complaint. (For a more complete description of the procedural history of the case, the trial, the trial court's directed

verdict, and the Virgin Islands Supreme Court's decision, please see the April 2010, June 2010, and October 2011 issues of *MLRC MediaLawLetter*.)

Judge Kendall petitioned the Third Circuit for certiorari, asking it to consider several aspects of the Supreme Court's ruling concerning statements in three sets of articles: (1) articles reporting on Daniel Castillo, the criminal defendant who had murdered a young girl soon after Judge Kendall released him; (2) an article reporting on Ashley Williams, whom Judge Kendall did not remand into custody following his conviction for first-degree rape and who prompted a lengthy standoff with police when he later failed to report to prison and threatened to blow up his house; and (3) an article reporting on Judge Kendall's announcement that he was retiring from the bench.

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In April 2012, the Court of Appeals granted Judge Kendall's petition and agreed to consider two defamation issues: "(1) whether the Virgin Islands Supreme Court correctly applied independent appellate review for actual-malice determinations in public-figure libel suits," and "(2) what the appropriate actual-malice standard is in defamation-by-implication cases." (The court also agreed to consider whether the Justices of the Virgin Islands Supreme Court erred in failing to recuse themselves from Judge Kendall's appeal, but ultimately did not address the merits of that decision because any alleged error was harmless.)

Independent Review

The Third Circuit began its discussion of the defamation issues by explaining the "two -step process" for conducting independent review under [*Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 \(1989\)](#). First, the appellate court "determines what credibility determinations the jury must have made" by "discarding the evidence or testimony that the 'jury must have rejected' on the basis of 'the trial court's instructions, the jury's answers to . . . special interrogatories, and an understanding of those facts not in dispute.'" The court reviews these credibility determinations under the clearly erroneous standard. Second, any evidence that has not been discarded is "weighed 'alongside the undisputed evidence' to determine if the defendant acted with actual malice."

The Court of Appeals ruled that the Virgin Islands Supreme Court erred because it did not "analyze what credibility determinations the jury must have made" and did not "express the need to defer to the credibility determinations of the jury." Nevertheless, as is detailed below, the Court ruled that the Supreme Court correctly concluded that Judge Kendall had failed to meet his burden of showing that the articles at issue were published with actual malice.

Defamation by Implication

The Third Circuit began its analysis of the appropriate state of mind standard in implication cases by laying out the problem: In public official and public figure defamation

cases, the plaintiff must prove actual malice, which has two elements, "a 'falsity' element and a 'communicative intent' element." As the court explained, the Constitution mandates a specific state of mind with respect to both the falsity of a statement and that statement's meaning. The falsity element is addressed by the traditional actual malice standard – i.e., knowledge of falsity or reckless disregard for the truth. On the other hand, according to the court, the "communicative intent" element requires a showing of "improper motive" – i.e., "the intent or purpose" to defame. The distinction between these two elements is significant in cases involving allegedly defamatory implications.

In an "ordinary" defamation case, "the alleged defamatory statement has only a defamatory meaning," but in an implication case the statement "has two possible meanings, one that is defamatory and one that is not." In the ordinary defamation case, the communicative intent element is straightforward: Because the statement at issue has only one meaning, the statement itself "show[s] that its publisher knew it was defamatory." As a result, according to the Third Circuit, the plaintiff must meet only the traditional actual malice standard.

In contrast, in implication cases, "known falsity alone is inadequate to establish an intent to defame." And, the requirement that a plaintiff prove the "falsity element" of actual malice offers little protection because it is possible that a

defendant might know that something is false, but not have realized that his statements were capable of conveying that false meaning. Consequently, the First Amendment requires a plaintiff to make a separate showing that "establishes defendants' intent to communicate the defamatory meaning." The Third Circuit held that this showing can be made "by demonstrating that the defendant either intended to communicate the defamatory meaning or knew of the defamatory meaning and was reckless in regard to it."

According to the court, "mere knowledge of the defamatory meaning of a statement that also has a non-defamatory meaning cannot be enough." If knowledge alone were sufficient, "actual malice could be found no matter how unlikely it is that a listener would interpret the statement as having the defamatory meaning" – a standard that would run counter to the broad protections afforded to speech.

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**In implication cases,
"known falsity alone is
inadequate to establish
an intent to defame."**

(Continued from page 27)

Citing a string of Supreme Court decisions including *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *St. Amant v. Thompson*, 390 U.S. 727 (1968), and *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), the court explained that “[r]ecklessness is . . . the outer limit of actual malice, which means that the communicative-intent element of actual malice in defamation-by-implication cases can be satisfied by reckless disregard for the defamatory meaning of a statement.” The Third Circuit explained that recklessness “requires that the defendants knew that the defamatory meaning was not just possible, but likely, and still made the statement despite their knowledge of that likelihood.”

The Third Circuit’s Analysis

The court then conducted its own independent review of the trial record to determine whether Judge Kendall had met his burden of establishing actual malice with respect to each of the three sets of statements by clear and convincing evidence.

The Daniel Castillo Statements – Judge Kendall alleged that several Daily News reports implied that he knew Castillo had a violent criminal history when he released Castillo on his own recognizance. There was no dispute that Castillo had a history of violence when he appeared before Judge Kendall on domestic violence charges. Rather, Judge Kendall claimed that this history was not presented to him at Castillo’s bail hearing. He based his defamation claim on Daily News statements that Castillo was released “despite his history of violence.” For example, in one article, the newspaper wrote that “Kendall found probable cause to charge Castillo but released him pending trial – despite Castillo’s history of violence including charges of rape, assault, and weapons violations.” The court explained that “[a]lthough this statement does not explicitly say that Judge Kendall released Castillo despite *knowing* of his history of violence, Judge Kendall contends that this is the implication the defendants intended readers to understand.”

In support of this contention, Judge Kendall made two arguments, both of which the court rejected. First, he argued that the court should disregard the testimony of the reporter who wrote the articles and told the jury that she intended to

convey that Castillo “had a history of violence and Judge Kendall did choose to release him.” The court agreed that the jury “must have” disbelieved this testimony, but, consistent with prior Supreme Court precedent, it held that the “[m]ere disbelief of a defendant’s statement ordinarily is insufficient to establish malice.”

Second, Judge Kendall argued that he had met the “communicative intent” element because the reporter covered community protests about Judge Kendall after Castillo was charged with the girl’s murder. According to Judge Kendall, the reporter therefore was aware of how the public interpreted her prior reporting, but nevertheless continued to publish the same statement about Castillo’s history of violence.

The Third Circuit disagreed, noting that the “communicative intent” inquiry is subjective and requires “some evidence showing, directly or circumstantially, that the

defendants themselves understood the potential defamatory meaning of their statement.” Here, Judge Kendall had offered no direct evidence that the defendants knew of the allegedly defamatory meaning. Likewise, the coverage of the protests did not provide circumstantial evidence of the defendants’ state of mind. As the court noted, the Castillo story “was covered by several news outlets, which makes it impossible to know whether the protests were caused or informed by the defendants’ statements.”

Moreover, at trial, the protesters did not testify that the Daily News was the source of their information. Consequently, there was no circumstantial evidence, let alone clear and convincing evidence, that the reporter was aware of the alleged defamatory implication.

The Ashley Williams Statement – The court next turned its attention to an article that reported on the lengthy police standoff that ensued when Williams failed to report to prison, his threat to blow himself up, and the subsequent evacuation of his neighborhood. Judge Kendall complained that in that article the Daily News falsely reported he had allowed Williams to “spend the weekend in the community unsupervised” following his rape conviction. According to Judge Kendall, he actually had ordered Williams to be placed under house arrest. The Third Circuit explained that this was “an ordinary defamatory statement rather than one by

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The Third Circuit held that the Virgin Islands Supreme Court did not err in ruling that Judge Kendall had failed to meet his constitutional burden of proving actual malice.

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implication,” and Judge Kendall therefore only was required to show knowledge of falsity or reckless disregard of the truth.

Judge Kendall did not offer any direct evidence that the reporter knew the statement at issue was false. Instead, he argued that the jury must have found from the reporter’s testimony that she “fabricated” the statement that Williams was released “unsupervised” because she purportedly admitted that she did not have a source for that statement.

The court again disagreed with Judge Kendall after carefully evaluating the reporter’s testimony and the undisputed record. It was undisputed that following Williams’ conviction, two prosecutors told the reporter that “Judge Kendall sent Williams ‘home.’” It also was undisputed that the reporter was at the scene during Williams’ standoff with police. The reporter’s trial testimony showed that none of the officers at the scene told her Williams had been placed under house arrest. The court ruled that the reporter’s “conclusion that Williams was unsupervised [was] . . . reasonably derived from her observations at the scene and her knowledge that he was sent ‘home.’” Judge Kendall thus could not establish that her reporting was fabricated.

The Report on Judge Kendall’s Retirement – Judge Kendall claimed that he was defamed by a subtitle in the headline of the Daily News’ report on his retirement, which stated that the judicial conduct complaints filed against him were “still pending.” According to Judge Kendall, this statement was false because a federal district court had enjoined the commission in charge of disciplining judges

from proceeding against him. The Court of Appeals explained that this final claim related to an “ordinary defamatory statement” and thus required Judge Kendall to prove knowing falsity or reckless disregard for the truth.

On appeal, Judge Kendall argued that he had established actual malice because the jury must have disbelieved the author’s testimony about the headline’s subtitle, and the article itself reported that the commission’s proceedings had been enjoined and thus could no longer have been “pending.” The Third Circuit agreed that the jury must have discredited the testimony. Nevertheless, the court did not defer to “the jury’s possible conclusion that the article did not support the subtitle because that conclusion requires an inference from the text of the article, which we are free to review independently.” The court again noted that the mere disbelief of a reporter’s testimony is insufficient to establish actual malice and concluded that the article itself reflected the newspaper’s belief that the judicial complaints were still pending.

Conclusion

The Third Circuit held that the Virgin Islands Supreme Court did not err in ruling that Judge Kendall had failed to meet his constitutional burden of proving actual malice.

Michael D. Sullivan and Michael Berry of Levine Sullivan Koch & Schulz, LLP represented the defendants, together with Kevin Rames of the Law Offices of K.A. Rames, P.C. Plaintiff was represented by Howard M. Cooper, Julie Green, and Suzanne M. Elovecky of Todd & Weld LLP.

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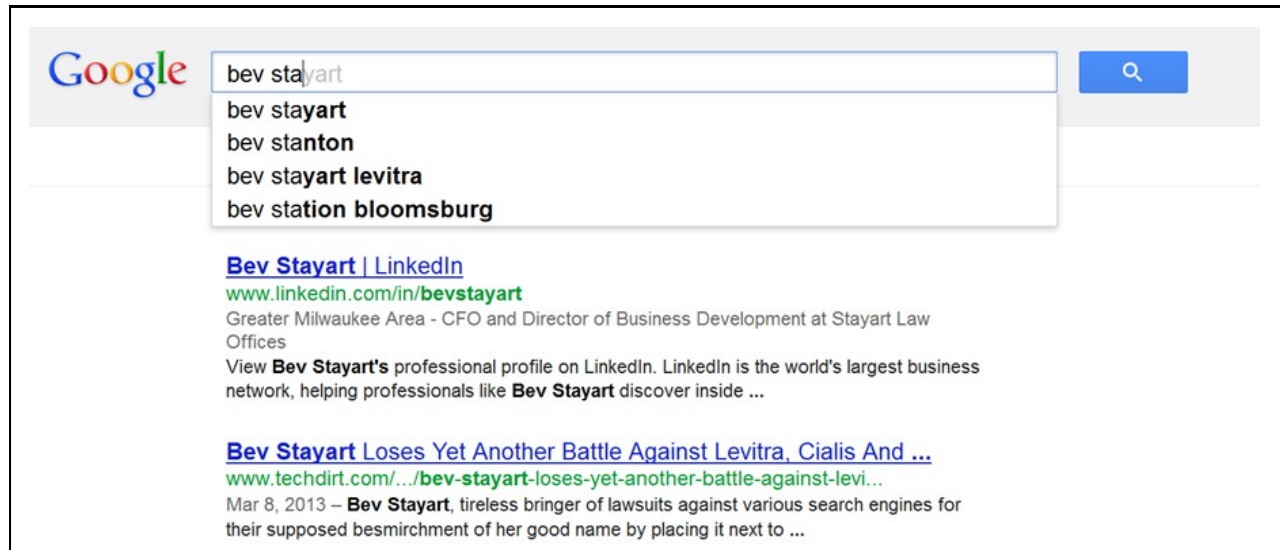
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Seventh Circuit Affirms Dismissal of Misappropriation Suit Over Google Suggested Search Result



The Seventh Circuit this month affirmed dismissal of a misappropriation claim against Google by a plaintiff who complained that Google’s suggested search result for her name linked her to the drug Levitra, and sponsored links triggered by her name show advertisements for erectile dysfunction drugs. *Stayart v. Google*, No. 11-3012 (7th Cir. March 6, 2013) (Flaum, Williams, Tinder, JJ.). The Court held that the claim was barred under the public interest exception to the Wisconsin misappropriation statute. Moreover, the use of plaintiff’s name was merely incidental and therefore not actionable.

The plaintiff Beverly Stayart has doggedly – albeit unsuccessfully – sued other search engines over search results of her name. More than two years ago, the Seventh Circuit affirmed dismissal of a Lanham Act suit against Yahoo! *Stayart v. Yahoo! Inc.*, 623 F.3d 436 (7th Cir. 2010) (Manion, Williams, Darrah, JJ.) (affirming dismissal of Lanham Act claim because plaintiff had no commercial interest in her name).

The instant suit was filed in April 2010. Plaintiff alleged that Google violated Wisconsin misappropriation law because a search of the name “Bev Stayart” yields a suggested search term of “Bev Stayart levitra” and sponsored links for Levitra and other drugs. Google Suggest is an automated tool that recommends additional search queries when a user begins to type descriptive words or phrases into the search engine.

Affirming dismissal, the Seventh Circuit held that the search term “bev stayart levitra” is a matter of public interest primarily because Stayart made it one through her litigations. The issue is recounted in a variety of court decisions and documents “and on that basis the search result is a matter of public interest.” As the Court explained, “It follows that if court documents warrant the public interest exception, the search providers and indexes that lead the public to those documents or that capture key terms related to them are likewise entitled to that exception.” Moreover the public interest exception applied even if Google was primarily interested in making a profit.

Finally, plaintiff’s claim was barred by the incidental use exception to Wisconsin’s misappropriation law. The Court found that nothing in plaintiff’s complaint suggested that the connection between her name and Google’s search business was “substantial rather than incidental.”

Google was represented by Jennifer L. Gregor and James D. Peterson, Godfrey & Kahn SC, Madison, WI. Plaintiff was represented by Gregory Stayart, Elkhorn, WI.

Texas Libel Defendants Awarded Nearly \$200,000 in Attorney's Fees in Anti-Slapp Motion Win

By Chip Babcock

Three defendants were awarded nearly \$200,000 in attorney's fees after they prevailed on their motions to dismiss under the Texas Citizens Participation Act commonly referred to as the Anti-SLAPP statute. [*Cruz v. Burnt Orange Report, et al.*](#), No. 12-09275 (Tex. Dist. March 22, 2013).

Judge Jim Jordan of Dallas' 160 District Court granted all of the fees requested and made an important ruling for pro bono defendants.

The Plaintiff, Baltasar Cruz, argued that since two of the defendants were being represented on a pro bono basis by the law firm of Jackson Walker attorney's fees were not permitted because of language in the statute that suggested the fees had to be "incurred." The Burnt Orange Report, a

political blog based in Austin, argued that the statute only required that expenses be incurred, but that, in any event, the "justice and equity" language in the statute meant that Texas courts were authorized to follow federal courts which allow fees for pro bono plaintiffs under the federal Equal Access to Justice Act on public policy grounds. This is an important ruling to establish the right for pro bono representation under the statute. The attorney's fees question took up three hearings over the course of several months.

Chip Babcock, Nancy Hamilton and Audra Welter of Jackson Walker represented the Burnt Orange Report and its owner, Karl Thomas Musselman and editor, Katherine Haenschen. The other defendant, James Van Sickle was represented by Melissa Bellan of Buchanan & Bellan.

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7th Circuit Affirms Dismissal of Claims Against Legal Research Website and Search Engines

Sites Link to Case Filings and Rulings

By Steve Mandell, Steve Baron, and Elizabeth Morris

The Seventh Circuit recently affirmed a district court's dismissal of a plaintiff's suit which sought to "delink" public records about his employment litigation. The Court found that the First Amendment barred such claims because defendants were republishing facts contained in lawfully obtained judicial records. Moreover, the speech was protected, even though defendants are for-profit entities. *Nieman v. VersusLaw, Inc.*, Case no. 12-2810 (7th Cir. March 19, 2013) (Posner, Williams, Sykes, JJ.).

Factual Background

VersusLaw publishes court cases online and provides them to customers for a fee. Internet search engines Google, Yahoo!, and Microsoft Bing generate "hits" for VersusLaw cases when a user conducts an online search. Plaintiff Jason Nieman sued the publisher, its president and the search engines after he concluded that potential employers could easily find past employment suits that he had filed and therefore would not hire him.

After defendants refused to delink Mr. Nieman's cases, Mr. Nieman sought administrative relief through the Equal Employment Opportunity Commission and the Illinois Department of Human Rights. When that failed, Mr. Nieman filed suit in Illinois state court. He alleged ten counts against the defendants, including violations of the Illinois Human Rights Act, the Civil Rights Act, the Lanham Act, and the RICO Act, commercial misappropriation, intentional interference with current and prospective economic advantage, and unjust enrichment and civil conspiracy.

The defendants removed the case to the Central District of Illinois. *Nieman v. VersusLaw, Inc.*, No. 3:12-cv-3104 (C.D. Ill.). The defendants then separately moved for dismissal;

Yahoo! and Microsoft also moved for judgment on the pleadings. Defendants argued that: (1) the First Amendment barred recovery because Mr. Nieman's court cases were part of the public record; (2) Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, also prevented recovery because the defendants only provided the content and did not develop it; and (3) Mr. Nieman failed to state a claim.

District Court Rulings

On June 13, 2012, Magistrate Judge David Bernthal issued a report and recommendation to dismiss the case in its entirety because no liability exists when public judicial records are maintained or reproduced. The report and recommendation also stated that defendants were not liable under the CDA because "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230 (c) (1).

On August 3, 2012, District Judge Sue E. Myerscough adopted the report and recommendation in a separate opinion and dismissed the complaint. The district court focused more on Mr. Nieman's failure to state any of his claims. Nonetheless, the district court also held that the First Amendment created a privilege to publish information in the public record, even when those facts involve a private figure. Repleading would therefore be futile.

In addition, the district court agreed that the CDA would preclude relief. The opinion, however, left open whether the CDA would reach criminal and intellectual property claims. See 47 U.S.C. § 230(e)(1), (2) (stating that the CDA should not "be construed to (1) impair the enforcement of any

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The Court held that the First Amendment permits the publication of facts—including otherwise private information—found in lawfully-obtained judicial records.

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Federal criminal statute or (2) limit or expand any law pertaining to intellectual property”). For more on the district court opinions, *see* Steve Mandell, Steve Baron, & Elizabeth Morris, *1st Amendment-Section 230 Bar Claims Against Legal Research Website and Search Engines*, MLRC MediaLawLetter, Aug. 25, 2012, at 40-42.

Seventh Circuit Appeal

On February 25, 2013, the Seventh Circuit affirmed the district court’s decision in an opinion written by Judge Richard Posner. The short opinion concentrated solely on the First Amendment issue and did not address the CDA.

The Court held that the First Amendment permits the publication of facts—including otherwise private information—found in lawfully-obtained judicial records. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Judicial opinions “belong to the public, which underwrites the judicial system that produces them,” and not to individual litigants. *Pepsico, Inc. v. Redmond*, 46 F.3d 29, 31 (7th Cir. 1995). The result does not change simply because defendants provide the speech “in a form that is ‘sold’ for profit” either; First Amendment protections still apply. *See Va. State Bd. Of Pharm. V. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). Therefore, because Mr. Nieman based his case upon the republication of documents in the public record, the First Amendment precluded recovery. As a result, the Court concluded that none of the other arguments needed to be addressed.

Steven Mandell, Steven Baron, and Elizabeth Morris of Mandell Menkes LLC, Chicago represented VersusLaw, Inc. and Joseph Acton. Google Inc. was represented by Jade Lambert of Perkins Coie LLP, Chicago. Yahoo!, Inc. and Microsoft Corporation were represented by Lynn Thorpe of Gonzalez Saggio & Harlan LLC, Chicago and Peggy Miller of Gonzalez Saggio & Harlan LLC, New York. Jason Nieman is a pro se litigant from Springfield, Illinois.



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Dozens of Civil Rights-Era Files Will Be Released In Settlement of D.C. FOIA Case

By Christine N. Walz,

Charles D. Tobin and David M. Giles

In a significant victory for advocates of government transparency, the FBI has agreed to release records documenting the work of photographer Ernest Withers as an informant in Memphis during the civil rights era. The settlement, believed to be the first of its kind involving a civil rights-era informant, is the culmination of a nearly two-and-a-half year long FOIA lawsuit in a Washington, D.C., federal court case, *Memphis Publishing Company v. Federal Bureau of Investigation*.

Withers was the most well-known photographer from the era, creating some of the iconic images of the Civil Rights Movement through the trust and unparalleled access the leadership gave him. After Withers died in 2007, the *Commercial Appeal* filed a FOIA request for his FBI file. Documents the FBI released in response to this request confirmed what the *Commercial Appeal's* reporter, Marc Perrusquia, had already determined through intrepid reporting: that as Withers was earning the confidence of the movement's leadership that gave him special access, he also was reporting their plans to federal officials.

Initially, despite having released documents referencing Withers as confidential informant number "ME-338-R," the FBI refused to acknowledge that Withers was a paid

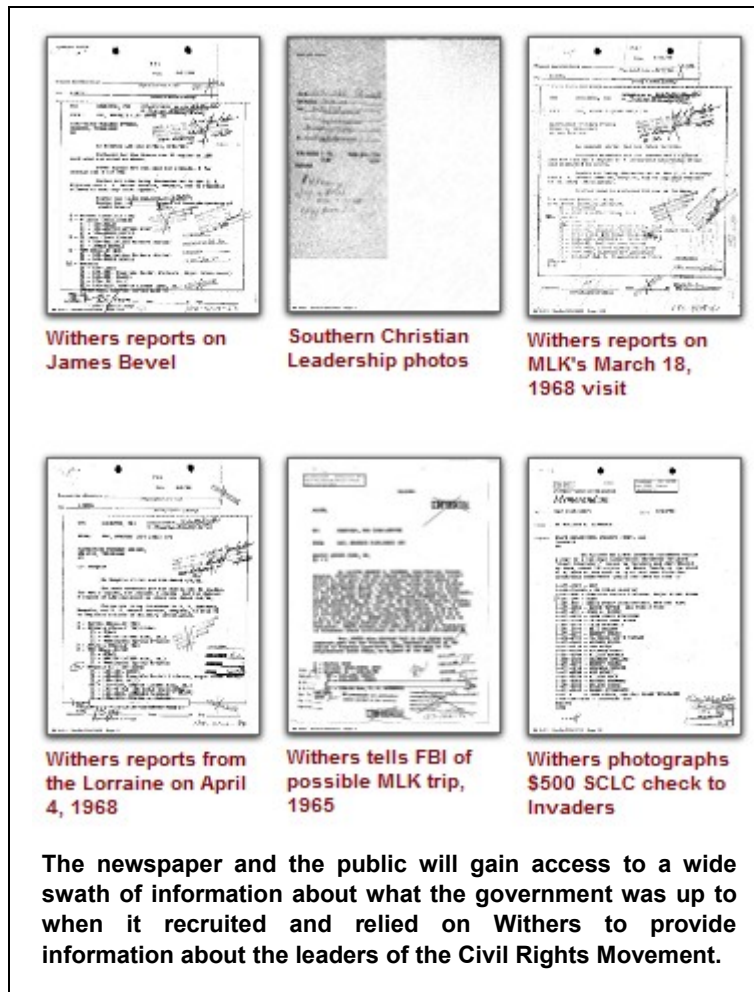
informant. Relying on a rarely-invoked provision of the Freedom of Information Act, the FBI opted to, under these circumstances, treat Withers' informant records as "not subject to" the Freedom of Information Act.

It was not until a year ago, when a federal judge in Washington D.C. in the newspaper's FOIA case ruled that the FBI could no longer deny Withers' role as a confidential informant, that the FBI released any records. Last fall, despite the Court's ruling and their decision to release a few relevant records, the FBI continued to fight the newspaper's efforts to open Withers' full file.

After a series of rulings favorable to the newspaper, U.S. District Court Judge Amy Berman Jackson reminded the bureau in open court that, "to protect the information, the Government [would] have to establish in this courtroom in 2012 that when the FBI spied on Reverend Dr. Martin Luther King 50 years ago the 'information was compiled for law enforcement purposes' 'in the course of a criminal investigation' or a

lawful national security investigation." She further admonished the FBI about its reliance on the law enforcement exemptions to withhold historical documents and questioned whether "the United States of America today, under the leadership of this Administration, this Attorney General, this Department of Justice and this FBI is fully committed to the course of litigating the questions that need to be litigated to

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establish the availability of the exemption..."

At Judge Jackson's urging, the parties agreed to non-binding mediation. These settlement discussions produced an unprecedented and creative resolution to the FOIA lawsuit. Under the settlement, over the next two years, the National Archives and Records Administration (NARA) will release portions of 70 archived FBI investigative files in which Withers participated as an informant, and which contain copies of the records from the FBI's informant file. Those 70 cases include the FBI's investigations of Dr. Martin Luther King Jr., the Southern Christian Leadership Conference, the NAACP, and the black power and peace movements between

1958 and 1976. The FBI also has agreed to pay the newspaper \$186,000 in legal fees.

The compromise allows the FBI to protect the integrity of its informant program by not turning over the discrete informant file intact. At the same time, the NARA release opens up large portions of the same records. In the end, the newspaper and the public will gain access to a wide swath of information about what the government was up to when it recruited and relied on Withers to provide information about the leaders of the Civil Rights Movement.

Christine N. Walz and Charles D. Tobin with Holland & Knight LLP in Washington D.C., along with David M. Giles, Deputy General Counsel, The E.W. Scripps Co. in Cincinnati, represented the Commercial Appeal and its reporter.

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California Federal Judge Strikes Down Controversial NSL Gag Orders

By Marc Fuller

A federal district court in San Francisco recently struck down “gag-order” provisions of a controversial investigative tool commonly used by the FBI to obtain information about users of email and social networking services. On March 14, 2013, Judge Susan Illston of the United States District Court for the Northern District of California held that the nondisclosure requirements that virtually always accompany National Security Letters violate the First Amendment and enjoined the government from issuing them. [*See In re National Security Letter*](#), No. 11-02173, 2013 WL 1095417 (N.D. Cal. March 14, 2013). Her decision, which is stayed pending a likely appeal to the Ninth Circuit, conflicts with a 2008 decision from the Second Circuit.

Background

National Security Letters, or NSLs, are a form of administrative subpoena that allow the federal government to obtain various types of business records for use in terrorism or counterintelligence investigations. The authority to issue these requests is found in various statutes, which cover different types of records and industries. For example, under the Electronic Communications Privacy Act, the government may request certain non-content “subscriber” information, including names, addresses, and billing records of users of wire or electronic communications services (such as email or messaging services). *See* 18 U.S.C. § 2709. Other NSL statutes allow the government to obtain financial records and customer information from banks, insurance companies, and credit-reporting agencies. *See, e.g.*, 12 U.S.C. § 3414(a)(5) (Right to Financial Privacy Act); 15 U.S.C. § 1681u(a) (Fair Credit Report Act).

The FBI’s reliance on NSLs has become routine. According to the Department of Justice, between 2003 and 2006 the FBI issued approximately 200,000 NSLs, and it issued 16,511 in 2012. But despite their frequent use, NSLs are shrouded in secrecy as result of the strict nondisclosure requirements that apply to them. If the FBI Director or his designee certifies that “there may be a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation,

interference with diplomatic relations, or danger to the life or physical safety of any person,” an NSL recipient may not disclose to anyone, except an attorney, that the FBI has sought or obtained access to the records. 18 U.S.C. § 2709(c) (1). According to the DOJ, approximately 97% of NSLs are accompanied by a nondisclosure certification. (Earlier this month, Google began publicly reporting information relating to its receipt of NSLs, but was able to state only that it received between 0 and 999 NSLs annually, affecting between 1,000 and 1,999 user accounts per year.)

As originally enacted, NSL statutes prohibited the recipient from disclosing the fact or scope of the request to anyone (even an attorney), effectively foreclosing a recipient’s ability to contest the substance of the request or the nondisclosure provisions in court. But after those provisions were found unconstitutional, *see Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), Congress amended the NSL statutes to permit limited judicial review. *See* 18 U.S.C. § 3511(a)-(b). Under the current provisions, if a recipient brings a challenge within one year after an NSL is issued, a court may modify or set aside the nondisclosure requirement if it finds that “there is no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.” *Id.* § 3511(b)(2). But if a high-ranking DOJ official certifies that disclosure is necessary, “such certification shall be treated as conclusive unless the court finds that the certification was made in bad faith.” *Id.*

Second Circuit’s *Doe v. Mukasey* Decision

Judge Illston’s recent decision was not the first to consider the constitutionality of NSL nondisclosure provisions. In 2007, Judge Victor Marrero of the Southern District of New York held that the provisions were an unconstitutional prior restraint and content-based restriction and that the circumscribed judicial review violated separation of powers principles. *See Doe v. Gonzales*, 500 F. Supp. 2d 379, 406-13 (S.D.N.Y. 2007).

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The Second Circuit affirmed in part and reversed in part. See *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). Applying *Freedman v. Maryland*, 380 U.S. 51 (1965), which sets forth procedural standards for government licensing schemes, the court held that the constitutional deficiencies of the nondisclosure provisions as written could be remedied by requiring the government to inform NSL recipients of their right to object, and if a recipient did object, the government would be required to initiate judicial review within 30 days, with that review concluding within 60 days. *Id.* at 879.

The Second Circuit also agreed with the government that the constitutional problems with the judicial review provisions could be addressed, at least in part, by adopting the government's voluntary concessions that (1) nondisclosure would be required only when the FBI official certifies that disclosure may result in an enumerated harm related to a terrorism or counterintelligence investigation (as opposed, for example, to a general risk of "danger to the physical safety of any person"), (2) a court may set aside or modify a nondisclosure requirement unless there is "some reasonable likelihood" that the enumerated harm will occur (as opposed to precluding court action unless there is "no reason to believe" that the harm will occur), and (3) the government will bear the burden to establish the need for nondisclosure. *Id.* at 874-76. Moreover, the Second Circuit invalidated the statute's requirement that courts treat the government's proffer as "conclusive," finding that such deference deprived NSL recipients of meaningful judicial review. *Id.* at 882.

Judge Illston's Decision

Judge Illston essentially agreed with the Second Circuit's diagnosis of the constitutional infirmities in the NSL statutes as written. Most notably, she held that the NSL nondisclosure provisions were not a "classic prior restraint" or a "typical" content-based speech restriction. *In re National Security Letter*, 2013 WL 1095417, at *6. And she agreed that the procedural standards of *Freedman v. Maryland*, not the "extraordinarily rigorous" *Pentagon Papers* test, applied. *Id.* Judge Illston disagreed, however, with the Second Circuit's prescription of relying on the government's voluntary concessions to cure these constitutional infirmities.

Noting that the government had not enacted any regulations to formally adopt those concessions and that it stated only in oral argument that it was, in fact, complying with the *Mukasey* concessions on a nationwide basis, Judge Illston held that such concessions could not save the NSL statutes from the petitioner's facial challenge. *Id.* at *8. Accordingly, Judge Illston held that, as written, the NSL nondisclosure provisions failed the *Freeman v. Maryland* test and were not sufficiently narrowly tailored to serve the admittedly compelling interest of national security. *Id.* at 10. Following Judge Marrero and the Second Circuit, Judge Illston also invalidated the statutory requirement that courts treat the government's certification in support of nondisclosure as "conclusive." *Id.* at *11-12.

Judge Illston further found that the nondisclosure provisions were not severable from the substantive NSL statute at issue in the case. *Id.* at *15. She therefore enjoined the government from issuing NSLs under Section 2709(c) or enforcing the nondisclosure provisions in any other case. *Id.* at *16. Recognizing the "significant constitutional and national security issues at stake," however, she stayed her ruling pending an anticipated appeal to the Ninth Circuit. *Id.*

Outlook

In light of the stay of Judge Illston's ruling and the likely appeal, NSL recipients are not yet able to identify themselves or participate meaningfully in public discourse about the requests or their responses. But her ruling sets the stage for a potential split between the Ninth and Second Circuits on the issue of whether the constitutionally dubious NSL nondisclosure and judicial review provisions can be saved by the government's voluntary, *Mukasey*-style concessions. And the agreement of both courts that the provisions, as written, raise serious constitutional concerns highlights the need for legislative reform. In the near term, Judge Illston's ruling may encourage more electronic communications service providers and other NSL recipients to challenge the NSLs and accompanying nondisclosure provisions, particularly in the Northern District of California, where many of them reside.

Marc Fuller is counsel at Vinson & Elkins in Dallas. Petitioners were represented by Cindy Cohn of the Electronic Frontier Foundation and Aaron Dyer of Pillsbury Winthrop Shaw Pittman in Los Angeles. The government was represented by Steven Yale Bressler of the United States Department of Justice in Washington, D.C.

Canadian Supreme Court Upholds Hate Speech Law

By Brian MacLeod Rogers

In [Saskatchewan \(Human Rights Commission\) v. Whatcott](#), 2013 SCC 11, the Supreme Court of Canada unanimously upheld a provincial human rights code provision prohibiting “hate speech” against a protected group.

The case arose from flyers against homosexuals – one was headed “Keep Homosexuality Out Of Saskatoon’s Public Schools!” – distributed by a fundamentalist Christian minister and his group, “Christian Truth Activists”, in opposition to teaching about homosexuality in the public school system. Over the past decade, there has been growing controversy in Canada over restrictions of free expression through human rights laws, and these laws have come under close scrutiny, primarily through a series of federal cases involving Internet hate speech. A few complaints under provincial and federal laws were even made against some media, including the national news magazine Macleans, by Islamic groups over their coverage. None of the complaints against the media ever went passed the first stages, but the controversy over controlling hate speech has continued. In fact, the federal government has taken steps to remove the prohibition from the Canadian Human Rights Code, and the Province of Saskatchewan, where the *Whatcott* case arose, had already stopped enforcing part of the impugned statute, based on an earlier provincial appeal court ruling.

The case attracted 21 interveners from all sides of the spectrum and was heard in October 2011. The delay in the ruling and an earlier dissent by the now Chief Justice in the first Charter ruling on the issue (*Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892) had given rise to much speculation over what the Court might do. In the 1990 case, the federal legislation survived a narrow 4 to 3 ruling by the Court that enabled it to be actively used since then, principally against Holocaust deniers and anti-Semitic websites.

This time around, Chief Justice Beverley McLachlin sided with the rest of the Court in an unanimous judgment written

by Justice Marshall Rothstein, but the test for what constitutes offensive speech was clarified and strengthened, and the Court struck down part of the law as unconstitutional that banned expression that merely “ridicules, belittles or otherwise affronts the dignity of those” in a group that is protected under the legislation.

In redefining “hatred”, the Court clarified its earlier test and imposed three principles for applying hate speech prohibitions: (1) the test is objective – “whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred” – and not a subjective one; (2) only extreme manifestations amounting to “detestation” and “vilification” arise to the level of “abhorrence, delegitimization and rejection” that is sufficiently harmful; and (3) the analysis must focus on the effect of the expression, not its author’s

intention. The Court was clearly focused on a concern that democracy could be undermined through exposing a protected group to hatred:

Hate speech is, at its core, an effort to marginalize individuals based on their membership in a group. ... hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social

standing and acceptance within society. When people are vilified as blameworthy or undeserving, it is easier to justify discriminatory treatment.

Hate speech, therefore, rises beyond causing emotional distress to individual group members. It can have a societal impact. If a group of people are considered inferior, sub-human, or lawless, it is easier to justify denying the group and its members equal rights or status. ... Hate speech lays the ground work for later, broad attacks on

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The Court was clearly focused on a concern that democracy could be undermined through exposing a protected group to hatred.

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vulnerable groups. These attacks can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, genocide.

Hate propaganda ... impacts on that group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy. Indeed, a particularly insidious aspect of hate speech is that it acts to cut off any path of reply by the group under attack.

Against a backdrop of references to fascist Italy and Nazi Germany, and more recent examples in Yugoslavia, Cambodia, Rwanda, Darfur and Uganda, the Court rejected leaving regulation of hate speech to the "marketplace of ideas": "While hate speech may achieve the self-fulfillment

of the publisher, it does so by reducing the participation and self-fulfillment of individuals within the vulnerable group."

As well, attempting to control hate speech solely through criminal law would serve to "regulate only the most extreme forms of hate speech, advocating genocide or inciting a 'breach of the peace'." "In contrast, human rights legislation 'provides accessible and inexpensive access to justice' for disadvantaged victims to assert their right to dignity and equality."

In the end, the Court upheld the Saskatchewan Human Rights Commission's finding against two of the four impugned flyers and sanctioned the penalties against them, with compensation awards of \$2,500 and \$5,000, but the other two were deemed to fall short of the mark. Costs were awarded to the Commission against Rev. Whatcott for the entire proceedings.

Brian MacLeod Rogers is a barrister and solicitor in Toronto. A full list of counsel is available in the linked opinion.

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November 13, 2013
New York, NY

MLRC/NAA/NAB MEDIA LAW CONFERENCE

September 17-19, 2014
Reston, VA

Across the Pond: The Vanishing Freedom of the Press in the United Kingdom

John Wilkes Make Way for Hugh Grant And Max Mosley

By David Hooper

These are early days in the struggle to regulate the press in the United Kingdom and it is too early to predict the precise form such regulation will take. However, the hard-won freedoms achieved by the likes of John Wilkes in the eighteenth century seem to be being undermined by an opportunist political opposition combined in their hatred of the Murdoch press and a right of centre press which has likened the leader of the opposition to a cartoon figure in the TV show Wallace & Gromit and by politicians outraged at the press exposure of their flexible approach to parliamentary expenses which saw a number of them jailed and the majority held up to public ridicule.

In this endeavour this coterie was assisted by the lobbying group Hacked Off which has cynically exploited the scandals relating to phone-hacking and some of the more notorious libel cases where innocent persons wrongly suspected of involvement in murder cases were hounded by the tabloid press.

Hacked Off appears to be a front organisation paid for by a bunch of celebrities such as Hugh Grant, whose private life and sexual peccadilloes on the streets of California were slayed across the press; and sexual miscreants such as Max Mosley, whose Saturday afternoons with whips, prison uniforms and mock German accents were chronicled in the News of the World. Hacked Off has only disclosed one of its donors, the Rowntree Foundation, and has hitherto declined to come clean on the source of its funding. Its director is a hitherto unknown academic from a lesser university in Surrey. Their work is eloquently orchestrated by Hugh Tomlinson QC, the doyen of the claimant Bar.

This is not the place to examine in detail the provisions of the recognition criteria, but it is easy to see the hands of Hacked Off, who astonishingly were invited into the negotiating meeting to hammer out a press regulation deal by

the Leader of the Opposition in which the leading political parties eventually thrashed out a deal at 2.30 in the early hours. No representative of the media was present at the negotiations and the confection represented a triumph for Hacked Off.

When one goes through the various definitions that have found their way into the Royal Charter governing the press regulator and the Crime and Courts Bill, which is the legislation governing the exemplary damages cost provisions, one senses the triumph of the Hacked Off lobby. The definition of news-related material not surprisingly includes celebrity gossip and there are provisions which will enable

celebrities to make it clear that they do not welcome any publicity other than that presumably orchestrated by their publicity agents. The detail remains to be worked out, but the English law seems to be shifting closer to that of France and for there to be an incipient right to be left alone.

The implementation of the Leveson proposals was accelerated by the introduction of the Lord Puttnam amendment, which had effectively tacked them onto the Defamation Bill

where they really did not belong, with a

consequent threat to the implementation of that reform. The one salutary feature of this squalid deal is that the final reading of the Defamation Bill is scheduled for 16 April and it should become law in approximately its original form. There was a Parliamentary majority in favour of the Leveson proposals which had threatened to tack them onto any passing piece of legislation, hence the deal engineered by the political leaders, aided and abetted by Hacked Off.

The deal that was struck was broadly this. The Enterprise and Regulatory Reform Bill was amended to establish the Press Regulatory Board under a Royal Charter. A Royal Charter is a product of the Royal Prerogative where

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Lord Justice Leveson - click to access the Inquiry website.

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the Monarch exercises power on the advice of her Privy Council, which is an appointed body of senior politicians who operate outside the parliamentary process and tender advice to the Monarch. A Royal Charter was used to remove control of the Press Regulator from the hands of politicians and had inserted a provision that the law relating to the Regulator could not be changed without a majority of two thirds of both Houses of Parliament.

The wording of the Royal Charter and the changes to the Law relating to the award of exemplary damages and the awarding of legal costs bear all the hallmarks of compromise and swiftly drafted legislation on a matter of fundamental importance. The detail of these provisions is a matter for later when the changes have been fully agreed. What is striking is the width of the proposals.

Initially the proposals appeared to catch a very wide range of website operators by virtue of the definition of Publishers in Schedule 4 of the Charter. A Publisher would include a website including news-related material, whether or not related to a newspaper or magazine, if publication took place in the United Kingdom of is targeted primarily at an audience in the United Kingdom. Originally this applied whether or not the website was run for profit, but Hacked Off seemed to be backtracking on that. The criteria seemed to be whether the material is written by different authors and is to any extent subject to editorial control.

As one ploughs through the definition sections, one becomes aware of the catch-all objectives of Hacked Off. The aim seems to have been to exclude lone bloggers from the new law and, it would appear, special interest titles relating to pastimes, hobbies and trades. To this may be added not-for-profit organisations and possibly small (and almost by definition consequently less wicked) publishers. The key to these definitions seems to be politics rather than principle.

In an interesting article in Informm blog Carl Gardner has made the point that theoretically the legislation could catch American publications such as the New York Times, which could run the risk of adverse consequences in terms of exemplary damages and legal costs. Lord Lucas raised this point in the House of Lords. Lord MacNally, the Minister of Justice, made it clear that the Government was not trying to

regulate the New York Times or Le Monde, although there was nothing to prevent them from registering if they so wished. It is clear, however, that the terms of the Crime and Courts Bill would treat such foreign publishers as having a good reason for not being members of an approved regulator – and therefore in consequence not subject to the adverse consequences of not registering.

What is clear is that in addition to the potential burdens of exemplary damages and the award of costs, the media face an enormous administrative and consequentially financial burden. The Press Regulator will be paid for by the Press and it will spawn a large number of bodies to be staffed and paid for such as the recognition panel which will determine applications for recognition from regulators, the Main Recognition Board which is responsible for the conduct and management of the panel's business, which will include a Complaints Committee and a Standards and Compliance Committee.

There is a Recognition Appointments Panel, which appoints the Recognition Panel which itself oversees the main Recognition Board. In addition to this each paper will have to have a compliance department, which meets the requirements of the main Recognitions Board. Coupled to this will be the cost of the arbitration scheme which will be free to use for complainants with the risk of exemplary or aggravated damages as provided for in the Crimes and Courts Bill. These are

alarming financial burdens on a financially unhealthy industry. There will be a large number of officials paid for by the media telling the media how to run their businesses. There is a system of carrot and stick in relation to exemplary damages and legal costs provisions aimed at favouring those who join the Regulator.

The real question is whether or not the press will voluntarily sign up to the scheme. The Spectator and Private Eye have made it clear that they will not. Right of centre papers have been hostile from the start. Left of centre papers such as the Guardian and the Independent are having second thoughts. They may propose a system whereby the Press will have a year to propose its regulatory alternative. There is real risk that the Press simply will not sign up to the present proposals.

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The detail remains to be worked out, but the English law seems to be shifting closer to that of France and for there to be an incipient right to be left alone.

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The cost provisions are complex and aimed at encouraging the press to sign up with the Regulator and where possible to use arbitration. In such cases costs would not normally be awarded against a media defendant in court proceedings unless the court was satisfied that the issues could have been dealt with by arbitration or that it was just and equitable to award costs. Allowing the Court to decide on what is just and equitable seems to drive a coach and horses through this particular carrot offered to the media.

The position is little better when it comes to exemplary damages. Gill Phillips, General Counsel at the Guardian, has written a powerful piece in *Informm* that such a provision which singles out a particular type of defendant for special punitive treatment is unlikely to survive a challenge under Article 10 of the European Convention of Human Rights. The aim of the legislation is to exempt media defendants who are members of the approved regulator at the time of the relevant libel. However, the legislation appears to envisage awarding exemplary damages even against members of the approved regulator if they have shown what is thought to be reckless disregard for the claimant's rights and their conduct is such that the court feels the defendants should be punished for it and other remedies would be insufficient. Clearly this is intended for "outrageous cases" but it is a disincentive to register. It is also an incentive to claimant lawyers to allege outrageous behaviour as a matter of course.

The media is bound to be asking itself whether the regulatory route is worth the candle. It is worth reading the proposed exemplary damage clauses in the Crimes and Courts Bill to see which way the wind is blowing, remembering always that the regulator will have power to impose appropriate and proportionate sanctions including fines up to one per cent of turnover or £1 million of systematic breaches of the regulatory system.

In relation to exemplary damages the court will be directed to look at whether the internal compliance procedures of the medium defendant were of a satisfactory nature and the extent to which they had been complied with.

In addition to the potential burdens of exemplary damages and the award of costs, the media face an enormous administrative and consequentially financial burden.

The legislation states that while the amount of exemplary damages should be no more than the minimum necessary to punish the conduct complained of and must be proportionate to the seriousness of the conduct complained of, the court must have regard to deterring the defendant and others from similar conduct. The effect of such changes will not just be chilling but glacial and a charter for suppressing the investigative – even if on occasion tasteless or errant - press and a charter for miscreants and claimant lawyers.

It is worth remembering that those who libelled and harassed the wrongly accused suspects in murder cases were punished by six figure libel awards. Those who wrongly paid police officers for private information or hacked telephones are likely to face substantial prison sentences which will provide clear deterrents for their successors and proprietors. One does not need legislation to make illegal that which is already illegal.

The picture is therefore a bleak one. The unaccountable Hacked Off gang appears to be in the ascendant but they may have ensured that the press will not sign up with the approved regulator.

As things stand, there is much in the Royal Charter and Crimes and Courts Bill which goes even beyond the suggestions of Leveson. Leveson would have left the Editors Code in the hands of editors. Now it will be determined by the regulator. Third parties will now be able to make complaints about media content with the restraining adjectives relating to a threshold of substantial public interest having been significantly watered down. The recognition criteria required of media subscribing to the approved regulator are more severe than those proposed by Leveson. The regulator appears likely to have more control over the internal processes of the media than appeared likely under Leveson.

These are grim times for the British media, but the enemies of the media and the self-appointed guardians of the oppressed may have overreached themselves and are likely to have deterred the media from signing up with the approved regulator.

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French Court Orders Twitter to Disclose Identity of Users Who Posted Offensive Messages

By Jean-Frederic Gaultier and Clara Steinitz

On January 24, 2013, the President of the High Court of Paris ordered the US social networking platform Twitter to disclose the identity of some of its users who had published anti-Semitic, racist and homophobic posts ("tweets"). Tribunal de grande instance de Paris, interim order, matters nr. 13/50262 and 13/50276, UEJF and others vs. Twitter Inc. and Twitter France

A decision grounded on traditional French procedural rules resulted in an out-of-the-box decision for e-communication service providers.

Background

In October 2012, anti-Semitic *tweets* in French were posted on Twitter, along with the hash tags "*#unbonjuif*" (*#agoodjew*) and "*#un juif mort*" (*#adeadjew*). Twitter Inc., incorporated in California and operating the platform exclusively from the US, agreed to remove these *tweets* after the two associations UEJF (*French Jewish students union*) and AIPJ (*J'accuse!...International Action for Justice*) brought the messages to its attention.

UEJF and AIPJ then sued Twitter Inc. and its subsidiary Twitter France in interim proceedings to obtain disclosure of the identity of whoever set up the accounts used to spread anti-Semitic messages. Other associations then joined the proceedings, adding other racist and homophobic accounts to the list in relation to which personal data of the users were sought.

Whilst confirming that the French 2004 Confidence in the Digital Economy Act is not applicable to the matter, the Court upheld the request on grounds of general procedural law.

Data Protection Rules

Under Article 6-II of the 21 June 2004 Confidence in the Digital Economy Act and its implementing decree of 25 February 2011, providers of electronic communications services have an obligation to collect and keep personal data of the users posting content on their media and judicial authorities may request communication of such data from the

service providers. *See* Act n° 2004 -575 of 21 June 2004 for the Confidence in the Digital Economy and Decree n°2011 - 219 of 25 February 2011.

Considering the universality of e-communications services, the scope of the obligation is expressly limited to situations where the French Data Processing and Civil Liberties Act of 6 January 1978 is applicable. *See* Act n°78- 17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties.

This is the case when those collecting and holding the personal data are established in France. This is also the case where, although not established on French territory or in any other Member State of the European Union, they implement manual or automated data processing operations on the French territory. *See* Article 5, I, 2° of the 1978 Act. Such requirement may be fulfilled by the mere use of cookies, according to the EU working party on data protection in relation to search engines. *See* Opinion 1/2008 on data protection issues related to search engines adopted on 4 April 2008.

This being said, Twitter Inc. has neither offices nor employees in France. Twitter France is a commercial agency with marketing activities. For the Paris Court, there was no evidence suggesting that Twitter France is involved in the technical operation of the social networking platform or that Twitter Inc. processes the data from the French territory.

It thus comes as no surprise that the Paris Court considered the 1978 and 2004 Acts not to be applicable in the present matter.

General Rule of French Civil Procedure

The terms of use of the Twitter network provide that users must comply with local laws with respect to "*online conduct and acceptable content*."

The applicants sustained that the local law applicable to the authors of the disputed *tweets* was French law, a fact that is not challenged by Twitter Inc. The solution was drawn from article 113-2 of French Criminal Code, according to which "*French Criminal law is applicable to all offences*

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committed within the territory of the French Republic. An offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory."

It follows from this argument that the litigious contents were posted from France, although the decision never expressly states so. (An alternative assumption would be that the Court considered the broadcast or availability on the French territory of the litigious posts as the constituent element committed in France. If the solution has been applied in the past for defamation matters, it is however likely that the Twitter companies would have challenged the argument and thereby make it part of the issues reported in the decision.)

Under French law, incitement to discrimination, hatred or violence against a person or group based on their religion, origins, sexual orientation is a criminal offence punishable by a term of imprisonment of one year and a fine of 45,000 euros. Articles 23 and 24 of 29 July 1881 Act on the Freedom of Press.

The applicants thus filed a claim under Article 145 of the Code of civil procedure, a usual route to collect evidence prior to litigation:

"If there is a legitimate reason to preserve or establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure."

The Court held identification of the authors of the anti-Semitic, racist and homophobic messages to be such legitimate reason and therefore ordered Twitter to provide the requested data within two weeks, under a daily fine of 1,000 euros after such period. The Court also ordered Twitter to "set up as part of the French platform" an "easily accessible and visible" notice and take down system that would allow users to alert the site to illegal content which notably constitute

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"apology for crimes against humanity and incitement to racial hatred."

The simplicity of the decision is uncommon in the environment of electronic communication and data protection and has a real potential for expansion. Beside incitement to discrimination, violence and hatred, it is applicable *mutatis mutandis* to all criminal offence committed via a social media platform such as defamation and insults. See Article 29 of 29 July 1881 Act on the Freedom of Press.

According to online information, the decision has neither been appealed nor implemented. Twitter would currently be discussing with the French government the setting up of an alert and notification system on the platform for messages of incitement to discrimination, hatred or violence against a person or group of persons.

This has a taste of *déjà vu*, looking back to November 2000 when Yahoo! was ordered by the President of the Paris High Court to set up a system to geo-block Nazi objects on the auction site for Internet users located in France. See Tribunal de grande instance de Paris, interim order, 20 November 2000, UEJF, LICRA, MRAP vs. Yahoo Inc. and Yahoo France.

The US company then sued in California federal court challenging the application of the French court order. In November 2001, the District Court in San Jose held that the French decision was incompatible with the freedom of expression protected by the First Amendment of the Constitution of the United States. The decision was overruled by the Court of Appeals for the 9th District, on 23 August 2004, for procedural reasons. In a decision on the merits dated 12 January 2006, the Ninth Circuit refused to extend application of the First Amendment to the French territory. As a sovereign state, France may prohibit the sale of certain objects on its territory. The US company Yahoo! Inc. has chosen to expand its activities abroad and has to agree to its responsibilities if not complying with local laws

Yet the US company had concomitantly and opportunely decided a strategic change for its auction platform, which turned into a paid access platform where sensitive objects had been banned. History repeats itself.

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Ethics Corner: Respectfully Submitted: the Duty to Cite Adverse Legal Authority

By Luther Munford and Kimberly Davis

The Rule and its Interpretation

The more a media law specialist knows, the more likely it is that what is known to the lawyer may not be known to opposing counsel or to the court. This was certainly true before the MLRC sold its 50-State Surveys to the public, and to some extent remains true today. So for the specialist the duty to cite adverse legal authority arises more often than it does for others.

To understand the duty to cite adverse legal authority, it helps to consider the reasons why the duty exists, the ways in which the duty has been interpreted, and the potential consequences for falling short of its requirements. When one of the consequences is being unfavorably compared to an ostrich, the duty merits special attention.

The Appearance, at the Very Least, of Justice

Peacekeeping through reasoned decisions. Courts offer reasoned opinions in the hope that they will both inspire respect from the parties and the public and also provides rules for future guidance. In those ways, they promote finality, which ends disputes. As Karl Llewellyn wrote in *The Bramble Bush*, the business of the law is the peaceful resolution of disputes.

But "reason" demands not only logic but also consistency. Flipping a coin will not do. Fundamental fairness requires that like cases be decided alike. To do that, courts need to know "the law" in each case. So the lawyer's duty to cite adverse legal authority arises out of the legal system's need, when the smoke of battle has cleared, to keep the peace through reasoned decisions.

Trustworthy advocacy. Judges want respect. They want to be wise. The parties cringe when a judge acts like he knows it all, but it might be said that the lawyer's duty is to make sure that the judge does in fact "know it all." Lawyers who help judges do that stand to win favor and trust. Honest citation shows respect for the court and so may advance the client's cause in a way even more fundamental than the customary courtesies, such as addressing the court as "your honor" or the tradition of "all rise."

**For the specialist the
duty to cite adverse
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The ABA rule prohibits an attorney from knowingly failing to disclose to the court "legal authority in the controlling jurisdiction known to the attorney to be directly adverse to the position of the client and not disclosed by opposing counsel." ABA Model Rule of Professional Conduct 3.3 (a) (2). See ABA, Annotated Model Rules of Professional Conduct 331 (7th ed. 2011).

Legal authority. Legal authority includes not only case law, but also statutes, regulations, or even ordinances. Courts may have an even greater need for authority not otherwise readily available. See *Dilallo v. Riding Safely Inc.*, 687 So.2d 353, 355 (Fla. Dist. Ct. App. 1997)(recent repeal of statute); Geoffrey C. Hazard et al, *The Law of Lawyering* § 29.11 (2012). A statement that is merely dicta might be outside the "authority" category, but an unpublished opinion probably is within it.

Controlling jurisdiction. It is the jurisdiction which controls, and not necessarily the authority. See Ronald D. Rotunda and John S. Dzienkowki, Legal Ethics § 3.3 -2(2013). For state law in state court, it means the decisions of the state's courts. For state law in federal court, it also means the decisions of the same district court or of the court of appeals. For federal law, the principles are reversed. Federal courts are bound by their own decisions while state courts are bound only by the U.S. Supreme Court.

Because the authority itself need not be controlling, comment "d" to the Restatement of the Law Governing Lawyers §111 says that even unpublished opinions must be cited. But surely this depends on the jurisdiction. While unpublished federal appellate opinions may be generally cited, Fed. R. App. P. 32.1, some unpublished state court opinions may not be, Ill. Sup. Ct. R. 23(e).

And when an argument goes outside the controlling jurisdiction, the duty of candor requires truthfulness. It is one thing to cite an on point case that is good law in another state. It is quite another to say, or to give the impression, that the

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weight of authority supports the argument when it does not. See Aaron S. Bayer, *The Duty of Candor*, National Law Journal (Dec. 1, 2008).

Directly adverse. This phrase has meant many things to many commentators.

For the purposes of bar discipline, it would most conservatively mean "indistinguishable." A 1949 ABA opinion by Henry Drinker attributes this meaning to "directly adverse" but then goes on to offer judge-centered interpretations which speak to the importance of not incurring the wrath of the judge. Thus Drinker and others have suggested such standards as:

- Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding a case?
- Would a reasonable judge properly feel that a lawyer who advanced as the law a proposition adverse to the undisclosed decision was lacking in candor and fairness to him?
- Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority? See ABA Formal Opinion 280 (June 1949).

In general, it may be said that the louder an advocate shouts "holy fiddlesticks" -- or its coarser equivalent -- when discovering the authority, the more likely it is that the authority should be cited. See Hazard § 29.11.

Timing. A 1984 ABA Opinion says that the duty is to disclose the authority promptly. It held that a plaintiff who defeated a motion to dismiss had an immediate duty to disclose to the court a new adverse decision, even though that decision might itself be appealed to a higher court. See ABA Informal Opinion No. 1505 (March 1984).

The Consequences of Less than Truth

Your client loses. The most common sanction is that the breach of duty loses the case. Either the court or the other side finds the authority and the errant advocate loses all credibility. Even worse, the court finds the authority after judgment and vacates the judgment because of "misconduct ... by an adverse party," i.e. you. See Restatement of the Law Governing Lawyers §111, comment e, reporter's note.

Here a flip side should be considered. While the ABA says that an advocate does not have to provide a "disinterested exposition" of the law, such an "exposition" is the kind of argument that will best persuade a court. To survey relevant decisions and show how the needle should be threaded in the case before the court tells "all" to a court that would like to know "all." See ABA Model Rule 3.3 Comment 2.

Verbal sanctions. While bar discipline for this offense is rare, judicial tongue lashing is not. The Maryland Court of Appeals dealt harshly with a county attorney's office that failed to cite a controlling decision which established liability for police dog bites. It ordered a state-wide review of dog-bite cases and required the attorney to give notice of the decision to judges and parties in those cases -- which included five others in which defense counsel had not mentioned the decision! *Massey v. Prince George's County*, 918 F.Supp. 905 (D. Md. 1996).

And then there is the Seventh Circuit. When mass tort plaintiffs' counsel failed to cite a controlling Seventh Circuit decision, Judge Richard Posner called out counsel by name and appended to the decision two photographs. One was an ostrich with its head in the sand. The other was a man in a business suit with his head in the sand -- and his behind stuck up in the air. In true Posner fashion, the opinion apologizes to the ostrich, which it said does not really stick its head into sand. *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931 (7th Cir. 2011).

Rule 11. In *Jorgenson v. County of Volusia*, 846 F.2d 1350 (11th Cir. 1988), the court treated the failure to cite controlling cases as a confession of frivolity, and upheld the assessment of Fed. R. Civ. P. 11 sanctions.

Rule 38. Similarly, in *Newhouse v. McCormick & Co.*, 140 F.3d 302, 304-305 (8th Cir. 1997), the court imposed Fed. R. App. P. 38 sanctions on a litigant who continued to litigate "in the face of controlling precedents which removed every colorable basis in law for the litigant's position" and which made the appeal wholly without merit.

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