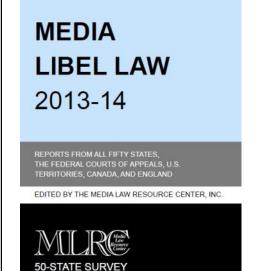
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Now Available from MLRC

Media Libel Law 2014-15 (November 2013) is a comprehensive survey of defamation law, with an emphasis on cases and issues arising in a media context. Topics covered include: Defamatory Meaning, Opinion, Truth/Falsity, Fault, Republication, Privileges, Damages, Motions to Dismiss, Discovery Issues, Trial Issues, Appellate Review, Remedies for Abusive Suits, Retraction, Constitutional/Statutory Provisions, and Summary Judgment.

Visit medialaw.org for more information.



Chris Matthews, left,and Aaron Sorkin at the MLRC Annual Dinner, November 13, in New York City.

MLRC Annual Dinner 2013

"A Conversation With Aaron Sorkin"

On Wednesday, November 13, 2013, nearly 700 MLRC members and friends gathered for MLRC's Annual Dinner at the Grand Hyatt in New York.

Acclaimed screenwriter and playwright Aaron Sorkin was interviewed by Chris Matthews, host of MSNBC's *Hardball with Chris Matthews*.

Aaron Sorkin is an Academy-Award winning writer and renowned playwright. His works include the theater production and film version of *A Few Good Men*, the feature films *The Social Network* for which he won the Academy Award for Best Adapted Screenplay, *Malice*, *The American President* and *Charlie Wilson's War*. He adapted *Moneyball* along with Steve Zalillian and story by Stan Chervin, for which he received the Critics Choice Award and New York Film Critics Award for Best Adapted Screenplay, and will next adapt *Steve Jobs*, the Walter Isaacson biography of the late Apple co-founder.

For television Mr. Sorkin created and produced the multiple Emmy-Award winning series *The West Wing*, produced and wrote the television series *Sports Night* and created the series *Studio 60 on the Sunset Strip*. Mr. Sorkin's HBO hit series, *The Newsroom*, debuted in 2012 and recently concluded its second season.

Chris Matthews is one of America's most renowned journalists covering politics today. His career includes presidential speechwriter, top aide to legendary Speaker of the House Thomas P. "Tip" O'Neill, Jr., print journalist and best-selling author. Mr. Matthews is currently the host of *Hardball* on MSNBC and appears regularly on other MSNBC and NBC programs, including election coverage. For over a decade, Mr. Matthews also hosted a Sunday morning program for NBC, *The Chris Matthews Show*. He is the author of seven books including the recent best sellers, *Tip and the Gipper: When Politics Worked*, published October 2013, and *Jack Kennedy: Elusive Hero*, published November 2011.

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MATTHEWS: Your story line in A Few Good Men is about the maturation of a lawyer into becoming a Marine.

SORKIN: Exactly right. And the fact of the matter is that the climax--you can't handle the truth is the line that people remember from A Few Good Men, but the climax of the movie and the climax of that scene is when Nicholson has gotten completely out of control, and he's cursing Tom Cruise out, and calls him son. And Cruise says, don't call me son. I'm a lawyer, and an officer in the United States Navy, and you're under arrest, you son of a bitch. So the climax of that movie is when he fills out his uniform and suddenly becomes proud of it.

SORKIN: Mark Zuckerberg was the first antihero I wrote, and I had to sort of drop my love of writing romantically and idealistically, and I was writing something else this time. But I really did like this story. When you are writing an antihero, whether it's Zuckerberg in the Social Network or Nicholson's character in A Few Good Men, you can't judge them. You have to like them. You have to write them as if they're making their case to God why they should be allowed into heaven. In writing the Social Network, I didn't want the movie to take a position on whether or not the Winklevoss twins had stolen Facebook, who was right and who was wrong. I wanted those arguments to happen in the parking lot. And they sure did because by and large, if you were over 30, you thought that this was a cautionary tale, and if you were under 30, you thought Zuckerberg was a rock star.







MATTHEWS: You write people with bad manners. Everybody's talking over each other.

SORKIN: I do it for all the reasons you just described. Mostly I do it because I like that sound, too. Listen, I like making all kinds of sounds, whether it's a drum solo or three violins. I like the sound of people stepping on each other.

* * *

MATTHEWS: West Wing is closer to reality than almost anything you see on television about politics. How did you know there was that much idealism in those West Wing rooms?

SORKIN: I didn't. I just wanted there to be. By and large in popular culture, we portray our leaders as either Machiavellian or dolts. And I just wanted to do something else. I wanted to show a very competent group of people agree or disagree with their political ideology, but you can't argue the fact that they wake up in the morning trying to do good.

* * *

MATTHEWS: You once said it was fun to tell stories about people who are trying to change everything. I think the pattern here. Moneyball, Billy Bean, Zuckerberg, even the different kind of president, single president is going to live like a single guy in America in the 21st Century. What is it Americans like about that? ...

AARON SORKIN: I'm not sure if it's a uniquely American thing or not. After all, for me, kind of at the root of all of this is Don Quixote, who I think he's the greatest character in literature. Here's the thing. We root for that guy when we're in a movie theater, and we make fun of that guy when we're not. I wish that weren't quite so much the case.

Online Advertising Takes Center Stage at 2013 MLRC Forum



This year's annual Forum – scheduled right before the cocktail hour of the Annual Dinner – tackled the technical and policy issues surrounding online advertising networks and programmatic buying. The program, which was supported by **Microsoft** and **Hachette**, and titled "Red, Hot and Crowded: Ad Networks, Exchanges and the Media Business," began with a presentation from **Ted Lazarus**, Director of Legal and **Josh Cohen**, Senior Business Product Manager, who both work for Google in its advertising platforms department.

Ad networks originally grew as a way for small websites, which could not afford their own ad sales teams, to sell ads for their sites. This has evolved into a mechanism, called programmatic buying, in which online publishers, big and small, can sell ad inventory in an automated way to a multitude of potential advertisers through auctions conducted on online exchanges. These exchanges allow for the setting of price ceilings and floors and allow advertisers to target specific demographics and types of sites. Likewise, publishers, too, can restrict advertising to particular product-types and brands. Once these parameters are set, ads are bought and sold, often in real time, in milliseconds, much like automated trading on a stock exchange.

At the conclusion of the presentation, and after the presenters answered a number of questions from the audience, **Ted Lazarus** moderated a follow-up panel discussion on the legal and business issues that are impacted by this technology. The panel included, **Joshua Pila**, Senior Counsel, LIN Media, **Karole Morgan-Prager**, VP & General Counsel, The McClatchy Company, and **Matt Haies**, VP & General Counsel, 24/7 Media. One of the problems publishers face is that the third party networks can utilize the publisher's data and monetize it by targeting the same customers on other sites. And notwithstanding pre-programmed advertiser criteria, publishers often see ads on their site that violate standards and practices, e.g., medical marijuana ads, and have a hard time tracing the ads back to the advertiser.

There is often a backlash from customers when the ads served are based upon customer behavior, a "creepiness factor" that several members of the panel felt needed to be balanced with the desire to serve useful and relevant ads to each consumer. Businesswise, programmatic buying is a mixed bag for major publishers. On the one hand, it has driven down the price of advertising, but on the other, it has opened up new markets to regional publications that could ordinarily only attract advertisers targeting the publisher's local base audience. With this new technology, the exchange can match appropriate advertisers with an audience that resides anywhere and everywhere.

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MLRC's 2013 Annual Meeting

MLRC's Annual Meeting was held on November 13, 2013 at the Grand Hyatt Hotel in New York.

Board of Directors Election

The Chair of the Board of Directors, Susan E. Weiner, of NBCUniversal, Inc., called the meeting to order.

The first order of business was the election of Directors for 2014. Two new Directors were proposed: Denise Leary of NPR and Regina Thomas of AOL. And four Directors were nominated to be reelected to two-year terms: Marc Lawrence-Apfelbaum, Time Warner Cable; Gillian Phillips, The Guardian; Kenneth Richieri, The New York Times Company; and Kurt Wimmer, for the Newspaper Association of America.

All six nominees were unanimously approved by those present at the meeting together with the 44 member proxies submitted to MLRC.

Four other Directors who were elected last year are entering the second year of their two-year terms. They are: Karole Morgan-Prager, The McClatchy Company; Lynn B. Oberlander, The New Yorker; Mary Snapp, Microsoft Corporation; and Susan Weiner, NBCUniveral.

Susan reported that there are 120 media members in MLRC and 206 members in the MLRC's Defense Counsel Section as of August 31, 2013. She said those numbers were "very impressive," and she thanked all the members for their continued support.

Finance Committee's Report

Karole Morgan-Prager, chair of the MLRC's Finance Committee, referred members to MLRC's financial statements and the compilation report from MLRC's accountants. For the 12-month period ending August 31, 2013, MLRC had \$1.57 million in total revenue, \$1.40 million in total expenses and \$184,268 increase in net assets, according to the statement of activities.

The Finance Committee meets quarterly to review the financial statements as well as to hear from Executive Director Sandy Baron and MLRC Administrator Debra Danis Seiden, Ms. Morgan-Prager reported. The committee then makes quarterly reports to the Board of Directors, she said.

Executive Director's Report

Sandy Baron thanked the Board of Directors for giving so much time to MLRC as well as ensuring so much "quality to our activities by virtue of their experience and their intelligence and common sense and wisdom." She noted that Bob Latham will be rotating off the Board Directors as his service as president of the Defense Counsel Section is ending. Sandy thanked Bob for his service. Lou Petrich will serve as DSC president in 2014.

MLRC's highlights of 2013 included the 10th annual MLRC/Southwestern Entertainment and Media Law Conference, held at Southwestern Law School in January. The conference will be held again in Los Angeles January 2014.

The sixth annual Legal Frontiers in Digital Media set of sessions was held in Silicon Valley in May 2013. This will be the last year in which MLRC will partner with Stanford Law School's Center for Internet and Society on this conference as the result of new rules implemented by the university, Sandy reported. The new partner for the conference is the Berkeley Center for Law and Technology. Sandy expressed gratitude for Robert Barr, executive director of BCLT, and Barr's colleague, Peter S. Menell, as enthusiastic partners. A better transition could not be asked from Stanford to Berkeley, Sandy said.

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Another "extraordinary" event in 2013 was MLRC's London Conference. Sandy thanked Hiscox and Bloomberg for their reception sponsorships and all the other supporters of the conference. The conference is strong due to its substance as well as the opportunity for lawyers from around the world to meet with each other. The Supreme Court of Victoria, Australia, sent a jurist to attend the conference. Australian justice Chris Maxwell was paired with Sir Michael Tugendhat, who is a High Court judge and the senior media judge for England and Wales. The jurists made for an interesting point-counterpoint on how common law jurisdictions deal with free press fair trial issues.

A grant from Google allowed for 16 lawyers from countries where online speech is under pressure to attend the London Conference. In addition, a special set of sessions was created for the Google-sponsored attendees so they could discuss the creation of a global network of lawyers to share ideas on how to use international norms, as well as local norms, to defend speech. Hopefully, another grant will be possible to bring the same group of lawyers to MLRC's Virginia Conference in September 2014. The In-house Counsel Breakfast Meeting was another key event at the London Conference.

MLRC added a new conference in 2013 on Legal Issues Concerning Hispanic and Latin American Media. The conference was held in partnership with the University of Miami Schoolof Communication and School of Law. Sponsorship was provided by the McClatchy Foundation as well as assistance from Holland & Knight. Many in the Hispanic media field are located in Coral Gables, Florida-area, but do not necessarily get many opportunities, especially at the more junior levels, to meet and discuss common issues and this event was a good opportunity for both. The conference's co-chairs were Lynn Carrillo of NBCUniversal and Adolfo Jimenez of Holland & Knight with the assistance of Chuck Tobin of Holland & Knight. This conference will be held again next March with more emphasis on bringing lawyers from Latin America proper to the conference. Sandy encouraged members who know lawyers from Latin America to invite them to the conference.

MLRC put out many publications in 2013, including the MLRC 50-State Surveys. After four years, Oxford University Press no longer is the publisher of those volumes. MLRC will publish, market and distribute its books inhouse. The Media Libel Survey has been printed and shipped. MLRC is reaching out to its members, and all subscribers to the 50-State Surveys, to let them know of the change-over to MLRC distribution and get them re-signed up for the Surveys.

MLRC's other signature publications include the MLRC MediaLawLetter, which is sent monthly, and the MLRC MediaLawDaily, which is sent every business day. The MLRC MediaDaily is designed to go to non-legal colleagues inside the corporate members, and that is also sent every business day. Even more publications result from the efforts of MLRC's committees.

Participation in the MLRC committees is a great way to contribute to the organization and to meet and work with media lawyers from all over the U.S. and even around the world. Maya Windholz and Timothy Jucovy particularly deserve kudos for creating the new Media Copyright and Trademark Committee at the behest of DCS President Emeritus Liz Rivto and President Bob Latham. As of October, Rebecca Sanhueza has stepped in as co-chair of the committee.

MLRC was active in many international efforts in 2013 in addition to its conferences. MLRC commented on the UK Defamation Act. MLRC also filed comments with the UK Law Commission in opposition to extending the reach of contempt of court to online archives. MLRC also commented on a proposal from the European Commission's High Level Group on Media Freedom and Pluralism to have each member nation set up media councils that, among other things, would have the right to sanction media.

MLRC also joined other organizations in intervening in proceedings pending in the High Court in London involving Glenn Greenwald's partner, David Miranda, and whether procedures used by law enforcement authorities in the United Kingdom to confiscate the electronics Miranda was carrying were consistent with UK law and the European Convention on Human Rights.

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Sandy thanked all of the companies and law firms that had sponsored its conferences and events, as well as purchased seats at the MLRC Dinner. These sponsorships allow MLRC maintain lower rates for its events, as well as support the staff that produces them. For example, this year's MLRC Forum on programmatic ad buying and ad networks was sponsored by Microsoft and Hachette Book Group.

Sandy thanked the staff of the MLRC for their work. Sandy particularly praised Debra Danis Seiden for her work as MLRC's all-purpose administrator, including for handling the project of moving the books in-house. Staff Attorney Dave Heller edits the MediaLawLetter; edits the MLRC Bulletins published three times a year; manages the London Conference; manages the International Media Lawyers Project; and has a seemingly boundless knowledge of media law. Staff Attorney Michael Norwick follows digital medial legal developments for MLRC; manages the annual Legal Frontiers in Digital Media sessions; edits the 50-State Surveys; puts out the damages survey, which benefits from his background as a litigator; and organized this year's annual forum on programmatic ad buying. Staff attorney Katie Hirce is the newest staff attorney; she is a past 2006-2007 MLRC fellow and she practiced at McCusker, Anselmi, Rosen & Carvelli in New Jersey; Katie will manage the Virginia Conference and support the federal and state Legislative Affairs Committees. The annual dinner would not have happened without her. Jacob Wunsch, the MLRC production manager, puts together all of the publications and manages the MLRC web site; Jake also just finished overseeing the archival of the MediaLawDaily. Dorianne Van Dyke, the WSJ-MLRC Institute Free Speech Fellow, manages the First Amendment Speakers Bureau, which provides educational lectures at schools, libraries, and independent book stores, as well as a new student video protect. Sandy also expressed gratitude for the funding from the Dow Jones Foundation for underwriting the MLRC Institute allowing it to employ Dorianne. Amaris Elliott-Engel is the 2013-2014 MLRC Fellow, whose work is informed from spending a decade as a working journalist.

London Conference and International Media Lawyers Project

Dave Heller reported that the London conference this year was the largest ever with close to 230 attendees. The diversity of attendees included lawyers from South Korea, Brazil, Malaysia, and Thailand. Due to the International Media Lawyers Project, seven lawyers from jurisdictions where "free press rights are under stress" have been brought together to attend the conference. Face-to-face meetings are very important, especially for lawyers who are not familiar with MLRC. Dave hopes to see the International Media Lawyers Project grow with participation of lawyers at the Virginia Conference in 2014.

Defense Counsel Section Report

DCS President Bob Latham said the section's 18 committees have been very active in 2013. Thirteen papers have been generated as a result of the committees. A few more are to be finished by the end of 2013. Thirty-seven MLRC members participate as chairs or vice-chairs of the committees.

The Media Copyright and Trademark Committee is a new committee and is an additional way to bring in new members. One of the ways to grow the MLRC membership is the expansion of the scope of subject matter covered by the MLRC. The MLRC also is trying to increase members internationally and to make sure the next generation of lawyers in law firms become members too. Some committee leaders are younger lawyers, which ensures "we don't become some doomed anthropological species," Bob said to a round of laughter. Rotating the committee chairs also ensures new leadership.

Liz Ritvo will rotate off the DCS Executive Committee after spending 2013 as president emeritus. Laura Prather will start her five-year leadership cycle on the DCS Executive Committee as treasurer.

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Report on MLRC Institute

Dorianne Van Dyke thanked the Dow Jones Foundation and The Wall Street Journal for their support. Without them, the Institute's activities would come to a halt. Dorianne also thanked the MLRC Institute Trustees for giving their resources and time.

The MLRC Speaker's Bureau has reached 213 presentations. In late September, the Institute partnered with the American Booksellers Foundation for Free Expression on speaking events for Banned Booked Weeks. Jim McLaughlin of The Washington Post spoke at the University of Maryland as part of the Speakers Bureau. Carolyn Foley of Davis Wright Tremaine and Lynn Oberlander of The New Yorker gave a talk at the City University of New York as part of the Speakers Bureau. CUNY is interested in a partnership with the MLRC Institute in creating podcasts that could be used as an educational resource.

The MLRC Institute also held its first video contest for high school students to speak out about cyberbullying. The judges include Dale Cohen, special counsel for Frontline and an MLRC Institute Trustee; Kaitlin Monte, an antibullying activist and host of NBC New York's "Weekend Today in New York" trivia game; Jon Rubin, senior director of state and local education services for WNET New York Public Media; and Tracy Smith, a correspondent for "CBS News Sunday Morning." Microsoft has provided the prizes for contest winners.

The Institute's Actions Against Online Speech Blog is going to be merging with the Berkman Center For Internet & Society at Harvard University's legal threats database cataloging legal challenges faced by those engaging in online speech.

The Institute also was a sponsor of Sunshine Week, Free Speech Week and the Free to Tweet scholarship competition.

Jacob Goldstein, one of the MLRC Trustees, and Dorianne had the opportunity to meet Mary Beth Tinker, one of the lowan students who wore a black armband to school to protest deaths of soldiers in Vietnam and won a landmark case in favor of student speech.

Dorianne asked for members to 'like' the Institute on Facebook and to follow the Institute on Twitter.

New Business

Susan Weiner thanked Sandy for her drive and passion. She also joined Bob Latham in emphasizing MLRC's efforts to involve new members, including younger lawyers and lawyers new to the practice. Ms. Weiner also was pleased that six new media members joined in 2013 considering that the media industry has contracted.

As for new business, it was suggested that aspects of the London Conference format be used at the Virginia Conference and/or have links between plenary sessions and breakouts so that conference attendees can discuss issues raised at the plenary sessions. Another suggestion raised for the Virginia Conference was to hold a session involving the government, such as with officials like Attorney General Eric Holder.

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

CAN I USE THIS CLIP? A GUIDE TO AUDIO/VIDEO USE

A presentation from the MLRC Pre-Publication/Pre-Broadcast Committee on the legal issues arising from the use of audio or video clips. The presentation consists of a powerpoint to be used for training purposes. The powerpoint can be customized to suit the needs of a particular client. Slides that are not relevant to the organization's needs/issues can be deleted, and other information could be added, if desired.

Across the Pond: Updates on UK and European Media Law Developments

By David Hooper

Open Justice: Naming Acquitted Defendants
Who Might Be At Risk from Terrorists

The recent decision given on 17 December 2013 in the Court of Appeal by the Lord Chief Justice in *R v Marines A*, *B*, *C*, *D and E and Guardian and other Media* 2013 EWCA 2367 raised an interesting question of open justice. The facts were that a number of British soldiers in September 2011 had come across a severely wounded but heavily armed Afghan rebel. One of the Marines had told the rebel that it was time for him to shuffle off his mortal coil and made some jocular remarks about the Geneva Convention. Unhappily for him,

his helmet microphone recorded this for posterity. Marine A was convicted but Marines B–E were acquitted. There had been reporting restrictions preventing their being named during the trial. The question was what happened at the end of the trial.

There was little difficulty in deciding that the convicted Marine A should be named. More problematical was what should happen in respect of those who were acquitted, bearing in mind that publication of their names could place their lives at risk from reprisals. Matters were complicated in

that the trial judge had initially decided that their names could be published, but was then subsequently persuaded that he should make an Order prohibiting their publication.

The Court upheld the observation of Lord Diplock in A-G v Leveller Magazine [1979] AC 440 "If the way the Courts behave cannot be hidden from the public ear and eye, this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the Court itself it requires that they should be held in open Court to which the press and public are admitted and that in criminal cases at any rate all evidence communicated to the Court is communicated publicly."

They also upheld the observation of Lord Steyn in Re S (A Child) [2005] 1 AC 593, "The ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court. The duty of the court is to examine with great care each application for a departure from the role by reason of rights under Article 8 ... The full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law."

As regards Marine A, who was convicted, the Court concluded "It would require an overwhelming case if a person convicted of murder in the course of an armed conflict were to remain anonymous." The Court appreciated that this might place the Marine at risk while serving his sentence, but

that was something that the prison authorities were equipped to deal with. So far as the acquitted soldiers were concerned, they had returned to military service. There was some evidence that their identity was already known to a number of journalists.

The Court concluded that "The risk was not immediate and that it would not be reasonable (on the facts of the case) to make so substantial a derogation from open justice as to prohibit the identification of (those soldiers)" Attempts are being made to appeal this ruling to the Supreme

Court and pending the final resolution of the case the names of the acquitted soldiers have not yet been published, however, on 19 December 2013, the court decided that the names of two of the four acquitted soldiers could be published leaving the issue of publication of the names of the other two over for further argument..

The Court concluded "It would require an overwhelming case if a person convicted of murder in the course of an armed conflict were to remain anonymous."

Flood v. Times Newspapers Limited

The last act in the case which had gone to the Supreme Court (Flood v Times Newspapers Limited (2012) UK SC 11) was reported on 19 December 2013. This was an assessment of damages, which was heard before Mrs Justice

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Nicola Davies. The primary decision was that the article entitled "*Detective accused of taking bribes from Russia*" was protected by Reynolds privilege when it originally appeared in The Times newspaper and the TimesOnline website.

The case concerned possible improper or corrupt conduct between a serving police officer and a Russian oligarch. This led to a police investigation as a result of which the police officer was cleared of the allegations against him. Flood had been exonerated by the investigating police officer and this had been upheld by the Independent Police Complaints Commission. The way that the investigation had been reported and the matter had been investigated by The Times journalist Michael Gillard resulted in the court finding that notwithstanding the ultimate exoneration of the police officer the original report that he was being investigated was covered

by Reynolds privilege as was the fact that he had been named as the officer under investigation.

The article was published on June 2006 and Flood was officially notified that he had been exonerated in September 2007. The result of the decision of the Supreme Court was that the publication between June and September 2007 was covered by Reynolds privilege. The problem was that The Times did not update their website until October 2009 to record the fact that he had been exonerated.

Flood's claim failed in respect of the period June 2006 and September 2007 but

he sued in respect of the publication between the period September 2007 and October 2009 when the fact that he had been exonerated was incorporated into the online report. There was no defence in respect of this period of publication and the judge awarded Flood £45,000 libel damages plus £15,000 aggravated damages. The case demonstrates the need to update websites when it is drawn to the attention of the publishers that the facts have changed and that what may have been originally justified is no longer justifiable. The Internet lends itself to such updating or modification and the lesson of this case is that it may well prove to be costly if the original story is not updated or modified. It does not necessarily mean that there is a continuing obligation to keep updated the reporting of a particular case, but if new facts are

drawn to the attention of the newspaper, it may very well be incumbent on the paper to update the story.

The judge felt that there was a balancing exercise to be carried out. She stated "it is possible to pursue journalism which is said to be in the public interest and demonstrate consideration for the subject, whose reputation may suffer in the event of publication. The need for such consideration is particularly acute given the subject's lack of redress. Once it is known that there is material which exonerates, in whole or in part, the subject of the journalistic investigation, consideration should be shown for the position of the subject by publishing exculpatory material". The judge was critical of the failure on the part of the newspaper to update the story and to link it with the settlement of the action and indeed she concluded that the correspondence and aggressive and hostile tone had increased the distress and hurt to the Claimant. The

judge accordingly awarded damages of £45,000 to reflect the distress, anxiety and suffering and damage to his reputation the claimant had sustained in the period 5 September 2007 to 21 October 2009 in order to mark his vindication. She also awarded a further £15,000 to represent the aggravation of those damages by reason of the conduct of the defendants and "to serve as a deterrent to those who embark upon public interest journalism but thereafter refused to publish material which in whole, or in part, exculpated the subject of the investigation".

Media defendants in such circumstances have to consider carefully whether some modification to the original story is required when exculpatory facts are drawn to their attention. That has to be considered on its own, as there are perils in trying to tie the modification of the story to a settlement of the case, tempting as that may be in commercial terms.

The case concerned possible improper or corrupt conduct between a serving police officer and a Russian oligarch. This led to a police investigation as a result of which the police officer was cleared of the allegations against him.

A Claim against the Media Struck Out

19 December 2013 also saw a decision in the case of *Kneafsey v Independent Television News and Channel 4* (2013) EWHC 4046 by Mr Justice Tugendhat. This was also a claim involving the police, but it could perhaps be said that the claim was rather more ambitious than the Flood claim. At

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the heart of the case was whether a number of police officers had used excessive force in arresting a man who was later convicted of handling stolen goods. A disciplinary enquiry led to the officers being reprimanded but they remained in the police force. This was the subject of some criticism in the news report. The claim was based on a somewhat elaborate meaning spelled-out of the words that there was a conspiracy on the part of the claimants to mislead the disciplinary tribunal.

What was interesting in the decision, which was to strike the claim out was the judge's willingness not only to doubt whether the words bore that meaning but to be willing, even on a strikeout application to conclude that no useful purpose would be served by the action proceeding as there was no real prospect of the officers being awarded any more than nominal damages. The judge was also prepared to look at the prospect of a Reynolds defence, even though at that stage it had not

been pleaded as a strike-out application took place before the service of the defence. However, the judge was prepared to look at the overall circumstances and concluded that the claimants had no real prospect of defeating a Reynolds defence and he therefore concluded that the case for summary judgement should be decided in favour of the defendants. The case is a good illustration of the robust approach that the courts are willing to take inappropriate circumstances at a very early stage in proceedings which they conclude are

without merit, rather than letting the case proceed with the consequent cost involved on the basis that there might be some arguable points which could merit a full trial.

Contempt of Court: Jurors and the Internet

On 28 November 2013 the Law Commission published a report on the consultation which had taken place and, in fact, ended on 28 February 2013, on how to deal with jurors who were conducting their own research on the Internet and social media in breach of their duties as jurors. This is a matter about which I have written earlier.

One of the points which was considered was what liability there should be in respect of material which might seriously prejudice a trial -one case - R v Tomlinson -had involved material which was available on the Internet in the form of highly prejudicial evidence of previous disciplinary action for violent conduct against a policeman who was subsequently put on trial for manslaughter - when it was perfectly legitimate to publish the original material and before the criminal proceedings had become "active," so as to trigger the strict liability rules relating to contempt of court – namely that one can, irrespective of your state of mind, be guilty of contempt of court if one publishes material which gives rise to a substantial risk of serious prejudice to a trial.

The recommendation is that in relation to such publications, no liability would arise until the Attorney General had put the media on formal notice that the relevant proceedings have become active since the date of the original publication and drawing the attention of the media to the offending contents of the publication. They also recommend that prosecution, defense or the Attorney General should be

> able to apply for an injunction to prevent the continuing publication of the material, with the permission of the Attorney General no

organizations would be liable to contempt if they did not take down the offending material during the period during which the relevant proceedings were "active." That was what could have happened in the permissible material during the currency of

longer being a prerequisite. The effect of this is that media

Tomlinson case where the media were ordered to take down the originally

the trial.

Media organizations

would be liable to

contempt if they did not

take down the offending

material during the

period during which the

relevant proceedings

were "active."

If effect is given to these proposals by the Law Commission, which would require amending legislation which it seems quite likely, the media would face an increasing number of applications to remove potentially prejudicial material from their archives. The likelihood also is that it would be a fairly fruitless task trying to persuade a criminal court that such material was not prejudicial, or that the interests of freedom of speech outweighed fear about prejudice to the trial.

The Law Commission also recommend the creation of a new statutory criminal offence for a juror deliberately searching for extraneous information relating to the case which he or she is trying. This brings the law into line with

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the practice in Australia. At present, jurors should be given very clear directions by the judge not to do their own research and to try the case on the evidence presented in court. There have been a number of cases where jurors who have disobeyed such directions have been jailed. In such circumstances, it does seem to make sense for there to be a specific criminal law prohibiting such activity with it being made abundantly clear to jurors that they would themselves be committing a crime if they did their own Internet research during the trial.

The Law Commission does, however, recommend that the absolute prohibition on any disclosure of jury deliberations under Section 8 Contempt of Court Act 1981 should be amended. There should be exemptions for a juror who discloses deliberations to the appropriate authorities, where

he or she believes there has been a miscarriage of justice, or where it is necessary for the purpose of allowing approved academic research into jury deliberations.

Plebgate - A Cautionary Tale on Costs

Plebgate could really have only have happened in England. The Chief Whip of the Conservative Party was leaving a Cabinet meeting at 10 Downing Street and wanted to bicycle through the main gates which required the Police to open them. They refused to do so and insisted that he

pass through the side gate. He became irate, but the matter at issue was whether he called the Police "f...ing plebs" – something he denied. However, he lost his job.

It subsequently appeared that the Police were not telling the truth and one of the Police officers faces criminal charges. This was too good a story for The Sun newspaper to miss. They reported the plebs remark, only to find themselves sued for libel by Mr Mitchell, who benefited from a conditional fee agreement with the claimant lawyers, Atkins Thomson. Mitchell admitted that he had been less than polite to the police but denied calling them plebs, a term really only used by toffs who had benefited from a private education involving learning Latin.

So far so good and lots of employment for the legal profession. The Sun's lawyers anticipated their costs in the libel action would be £589,558. The Claimant's lawyers proposed to charge a bargain basement £506,425. Unhappily, the Claimant's solicitors failed to comply with CPR PD51D Defamation Proceedings Cost Management Scheme, in which paragraph 4 provided that not less than seven days before the hearing of the case management and costs budget hearing, they should lodge their costs budget.

The hearing had been originally scheduled for 10 June, but it was relisted for 18 June. Unfortunately, the Claimant solicitors arrived at Court without a budget. The procedural judge, Master Victoria McCloud, refused to grant relief against the consequences of this omission, which were to limit the recoverable fees to the applicable Court fees totalling no more than £2,000. This was something less than cheering news for Atkins Thomson, who were doing the case on a conditional fee agreement.

The default was relatively trivial and arose out of pressure of work at the firm. However, with the case being argued by leading specialist counsel in costs matters, the Court of Appeal, presided over by the Master of the Roles, Lord Dyson, had no sympathy. *Mitchell v. News Group Newspapers*, (Nov. 27, 2013)

The litigation must be conducted efficiently and at a proportionate cost and the enforcement of compliance with Rules of Practice and Court Orders was of paramount importance and should be given great weight. A court was likely only to grant relief against these draconian

consequences, which are the product of the attempts by the proposals by Lord Justice Jackson for cases to be run efficiently and at less cost, in extreme cases, such as accident or debilitating illness, rather than for administrative reasons such as overwork and the general vicissitudes of life.

As Lord Dyson stated "In the result, we hope our decision will send out a clear message. If it does, we are confident that in time, legal representatives will become more efficient and will routinely comply with Rules, practice directions and Orders. If this happens, then we would expect that satellite litigation of this kind which is so expensive and damaging to the Civil Justice System will become a thing of the past."

Cases must, therefore, be run efficiently and within budgets and administrative slip-ups will receive no mercy

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Mitchell admitted that he had been less than polite to the police but denied calling them plebs, a term really only used by toffs who had benefited from a private education involving learning Latin.

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from the courts. (It should be said that Atkins Thomson have stated that they will conduct the case pro bono so Andrew Mitchell will not be a loser. The Sun is at risk of having to pay damages if they lose the libel action, but not the costs of over £500,000.)

Implementation of the Defamation Act 2013

I summarized the principal provisions of the Defamation Act of 2013 in an earlier article. *See <u>The New Defamation Act: What Difference Will it Really Make</u>, MediaLawLetter May 2013.*

The Act itself was passed back in April 2013 and it was far from clear why it was taking so long for the legislation to be implemented. The delay having taken place, it seemed likely that the legislation would not be brought into effect until the spring of 2014, when it seemed likely that the

counter-balancing protection for Claimants from a stronger independent regulator and possibly with an arbitration scheme might come into effect to offset the changes in the Defamation Act 2013, which favoured Defendants.

On 8 November 2013, the Consultation on Costs Protection and Defamation of Privacy Claims closed. The upshot of this is that the present costs regime, including conditional fee agreements and the ability of Claimants to recover After The Event

Insurance premiums, will be abolished and replaced by a new acronym called QOCS which stands for "Qualified Oneway Costs Shifting."

These changes had been implemented in other areas of the law, but there was belatedly a cut-out for defamation and privacy claims while the Leveson proposals and regulation of the Press were mooted. This in effect follows the recommendation of Lord Justice Leveson that costs protection should be extended to media related litigation (Recommendation 74, Executive Summary). Under the proposals, a judge would be able to impose a "one-way" costs order in a case where it is clear that one side would not otherwise be able to participate in proceedings because of the potential legal costs.

The poorer party would only be liable for its own legal costs, while the richer party would be liable for both sides

costs if it lost the case. Theoretically that protection could extend to the defendant as well if they were being pursued by a wealthy serial litigant, like the late Sir James Goldsmith or Robert Maxwell.

These changes are likely to benefit Defendants in that the days of Claimants being able to recover double fees incurred by a Claimant, who is never himself going to have to pay those conditional fees with the consequence that they tended to get inflated in the absence of a paying client, plus the enormous After The Event Insurance premiums, which provided only very limited comfort for successful Defendants as the insurance was nearly always insufficient in the amount of cover, are being replaced by a preferable regime so far as Defendants are concerned, although that will provide a degree of protection for unsuccessful Claimants in that they may not have to pay the Defendant's costs, even if they lose.

That may encourage unmeritorious claims, but the financial risks in winning a questionable libel action are such,

particularly as the Claimant is likely to have to pay his own legal costs, that libel Claimants are likely to be very cautious in bringing claims unless they are reasonably confident that they have a good prospect of success. We will have to await seeing how the Government strikes a balance between the interests of Claimants who consider they have been libelled and Defendants who feel they need protection against unsuccessful Claimants. In this instance, one imagines that the scales will tilt somewhat in favour

The Act itself was passed back in April 2013 and it was far from clear why it was taking so long for the legislation to be implemented.

of Claimants.

However, the Act and the Regulations under section 5 relate to the definition of operators of Websites Regulations 2013, which it will be recollected will govern the liability of Internet Service Providers and will lay down the procedure which an Internet Service Provider should follow when a notice is served upon them regarding material posted by a third party will on balance significantly favour defendants.

Privacy & Princess Caroline

There has been yet another decision from Strasbourg over publication of photographs of Princess Caroline on yet another holiday in a German magazine, which also contains

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details about the Von Hannovers. <u>Von Hannover v Germany</u> (no 3).

Caroline has provided a service in a further clarification of the European law on privacy and her resort to multiple privacy litigation – she has brought three such claims – seems to have negated her initial success. The Federal Court of Justice in Germany concluded that she was a public figure and that in consequence, although the article was of no particular public interest in the sense of concerning any real political topic of the day or matter of legitimate public debate it was however on balance the case where freedom of expression in the sense of the somewhat dubious ground that

there was a general interest in a discussion about how public figures let out their holiday homes outweighed her right to private life. This decision was upheld in Strasbourg.

There seems to be likely to be more latitude for the publication of photographs and articles of general interest to readers about public figures and it seems that all she has achieved is to undermine her initial success in preventing the publication of photographs of herself in a restaurant. The threshold of public interest which was initially be fairly difficult hurdle of contributing to public debate does seem to have been lowered and this is a good decision for celebrity magazines- an example of the case too far.

David Hooper is a partner with RPC in London.

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Judgment Against Austrian Newspaper Not a Violation of Article 10

Defamation, Privacy and Public Figures

By Conor McCarthy and Caoilfhionn Gallagher

<u>Print Zeitungsverlag GmbH v. Austria</u> is a somewhat surprising decision by the European Court of Human Rights, in which the Court, applying principles derived, in part, from its case law on privacy, rejected a newspaper's challenge to a defamation judgment against it in respect of its publication of a public interest story concerning a number of politicians.

Background

The applicant newspaper, Print Zeitungsverlag GmbH, publishes "the Bezirksblatt", a weekly newspaper in Tyrol,

Austria. In January 2006 approximately 300 copies of an anonymous letter were sent out to individuals, including members of the supervisory board of the tourism association for two towns in Tyrol. These letters concerned two individuals, involved in local politics and public life, one of whom was standing for election to the post of chairman of the local tourist association, the other had been involved in politics for many years and was at the time of the letter the member of the city council in charge of public finance, (as well as holding a number of other public posts).

In January 2006 about 300 copies of an anonymous letter were sent out in two local towns. The letters referred to two local politicians who were brothers and practicing lawyers. The letter was written in the form of a survey and contained the following question:

1. Would you buy a car from this man? 2. Would you stake your money on a promise made by this man? 3. Does this man have the necessary personal/professional qualifications? 4. Has this man ever built anything properly? 5. Is this man honest with his own

family? 6. Would you allow this man to execute your will? If you have answered one of these questions with 'no', please ask yourself why you want to leave this man in his current position.

The Bezirksblatt printed a story about the letter, which contained a full copy of it. The article contained the story of the anonymous letter and the politicians replies to the accusations made in it. It reported that both of them had stated that the letter had attempted to harm their political activities and had considered the accusations to be a personal insult.

The brothers sued Print Zeitungsverlag, claiming that the contents of the letter were defamatory. The domestic court in Austria held that the anonymous letter, which had been included in the article, fulfilled the requirements of defamation, as it accused the brothers of dishonesty and other disreputable character traits, relating to both their professional and private lives.

The brothers obtained a judgment against the company, which ordered it to pay them €2,000 each in damages and to publish the judgment. Print Zeitungsverlag appealed the decision, but its case was

dismissed by the Innsbruck Court of Appeal in August 2006.

On 30 May 2007 Print Zeitungsverlag applied to the Court of Human Rights complaining that the judgment of the domestic court was a violation of its rights under Article 10.

The Print Zeitungsverlag GmbH is not easily reconciled with certain elements of the ECHR's long established case law in this field. The decision may be an outlier, perhaps confined to its own facts. Time will tell.

ECHR's Approach to the Case

It was accepted by the Court (and the parties) that both Article 8, which encompasses the right to privacy and the protection of one's reputation as well as Article 10, the

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publisher's right to freedom of expression were engaged in the case. The overarching question for the Court was therefore whether the interference with the applicant's Article 10 rights was "neccessary in a democratic society" (in the terminology of the court) to protect the reputation of others, in view of the court's jurisprudence on this question in the context of journalism.

In answering this question the Court sought to apply principles developed in a number of its recent decisions, particularly MGN Limited v. the United Kingdom, Von Hannover v. Germany (no. 2) and Axel Springer AG v. Germany, the latter two of which were both cases decided by the Grand Chamber of the Court.

The Court noted that in cases of this type it was required to consider whether national authorities had struck a "fair balance" between two values guaranteed by the Convention, namely freedom of expression protected by Article 10, and the right to respect for private life enshrined in Article 8. The Court observed that "where the balancing exercise between the rights under Articles 8 and 10 of the Convention has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts".

The Court identified, from its previous case law, a number of criteria as being relevant where the right of freedom of expression is being balanced against the right to respect for private life and applied these to the case, finding as follows:

- The extent to which the report amounts to a contribution to a debate of general interest: The Court accepted that the article contributed to a debate of general public importance, namely the election of a new chairman of the local tourism association.
- 2. How well known is the person concerned and what is the subject of the report? Again, the Court noted that domestic courts had taken into account that because of their respective functions as chairman of the tourism association and member of the City Council each complainant in the defamation case was already in the public eye. In addition, the Court also attached weight to the fact that the domestic court had

- taken into account that the article was objective in its style and content in reaching its decision.
- 3. The prior conduct of the person concerned: The Court observed that there was no indication that the politicians, although often in the local media, had sought the limelight or laid open any details regarding their professional lives as practicing lawyers or their private lives. They had not previously been the subject of misconduct allegations. Weight was attached to this.
- The method of obtaining the information and its **veracity**: The Court considered that the applicant's journalist had given the politicians an opportunity to comment on the allegations prior to publication but had proceeded with publication of the letter despite objections. It was noted that the applicant company did not state that the insinuations in the letter were true or had any factual basis. Furthermore, the domestic courts, it was found, had properly placed emphasis on the anonymous nature of the allegations contained in the letter. The Court accepted that this was a relevant and important factor stating that the contents of the letter amounted to a "gratuitous attack" on the applicant's reputation, in view of which, "there were strong reasons for considering that the publication of the anonymous letter transgressed the limits of permissible reporting".
- 5. The content, form and consequences of the publication: The ECHR endorsed the domestic courts' point that the publication by the newspaper had resulted in the dissemination of the letter to a much wider public than had previously been the case. The applicants had, the court noted, in consequence of publication experienced negative repercussions in their personal and professional lives following publication.
- 6. **The severity of the sanction imposed**: The Court noted that the sanction, an award of 2000 Euros to each of the politicians, was not such as to render the interference with free expression disproportionate.

In view of all these factors, the European Court of Human Rights found that the domestic courts had considered the matter properly, identifying and taking account of the

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relevant factors. The Court found that domestic courts had given "relevant and sufficient" reasons for arriving at the conclusion that while the publication of the article itself contributed to a debate of general interest, reproduction of the anonymous letter amounted to defamation.

Analysis

Overall, the approach of the European Court of Human Rights in this decision is surprising. The statements in the impugned letter were posed as questions, raising issues clearly going to matters of political debate and public interest. Moreover, it is well established in the jurisprudence of the ECHR that political figures must, in the interests of robust debate in the democratic arena, be more tolerant of criticism than private individuals. In its judgment the court did not appear to pay particular regard to this long established principle, which might have been thought to be a very weighty consideration in a case such as this.

Moreover, the intensity of review adopted by the Court is also noteworthy. Traditionally in the jurisprudence of the ECHR, measures or decisions at the national level which interfere with public interest journalism on matters of general concern attract the most intense degree of scrutiny with regard to proportionality, given the importance of journalism and debate in a healthy democracy. The court, however, applied the "light touch" approach of determining whether domestic authorities had "relevant and sufficient" reasons for the balance they struck between free journalistic expression and the protection of a public figure's reputation. This approach is typical in other free expression contexts, for instance, restrictions on advertising but is unusual in the context of public interest journalism concerning politicians and matters of general public concern.

It does appear that the *Print Zeitungsverlag GmbH* is not easily reconciled with certain elements of the ECHR's long established case law in this field. The decision may be an outlier, perhaps confined to its own facts. Time will tell.

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Setbacks and Tension in the Inter-American Court of Human Rights

By Eduardo Bertoni

At the MLRC London Conference I was conversing with European and American colleagues about the advances and setbacks of international jurisprudence regarding freedom of press and freedom of expression. Some delegates were worried about the European Court of Human Rights' recent free expression jurisprudence and noted that, in contrast, the Inter-American Court of Human Rights seemed to be making better decisions. They asked whether the IACHR was, in fact, the stronger protector of freedom of expression.

In that moment, I told them I was not that optimistic, because the Inter-American Court has been making statements suggesting a possible change of course, especially in regard to criminal defamation.

Unfortunately, the Court's recent ruling in the case of <u>Mémoli v. Argentina</u> has confirmed my lack of optimism: for the first time, the Court ruled that a criminal defamation conviction does not violate freedom of expression, as protected by Article 13 of the American Convention of Human Rights. This ruling marks a serious and notable setback.

Background

The case is quite simple. In San Andrés of Giles, a city in the Province of Buenos Aires, Argentina, the municipal cemetery gave a cooperative control over the leases and titles of graves that had been public property. This coop set up contracts with third parties for the purchase and sale of these previously public sites.

The defendants, publisher Carlos Mémoli and Pablo Mémoli, a journalist, publicly denounced the taking of this property. They used strong language against the directors of the coop and were prosecuted and convicted of criminal defamation for doing so. In 1994, they received suspended prison sentences under Argentinian law for the crime of slander and libel. Following their conviction, there was a civil trial for the payment of indemnities, a process which has been taking place for more than 16 years.

In all the Inter-American Court's prior cases, criminal defamation convictions were considered a violation of freedom of expression. For example, in the *Herrera Ulloa v. Costa Rica* case in 2004, the Court ruled that the conviction of journalist Mauricio Herrera Ulloa be annulled. The Court made similar requests in other cases as well. For example, in the *Canese v. Paraguay* case in 2004, the Court considered the process of convicting Ricardo Canese, in itself a violation of his freedom of expression.

However, more recently in the *Kimel vs. Argentina* case in 2008, Court watchers began to see a change, due to what many suspect are tensions created by diverging views within the Court. Reading the individual decisions of the judges in that case showed that the judges were no longer unanimous

that criminal defamation convictions are incompatible with freedom of expression. Yet, even in the *Kimel* case, and others that followed, it was understood by the majority of the Court that criminal defamation convictions violated freedom of expression.

In *Kimel* the Court said the crime of slander and libel under the Argentine Penal Code was contrary to the American Convention, but in the case of *Mémoli*, where the conviction was for precisely the same crime, the Court found no violation of the American Convention. Furthermore, the

Court gave no reasonable explanation for the change in criteria.

It should be emphasized that even with this worrisome decision, the Court continues to give maximum protection to speech about public officials on matters of public interest. In other words, the Court's principles set in the past, are still applicable: "desacato" (insult laws) or statements about public officials' affairs should not be penalized.

While that is positive, what is problematic in the Court's *Mémoli* ruling is the narrow interpretation of what is or is not in the public interest, as compared to previous cases.

The *Mémoli* case has deepened the tensions within the Court, first seen in the *Kimel* decision. In *Memoli*, four of the

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For the first time, the Inter-American Court of Human Rights determined that a criminal conviction for the crime of slander and libel does not affect freedom of expression.

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Court's seven judges found the conviction to be compatible with freedom of expression. Only three found the conviction to be a violation of that fundamental right.

The *Mémoli* decision is undoubtedly a setback and a wake up call about the divisions within the Court. It also shows the need of the Court to regain its legitimacy and reputation as a protector of freedom of expression, so necessary in our region today.

Eduardo Bertoni is Global Clinical Professor at New York University School of Law and Director of the CELE, the Center for Studies on Freedom of Expression at University of Palermo School of Law in Argentina.

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ECHR Rules That News Portal Can Be Held Responsible for User Comments

Estonian Ruling Not a Breach of Article 10

By Tim Pinto and Mark Dennis

The owner of an online news portal had been found liable by the Estonian courts for defamatory user generated comments posted on that portal, even though it removed the comments promptly upon notification. The European Court of Human Rights has <u>held</u>, pending any appeal to the Grand Chamber, that the Estonian courts' decision was within Estonia's margin of appreciation and was not a violation of Article 10 ECHR (the right to freedom of expression).

Facts

The applicant, Delfi, owns one of Estonia's largest internet news portals, publishing up to 330 articles a day. Readers could post comments under the articles. Delfi received about 10,000 comments daily. It did not require posters to register or give a real name or an email address. The majority of comments were posted under pseudonyms. Delfi did not pre- or post-moderate comments.

The website featured (i) a disclaimer advising posters that they, not Delfi, were responsible for their comments; (ii) an automatic filter for certain swear words; and (iii) a notice-and-take-down system which allowed readers to click on a button to request that a comment be removed, and the comment was removed quickly by Delfi.

In 2006, Delfi published an article reporting how a ferry company's routes had delayed the opening of some ice roads by several weeks. The article attracted 185 comments, about 20 of which were defamatory of the company's majority shareholder, "L", calling for him to be lynched or killed and using offensive (including anti-Semitic) language.

Six weeks later, L's lawyers wrote to Delfi requesting that the 20 comments be removed and seeking damages of about €32,000 (US\$44,000). Delfi removed the comments on the same day and denied liability for damages.

L sued Delfi in the Estonian courts. Delfi relied on the Estonian equivalent of the hosting exemption in Article 14 of the E-Commerce Directive (2000/31/EC). The Estonian Supreme Court held that Delfi was a publisher of the

comments and could not rely on Article 14, and so had to pay damages of €320 (about US\$440).

Delfi applied to the European Court of Human Rights (the "ECtHR"), arguing that the domestic court's decision breached its right of freedom of expression guaranteed under Article 10 of the Convention.

Judgment of the ECtHR

The ECtHR held that there had been no violation of Article 10. The domestic court's finding that Delfi was liable and had to pay \in 320 was prescribed by law, pursued a legitimate aim (viz. the protection of L's reputation) and was a proportionate restriction on Delfi's right to freedom of expression.

This decision appears to have based on six main findings:

- Even though Delfi's own article was balanced, Delfi should have realised that the article might cause negative reactions against the ferry company and its managers, especially given the portal's alleged reputation for having defamatory reader comments.
- The comments were published to a wide audience and Delfi had an economic interest in the number of readers and comments which helped its advertising revenue.
- The posters could not modify or delete their comments once they were posted. Only Delfi could do this. Delfi could have moderated the comments before or after they were posted. As such, it had "a substantial degree of control" over comments on the portal, even if it did not fully exercise that control in practice.
- The measures put in place by Delfi were insufficient to fulfil "its duty to avoid causing harm to third parties' reputations". While the notice-and-take-down system was easily accessible and convenient, and Delfi had

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removed the comments without delay upon receiving notice, the comments had already been online for six weeks by that point.

- It would be very difficult for the claimant to identify and sue the anonymous posters. Posters were not required to register with the site nor state their real name or email address. The Estonian courts had to decide where to apportion blame and what remedy to award.
- The domestic courts had imposed a moderate sanction (damages of €320) against Delfi and made no specific order as to how Delfi should ensure the protection of third party rights in future.

Comment

On first impressions, this judgment does not appear to sit comfortably with the notion of free speech for intermediaries and, in particular, the EU hosting exemption under the E-Commerce Directive. summary, this states that, in return for taking down illegal third party content promptly upon notice, a relevant intermediary should not be held liable in damages for that content.

However, it is important to appreciate that this is a judgment of the ECtHR in Strasbourg and not the Court of Justice of the EU ("CJEU") in Luxembourg.

The role of the ECtHR is to ensure that a Convention State has appropriate laws and is applying them in a legitimate and proportionate manner in light of Convention rights. The ECtHR allows states a margin of appreciation (i.e. discretion), since the ECtHR has a supervisory capacity and its role is not to replace national courts. Moreover, its role is not to interpret EU legislation. That is the role of the CJEU. The ECtHR stresses in the judgment that it is not interpreting domestic and European law in order to decide Delfi's liability. In this case, Estonia had implemented the Article 14 exemption and its courts applied that law.

Even though the ECtHR's judgment refers to several Estonian laws which protect an individual's reputation, suggesting that Estonia may be quite a claimant-friendly jurisdiction, Delfi was only ordered to pay damages of €320. It appears that, in weighing up all the various factors, the ECtHR concluded that the Estonian court's decision in awarding damages of €320 was proportionate in the circumstances and was within the margin of appreciation afforded to national authorities in fulfilling the Convention obligations.

While the ECtHR largely side-steps a detailed analysis and application of the EU hosting exemption, it summarises

CJEU case law relating to

It is a shame that the Estonian Supreme Court had not felt the need to refer the interpretation of Article 14 to the CJEU. However, the interpretation of Article 14 is reasonably clear and the key

Article 14, noting that a service provider may only rely on Article 14 where its role is neutral, in the sense that its conduct is merely technical, automatic and passive, and it "has not played an active role of such a kind as to give it knowledge of, or control over, the data stored": Google France (C-236/08).

domestic issue was the application of that law to the facts. Nonetheless, the key question that the ECtHR had to consider - namely, how to balance protecting reputation and free speech where the UGC is anonymous and the website could have predicted defamatory comments resulting from its own article, did not require user registration and did not pre- or post-moderate the UGC - would be worth further consideration. In this regard, hopefully, the ECtHR Grand Chamber will also consider the matter, as the decision is provisional pending any further appeal.

Tim Pinto and Mark Dennis are lawyers with Taylor Wessing in London.



Delfi is one of Estonia's most popular news websites.

MLRC MediaLawLetter

Argentina Supreme Court Protects Online Reposting

Intermediary Liability Doctrine: Same Wine in New Bottle?

By Eduardo Bertoni

Like other Latin American countries, Argentina does not have specific laws governing liability for online intermediaries for third party posted content. The absence of specific laws on intermediary liability has become particularly problematic in defamation and invasion of privacy cases, with judges applying laws passed in an era when the Internet was not even imagined. In some cases, judges have ordered intermediaries to pay damages for third party content, but other cases have held the opposite.

A recent decision from the Argentina Supreme Court may provide some help. The Court applied an old doctrine to decide that an intermediary should not be liable. Sujarchuk Ariel Bernardo c/Warley Jorge Alberto s/daños y perjuicios" –SC, S.755, L.XLVI.

Background

The facts of the case are simple. The defendant, Mr. Warley, posted on his blog an article written by another person. The article, according to the plaintiff Mr. Sujarchuk harmed his reputation and he claimed for damages against Mr. Warley, who, besides posting the article, added as a title to the post containing the word "sinister" which was not in the original article.

Plaintiff won the case at the First Instance Judge and also at the Court of Appeal. However, the Argentinean Supreme Court reversed the decision, applying the doctrine known as "Campillay" (Fallos 308:789). The name of the doctrine came from a case decided in the 1980s, and the holding relevant for the "Sujarchuk" case is: a journalist or a publisher is not liable for the content published if he or she mentioned clearly the source from where the content is taken and also he or she has not contributed substantially to the content that was published.

The Supreme Court followed the arguments of the Attorney General when she gave her opinion in the case. After highlighting the importance of freedom of expression as a basic human right and its importance for democracy, the Attorney General cited the Campillay doctrine and noted that in the instant case the content of the article at issue was not written by the defendant but only posted to his blog.

Regarding the title created by the defendant, the Attorney General considered that this didn't change substantially what the article itself said, so it did not defeat the Campillay doctrine: defendant merely reproduced content written by a third party and identified the source.

The Sujarchuk case could have a great impact in a decision pending before the Supreme Court where the intermediaries are not bloggers but important search engines (Google and Yahoo). Though the case "Da Cunha Virginia c/Yahoo de Argentina SRL y Otro s/ daños y perjuicios" –S.C., D.544, L.XLVI.- is not decided yet, the Attorney General in her opinion of the case noted that the "Campillay" doctrine is applicable in cases where the search engines only indicate the place where information is available on the Internet.

As I said at the beginning, in Argentina we don't have legislation like Section 230 of the Communications Decency Act or the DMCA. However, there is strong advocacy in Argentina to clarify and to modernize the law in the country. However, in the meantime, an old doctrine may provide a safe harbor for intermediaries. In other words, some Judges understood that some old wine may fit in a new bottle.

Eduardo Bertoni is Global Clinical Professor at New York University - School of Law and Director of the CELE, the Center for Studies on Freedom of Expression at University of Palermo School of Law in Argentina.

Wall Street Journal Succeeds in Lifting UK Reporting Injunction

Four Day Ban on Libor Scandal Reporting

By Jason P. Conti, Jacob P. Goldstein

Prosecutors from Britain's Serious Fraud Office raced to court on October 17 to obtain an injunction prohibiting the publication of details of their investigation into alleged manipulation of benchmark interest rates. <u>Matter of R v. Tom Hayes</u>

Meanwhile, The Wall Street Journal published on its website an article, "U.K. Expected to Name Alleged Co-Conspirators in Libor Scandal," revealing the names of several implicated traders and brokers. British prosecutors had privately identified roughly two dozen uncharged, alleged co-conspirators as they prepared for an October 21

court hearing in the criminal cases against Tom Hayes, Terry Farr, and James Gilmour. This was the latest step in a massive, global investigation of more than a dozen banks that has so far yielded billions of dollars in settlements and several prosecutions related to the London interbank offered rate and other benchmarks.

A few hours after the Journal published, the Honorable Mr. Justice Cooke enjoined the Journal and its

UK-based European banking editor from publishing in England and Wales the names and details of uncharged, alleged co-conspirators of Hayes, Farr, or Gilmour. The judge further <u>ordered</u> that "any existing internet publication thereof be deleted." The order threatened the editor, David Enrich, the Journal, and any third party with imprisonment, fine and asset seizure for any breach of its terms.

The Journal removed the article from its website, replacing it with a note about the court order, and published a story about the injunction, which it decried as "a serious affront to press freedom." The Journal also printed the

disputed article in the newspaper's U.S. and Asia editions and prepared to fight the injunction in court.

On October 21, after hearing from lawyers for the Journal, the prosecutors and barristers for several anonymous clients seeking to cloak their identities, Justice Cooke ruled that there was "no basis" for the injunction and let it expire.

So what led him to prohibit publication for nearly four days and to order, moreover, that the published article be "deleted" from the internet?

Contempt of Court and Reporting Restrictions

In the week before the previously scheduled October 21st hearing in the prosecution of Hayes et al., the U.K. Attorney General circulated a bulletin to news organizations urging caution in reporting on the proceedings, a friendly reminder of the general legal constraints on reporting about court cases.

Under English law, the Contempt of Court Act 1981 makes punishable by fine or imprisonment any publication "which creates a substantial

risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced." The prohibition, which is a strict liability offense, applies only to "active" proceedings—from whenever an arrest warrant is issued or a defendant arrested until the proceedings end, with acquittal or sentencing. In 2011, for example, the Sun and the Daily Mail were found guilty of contempt and fined for publishing online a photograph of a murder defendant holding a gun.

The law also authorizes judges to impose reporting restrictions to postpone or prohibit news coverage of court



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proceedings, even fair and accurate reports, in order to ensure a fair trial: "[T]he court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose."

On October 17, after learning that the Journal was working on a story about the alleged co-conspirators, prosecutors called Enrich to draw his attention to the Attorney General's bulletin, which had not been sent to the Journal. The Serious Fraud Office also made clear its view that the names of the uncharged individuals in the indictments should not be published before Monday's hearing, at which

time the judge would consider whether to impose reporting restrictions. The Journal later reported that the Serious Fraud Office was in the process of pushing "for other suspects to agree to serve as cooperating witnesses, dangling possible anonymity as an incentive for their help."

Ex Parte, Prior Restraint Hearing

Without making any assurances about publishing plans, the Journal went about its work. The Journal prepared a story out of its London bureau, confident that there was

significant public interest, and no risk of prejudice as the article pointed out that being an unindicted co-conspirator did not amount to an accusation of wrongdoing or suggest any arrest or charges would follow. Later that Thursday afternoon, the prosecutors applied for the prior restraint "to maintain the status quo" of confidentiality until the court's Monday hearing. The Journal was unable to participate in the emergency hearing because the prosecutors provided only 25 minutes' notice and were unclear on the location.

While formally adopting a "neutral position," the prosecutors explained that these individuals had been named in the indictments against Hayes, Farr, or Gilmour in order to provide those defendants with necessary details of the charges against them.

However, as the alleged co-conspirators have not been charged and may never be accused of wrongdoing, disclosure of their identities could cause "financial prejudice, reputational damage and unfairness." The prosecutors' submission to the court noted that "the risk of prejudice is all the greater" because this is "such a high profile case." They also laid out several arguments against any restriction on the press, including the counter-argument that the "considerable public interest" here supported transparent proceedings.

Nevertheless, because any publication of the names would frustrate the court's consideration of reporting restrictions on Monday, Justice Cooke agreed to issue an injunction "on an interim basis until the determination of an application to impose reporting restrictions" could be heard.

As Justice Cooke and the prosecutors discussed the appropriate wording of the order, they learned that the

Journal had just published its article, naming eight alleged co-conspirators. Finding that "the continued existence of that publication would also frustrate the litigation in relation to publicity," the court revised its order to mandate that "any existing internet publication thereof be deleted."

The Journal complied with the order and prepared to fight it at Monday's hearing.

The Order Expires; No Basis for Any Prejudice

In addition to several procedural objections to the order, the Journal argued that a finding of "substantial risk of prejudice" in any "pending or imminent" proceedings was impossible. Nobody was suggesting that revealing the identities of the alleged co-conspirators would prejudice the active prosecutions of Hayes, Farr, and Gilmour. And there were no pending or imminent proceedings against the alleged co-conspirators as they had not been arrested or, in some cases, even interviewed. Any proceedings against them would be so far removed that publicity now could not possibly be sufficiently prejudicial to justify an injunction.

Moreover, given the substantial reporting on the Libor scandal, several of these individuals had already been publicly identified – not to mention the various reports and

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The judge further ordered that "any existing internet publication thereof be deleted." The order threatened the editor, David Enrich, the Journal, and any third party with imprisonment, fine and asset seizure for any breach of its terms.

(Continued from page 26)

tweets of the Journal's latest article that remained accessible online even after the Journal took the article itself down from its website. The Libor investigation has been the subject of extensive, world-wide press coverage. In light of the public interest in unfettered reporting on these proceedings as well as the inability of the court to restrain the significant amount of reporting by news outlets outside its jurisdiction, the Journal also argued that an injunction would be inappropriate and ineffective. The Journal further stressed that the individuals' reputational concerns could not support the order because of the rule against prior restraints of allegedly defamatory statements.

Lawyers for several anonymous clients nevertheless urged the court to keep their identities out of the public record.

At the hearing, Justice Cooke seemed rather unsympathetic towards the Journal, calling its Thursday publication a deliberate attempt to subvert the court's power to decide on reporting restrictions. He demanded to know what materials the Journal had obtained to report on the secret names and what the Journal intended to publish, to which the only response was a declaration of our intention to publish fair and responsible reports. Justice Cooke noted that the Journal must have known that a breach of confidence led it to learn the identities.

Regardless, Justice Cooke let his order expire and found "no basis" for any reporting restrictions, concluding that any proceedings would be so distant that there was no risk of serious prejudice. The Journal promptly re-published the article on its website, with a revised editor's note. Justice Cooke also said the named individuals were free to pursue claims for injunctive relief, but they would have to make new applications in the civil courts. None has done so.

Jason P. Conti, Jacob P. Goldstein Dow Jones & Company, Inc. was represented by Adam Wolanski, 5RB, and Caroline Kean, Wiggin LLP. Jonathan Scherbel-Ball, One Brick Court, represented a coalition of news organizations opposed to the order. Mukul Chawla QC, 9-12 Bell Yard, represented the Serious Fraud Office.

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Photojournalist Wins \$1.22 Million Judgment Over Images Taken From Twitter

By Itai Maytal

After a seven-day trial on damages, a federal jury found that Agence France-Presse and Getty Images willfully infringed upon eight "twitpics" posted by photographer Daniel Morel that he took of the 2010 Haiti earthquake and awarded him \$1.22 million. *Morel v. AFP and Getty Images*, No. 10 Civ. 2730 (S.D.N.Y. jury verdict Dec. 6, 2013).

The Manhattan jury awarded Morel the maximum statutory damages permitted for copyright infringement for the 8 photographs at issue — \$1.2 million. Morel also

received \$20,000 for statutory damages stemming from the jury's finding of 16 counts of non-innocent violations by the defendants of sections 1202(a) and (b) of the Digital Millennium Copyright Act ("DMCA"). (The jury also awarded Morel \$303,889.77 in actual damages and infringers' profits, which Morel declined in favor of statutory damages.)

The trial occurred after (1) AFP lost its motion to dismiss the case, claiming then that Twitter/Twitpic's Terms of Service conferred upon it a non-exclusive license to use the photographs and (2) the court granted Morel's motion for summary

judgment, finding that AFP, Getty and the Washington Post were liable for copyright infringement. *See Agence France Presse v. Morel*, 934 F. Supp. 2d 547, reconsideration granted in part, 934 F. Supp. 2d 584 (S.D.N.Y. 2013); *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 308 (S.D.N.Y. 2011). Morel settled his claims against the Washington Post and other named defendants prior to trial.

CONTROVIGRE A HATT I Un distriction photographes real dat fice is a use des pormans. In allests débute d'abund sur Texter, our les compress de Deniel Merel de Lhandro Servic. Les phicheas serembles; nos les rédictions, o ne se set plus âquel crédit protos se vouer! heures plus tarts, frança e aligant à compte se Nerel, photographe installé de lorgue dete en Haits: les de les perms stréch des droits », sacre (1974) les de les perms stréch des droits », sacre (1974) les de les perms stréch des droits », sacre (1974) les de les perms stréch des droits », sacre (1974) les de les perms stréch des droits », sacre (1974) les de les perms stréch des droits », sacre (1974) les de les perms stréch des droits », sacre (1974) les perms de les perms

From Morel's Answer and Counterclaim

Factual History

[The following summary is based on Judge Alison J. Nathan's January 14, 2013 decision on summary judgment]

On January 12, 2010, photographer Daniel Morel captured images of the immediate aftermath of the Haiti earthquake and uploaded 15 of them, in high resolution, on Twitter.com's picture sharing service, Twitpic. He also posted on Twitter that he had "exclusive earthquake photos," and linked his Twitter page to his Twitpic page. There were

no copyright notices on the images themselves, but Morel's Twitpic page included the attributions "Morel," "by photomorel" and the copyright notice "©2010 Twitpic Inc., All Rights Reserved."

Shortly after Morel posted his photographs, another Twitpic user, Lisandro Suero reposted them on his Twitpic page and, without crediting Morel, tweeted that he had "exclusive photographs of the catastrophe for credit and copyright." In the wake of the disaster, AFP found Morel's photographs on Twitter, credited to Suero, and sent them to Getty through their feed. The eight images were captioned AFP/Lisandro Suero.

The following day, AFP issued a caption correction that went out to Image Forum, AFP's wire and archive, crediting Morel for the Photos over Suero. The caption correction was sent to Getty through AFP's feed to Getty and was distributed to Getty's customers. It was not displayed on Getty's website. AFP did not remove photos credited to Suero from Getty's systems. The corrected images were captioned AFP/Daniel Morel. Getty's name was added to the credit when downloaded by licenses like the Washington Post.

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Once Morel learned about the unauthorized use of photographs, he permitted Corbis Inc., then his exclusive worldwide licensing agent, to alert Getty of his objections. Upon notice from Corbis, Getty claims that it searched for and removed all earthquake related images attributed to Morel on its customer-facing website. It did not at that time remove the Suero images. Getty then alerted AFP of the problem, which led the company to issue a Kill Notice through its wire and its ImageForum. AFP also removed from its archive all photos credited to Morel. One month later, Corbis alerted Getty to the Morel images still on the site that were credited to Suero. They were then removed.

Morel subsequently claimed that the activities of AFP, Getty and its licensees amounted to copyright infringement and violations of the DMCA. AFP responded by filing a

complaint seeking (1) a declaration that AFP had not infringed upon Morel's rights, based on its belief that he granted the company a non-exclusive license to use his photographs on Twitter, and (2) damages for commercial disparagement. Morel counterclaimed for copyright infringement and other claims against AFP, Getty and others. Following discovery and pre-trial motion practice, Judge Nathan ruled that the defendants were liable for copyright infringement and that there were genuine

issues of fact as to whether Getty and AFP violated the DMCA with the required intent.

Trial Summary

Over the course of seven days, the jury heard testimony from Morel, AFP's photo editor Vincent Amalyy and deputy photo editor Eva Hambach, Getty's Images Manager Andreas Gebhard, Senior Director of Photography News and Sports Francisco Bernasconi, Senior Paralegal Heather Cameron and North American Senior Sales Director Katherine Calhoun. At stake was as follows:

8 awards for copyright infringement (if statutory, \$750 to \$30,000, or with willfulness, \$750 to \$150,000);

16 awards for DMCA violations (2 for each image based on the defendants' removal of copyright management information and their addition of false copyright management information, where damages range from \$2,500 to \$25,000)

The jury was not allowed to know, as a result of a successful *in limine* motion, that AFP commenced this lawsuit.

Based on opening and closing statements by the parties, it would appear their key arguments to the jury were as follows:

Morel: The evidence shows that (1) as a result of AFP and Getty's actions, countless people around the world believed that Morel's photographs were taken by someone else and that the defendants had a right to sell or give the photos away; (2) the defendants licensed and sold Morel's pictures even

though they knew they were not made by the third party Suero; and (3) the defendants were "indifferent, lackadaisical, dismissive and inexcusably ineffective" in taking down Morel's pictures and preventing further licensing of his work.

AFP: The evidence shows that (1) AFP acted on the best information it had at the time about the origin of Morel's images and was not acting to harm Morel; (2) AFP never tried to hide its actions, but tried to correct its innocent mistakes promptly and

to compensate Morel for his works; (3) AFP is a not-forprofit organization made up of honest, straightforward and hardworking photojournalists and journalists that had no interest in hurting Morel; (4) AFP did not kill the photographs before it had a chance to make Morel an offer since doing so would have killed the opportunity for both of them; and (5) Morel contributed to the confusion by (a) posting his photographs on high resolution on TwitPic with no restrictions and exposing them to people like Suero, (b) charging unreasonable rates and (c) cutting out his agent Corbis from negotiations in order to make more money for himself.

Getty: The evidence shows that (1) Getty relied on AFP (which originally provided the images to Getty under a joint distribution agreement) to get the captions correct in its

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photographs; (2) Getty killed Morel's photos after it was notified about the problem; (3) Morel's agent Corbis delayed for six weeks in alerting Getty about additional Morel photographs in Getty's archive; (4) Morel was asking for an unfair compensation, far and above his actual damages (he was asking the jury "to make him the best paid news photographer on the planet ever") and (5) Getty has no interest in hurting photojournalists like Morel, particularly since the company is made up of photographers and photojournalists.

Following argument and testimony, the jury returned on November 22, 2013 the special verdict to Morel for the maximum statutory damages allowed under the Copyright Act for willful infringement of the eight photographs at issue, plus damages for violation of the DMCA. No determination on attorneys' fees has yet been made.

The defendants have already indicated to the Court that post-trial motions are pending.

Conclusion

Regardless of the outcome of post-trial motions or appeals, this case illustrates the serious copyright-related risks involved in using images found on social media, assuming a fair use defense does not apply. It also may point to risks that may exist even when images are properly licensed from stock photo services. In either case, it would seem prudent to confirm, where practicable, the provenance of questionable images and that the rights to use those images have in fact been fully secured before using them.

Itai Maytal is an associate attorney at Miller Korzenik Sommers LLP. Joseph T. Baio of Willkie Farr & Gallagher LLP represented the Plaintiff. Defendant AFP was represented by Joshua J. Kaufman of Venable LLP and Defendant Getty Images, Inc. was represented by Marcia Paul and James Rosenfeld of Davis Wright Tremaine LLP.



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Google's Digital Book Program Passes Fair Use Test

Index and Snippets a "Transformative Use"

By Judy Endejan

On November 14, Judge Denny Chin ruled that Google's digitization of more than twenty million books was a fair use under Section 107 of the Copyright Act, 17 U.S.C. § 107. Authors Guild, Inc., and Betty Miles, Joseph Goulden, and Jim Bouton v. Google Inc., No. 05 Civ. 8136 (S.D.N.Y.).

Background

Judge Chin's decision was the latest development in this case, which began in 2005 when the plaintiffs filed a copyright infringement suit for its Google Books project that scanned copyrighted books without permission of the

copyright holders. In 2011, Judge Chin rejected a proposed settlement between Google and the plaintiffs to resolve all claims on a cross-wide basis. After that, the parties were unable to reach another settlement and the case proceeded towards class certification. Plaintiffs sought class certification in 2012, which was granted by Judge Chin. At that time he denied a Google motion to dismiss the Authors Guild claims. Google appealed decision granting class certification. July 1, 2013, the Second Circuit vacated the class certification decision and remanded the case for resolution of whether Google's

fair use defense was valid, which led to the latest ruling granting Google's motion for summary judgment.

Google has two digital book programs. The first, the "Partner Program," involves the hosting and display of material provided by book publishers or other rights holders who give their permission for the display of their works. The second, the "Library Project," was at the core of the litigation. For the Library Project, Google scanned more than twenty million books from the collections of several major research libraries. Google would then deliver a digital copy to

participating libraries, create an electronic database, and make text available for online searching through the use of "snippets."

Fair Use Analysis

In his ruling Judge Chin analyzed the four elements necessary for fair use. For the first factor (the purpose and character of the use) Judge Chin found that Google's use of the copyrighted works was highly transformative because Google digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers and others find books. The other feature of the

program, searching through the display of snippets, is also transformative. Judge Chin said that the display of snippets of text is similar to the display of thumbnail images of photographs for searching. Google Books does not supersede or supplant books because it cannot be used to read books, a factor which also suggests fair use. The fact that Google's use is commercial does not negate a fair use finding because the commercialization is not direct and Google Books serves several important educational purposes

purposes.

Regarding the second factor (the nature of the copyrighted work) Judge Chin said

that the works or books are largely nonfiction published books, which favors a finding of fair use. The third factor (amount and substantiality of portion used) was met even though Google scans the entire book. Because Google Books offers full text search capabilities, digitizing an entire book is critical to its functioning and therefore necessary to make fair use of the work.

Finally, the fourth factor (effect of use upon potential market or value) was satisfied because Google Books, if (Continued on page 32)

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anything, only enhances the sales of books to the benefit of copyright holders. Google does not sell its scans and they do not replace the books.

Google Books allows individual and out-of-print titles to be discovered, enhancing the possibility that these books might be purchased.

Finally, Judge Chin found that Google Books provides significant public benefits and outlined several ways in which a finding of fair use would be consistent with the underlying purpose of the Copyright Act, which is to promote the progress of science and the useful arts.

Because the Google Books project is designed for research and preservation and not for wholesale, unauthorized copying or downloading of entire books, Google Books passes copyright muster. The judge was clearly impressed by Google's factual declarations that outlined the significant and varied research capabilities that Google Books offered with attendant public benefits because Google Books helps to preserve books, give them new life, and ultimately help researchers, authors, and publishers.

Judy Endejan is a partner at Garvey Schubert Barer in Seattle, WA. The plaintiffs were represented by Michael J. Boni, Boni & Zack LLC, Bala Cynwyd, PA; Edward H. Rosenthal and Frankfurt Kurnit Klein & Selz P.C., New York; and Sanford P. Dumain, Milberg LLP, New York. Google was represented by Daralyn J. Durie, Durie Tangri LLP, San Franciso.

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Sixth Circuit Upholds Dismissal of All Claims Related to "Soul Men" Film and Soundtrack

By William F. Wilson and Laura P. Merritt

The Sixth Circuit recently affirmed summary judgment for the defendants on all claims asserted by Sam Moore, formerly of the soul music group "Sam & Dave," related to the 2008 feature film "Soul Men" which starred Samuel L. Jackson and the late Bernie Mac. *Moore v. The Weinstein Company, LLC, et al.*, No. 12-5715 (6th Cir. October 31, 2013).

Moore, best known for his 1960s versions of the songs "Soul Man" and "Hold On, I'm Comin'," challenged a 98-page summary judgment decision by District Judge Aleta Trauger (M.D. Tenn.), dismissing his claims that the film and soundtrack violated his trademark rights and appropriated his life story.

Moore, along with his wife and manager Joyce Moore and their purported Tennessee trust, originally filed the lawsuit in 2009, suing The Weinstein Company (the film studio that produced and released the film), Metro-Goldwyn-Mayer Studios, Inc. (the film's theatrical distributor), Genius Products, LLC (the distributor of the DVD), Concord Music Group, Inc. (the creator and distributor of the film's official soundtrack), and Harvey and Bob Weinstein (the film's executive

producers and principals of the Weinstein Company).

Background

The movie "Soul Men" is a comedy centering on the reunion of two feuding former back-up soul singers. John Legend plays the lead singer Marcus Hooks and Jackson and Mac play back-up singers as part of the fictitious 1960s soul trio "Marcus Hooks and The Real Deal." Hooks leaves the

group and the two remaining members, Louis Hinds, played by Jackson, and Floyd Henderson, played by Mac, go their separate ways. Years later, after Hooks dies, Hinds and Henderson reunite in California and travel together to perform a tribute to Marcus Hooks at the famed Apollo Theater.

The Plaintiffs claimed that Jackson and Mac depicted "Sam & Dave" and asserted a variety of statutory and

common law claims. The Plaintiffs first argued under 15 U.S.C. § 1125 (a), that the title of the film "Soul Men" infringed Moore's purported common law trademarks in a variety of phrases including "Soul Men" and "Soul Man." They also contended that the film and soundtrack infringed upon the 1967 album "Sam & Dave Soul Men" featuring the single "Soul Man," and the 2008 Historic Films' documentary "The Original Soul Men Sam and Dave." Moore asserted violations of the Tennessee Consumer Protection Act (the "TCPA"), violation of a right of publicity, trademark dilution, common law unfair competition, false light invasion of privacy, unjust enrichment and civil conspiracy.

The Court of Appeals for the Sixth Circuit adopted the District Court's lengthy, well-reasoned decision for dismissing the Lanham

Act and state unfair competition claims, and turned its attention to the right of publicity, state trademark dilution, and state consumer protection claims.



Right of Publicity Claim

Moore argued that his right to publicity was violated by the use of his "likeness" in the movie without his consent.

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The Court applied the "transformative elements" test which has been gaining ground in several right of publicity cases involving First Amendment issues. Specifically, the Court weighed Moore's allegedly appropriated likeness against the film's expressiveness to determine whether the film was so transformed that it became "primarily the defendants' own expression rather than . . . [Moore's] likeness."

In upholding the lower court's decision, the Sixth Circuit noted that not only does the Restatement (Third) of Unfair Competition not generally protect a person's likeness in a film, but also that the film "without a doubt" added enough creative components as to sufficiently transform it to the defendants' own creative expression rather than Moore's likeness.

The Sixth Circuit stated that it had previously adopted the "transformative elements" test in *ETW Corp. v. Jireh Publ'g*, 332 F.3d 915, 931 (6th Cir. 2003) (holding that an artistic depiction of Tiger Woods celebrating his first victory at the Masters Golf Tournament added "significant transformative elements that made it especially worthy of First Amendment protection").

In fact, the *ETW Corp*. court had applied multiple First Amendment tests in reaching its dismissal, including the *Rogers* test most favored by defense counsel. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2nd Cir. 1989) (previously adopted by the Sixth Circuit in *Parks v. LaFace Records*, 329 F.3d 437, 451-52 (6th Cir. 2003) (reversing summary judgment where the relevance of the title "Rosa Parks" to the content of a rap song created a fact issue)).

Moore also argued that the First Amendment protections applied to the film did not apply to advertising inserts featuring Moore's image that were included in packaging for the film and soundtrack. The Court of Appeals for the Sixth Circuit was quick to reject this argument by stating that the group "Sam & Dave" was just one of numerous groups/artists depicted in these advertising inserts. The Court noted that the plaintiffs had presented no evidence that the inserts caused anyone to mistake the "Soul Men" reference for "Sam & Dave," and determined that no reasonable juror would mistake the movie or soundtrack for the performing group "Sam & Dave."

Simply marketing the film and soundtrack to fans of soul music did not provide a basis to conclude that fans would mistake "Soul Men" for the group "Sam & Dave."

State Trademark Dilution Claim

After dispensing with Moore's publicity claim, the Court analyzed Moore's state trademark dilution claim under the Tennessee Trademark Act, Tenn. Code Ann. § 47-25-513. At the trial court, the Plaintiffs had pursued a Tennessee claim but in arguing against the Defendants' summary judgment had attempted to inject a claim under Arizona law.

In analyzing conflict of laws principles (with Tennessee, situs of the lawsuit, and Arizona, Plaintiffs' residence, as the options), the Court of Appeals concluded that both states have closely similar trademark dilution statutes. The Court held that the District Court erred when it dismissed the plaintiffs' state dilution claim upon a finding that Tennessee law was inapplicable. The appellate court still held that the plaintiffs' trademark dilution claim failed because Moore had not presented sufficient evidence that any of his purported marks were famous as required by either Tennessee or Arizona law.

Applying the factors for trademark famousness, including the nature and extent of use of the same or similar mark by third parties, the Court recognized that several dozen thirdparty musical albums utilized the phrase "soul men" or "soul man."

Moore's attempts to illustrate his own personal fame were insufficient to create a genuine factual dispute about whether any of his purported marks had achieved trademark fame. Simply put, the Court emphasized that "the famousness inquiry under state law requires courts to evaluate in-state famousness, it still turns on the marks' fame — not Moore's."

State Consumer Protection Claims

The Court also considered Moore's claims brought under the Tennessee Consumer Protection Act ("TCPA"). Moore claimed that the defendants, through marketing and advertising, willfully caused a likelihood of confusion as to whether Moore sponsored the soundtrack and film. Despite Moore's failure to specifically identify a particular subsection of the TCPA for his claim, the Court reviewed his claim under the provision that prohibits "causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services." Tenn. Code Ann. § 47-18-104(b)(2). The Court determined that Moore's failure to appeal the District Court's (Continued on page 35)

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determination that no likelihood of confusion existed and Moore's failure to cite to any evidence establish confusion foreclosed Moore's TCPA likelihood-of-confusion based claims.

For his second claim under the TCPA, Moore argued that the Concord Soundtrack and Genius DVDs constituted false and deceptive advertising to the public and contained misleading statements regarding Moore's connection with the film. The defendants challenged not only the plaintiffs' choice of Tennessee law, but the fact that Moore did not point to any admissible evidence to show that defendants' actions deceived or injured Tennessee consumers. The Sixth Circuit upheld the District Court's dismissal, noting that Moore compounded his error on appeal by failing respond to the defendants' merit-based attack to meet his burden to show that a genuine issue of material fact existed regarding his TCPA claim and instead offering only a choice-of-law footnote.

Circuit Judges John M. Rogers and Deborah L. Cook (author of opinion) and District Judge Gregory F. Van Tatenhove ruled unanimously. The Plaintiffs did not file a motion for rehearing or for *en banc* consideration.

Defendants are represented by Robb S. Harvey and Heather J. Hubbard of Waller, Lansden, Dortch & Davis, LLP, Nashville. The authors are Waller associates. The Weinstein Company, Bob Weinstein and Harvey Weinstein are also represented by Bertram Fields of Greenberg Glusker Fields Claman & Machtinger LLP, Los Angeles. The Plaintiffs are represented by Arnold P. Lutzker of Lutzker & Lutzker LLP, Washington, DC, and Sean Martin of Martin Heller Potempa and Sheppard, PLLC, Nashville.

Post-script by Robb Harvey

The lawsuit was filed in Nashville, supposedly because the plaintiffs had lived in our great city some years ago. Y'all come visit our cultural vistas such as the Country Music Hall of Fame and Museum. The movie "Soul Men" was partially filmed just down the road in Memphis, the birthplace of Stax music. We encourage you to visit the Stax Museum of American Soul Music in Memphis and have some Memphis barbecue.



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Third Circuit Affirms Dismissal of Copyright Lawsuit Arising from VH1 Reality Shows

By Shaina Jones Ward

The U.S. Court of Appeals for the Third Circuit recently affirmed the dismissal of a copyright case against Viacom Inc., which alleged that episodes of two VH1 shows were based on a treatment the plaintiff had submitted to the company. <u>Sims v. Viacom, Inc.</u>, No. 13-1567 (3d Cir. Nov. 14, 2013).

The plaintiff had sued Viacom twice before on various legal theories claiming that the reality show "Charm School" was based on his treatment for a reality show entitled "Ghetto Fabulous." After both suits were dismissed, the plaintiff sued Viacom again, this time alleging that certain episodes of that

show and another VH1 show, "From G's to Gents," infringed his copyright, violated the Digital Millennium Copyright Act ("DMCA"), and constituted unjust enrichment.

In affirming the district court's dismissal of the complaint, the Court found that this third lawsuit arose out of the same facts and circumstances as the plaintiff's two prior actions and was therefore barred under the doctrine of res judicata.



Background

In 2004, Plaintiff Charles Sims and collaborator Allison Jordan registered a treatment for a proposed reality television show entitled "Ghetto Fabulous" with the Writers Guild of America. Jordan submitted the treatment to various television companies, including Viacom. As a precondition for reviewing the treatment, Viacom required Jordan to execute a standard submission release that required a submitter to file any claims for alleged misuse of the material within six months of learning of the use or intended use. Viacom never offered to buy the "Ghetto Fabulous" treatment.

In April 2007, the reality television show "Charm School" debuted on Viacom's VH1 network. It ultimately aired for three seasons. In January 2009, Sims and Jordan filed suit against Viacom in the Philadelphia County Court of Common Pleas, alleging that "'Charm School' is 'Ghetto Fabulous'" and asserting various contract, fraud, and "theft by conversion" claims.

Viacom removed the case to the U.S. District Court for the Eastern District of Pennsylvania. After dismissing some of the claims, the court granted summary judgment to Viacom on the remaining claims because, among other things, Sims and Jordan failed to file their claims within six

months of learning that Viacom allegedly used their ideas as required by the contract governing the submission of the treatment.

In June 2011, Sims alone filed a second action against Viacom in the U.S. District Court for the Western District of Pennsylvania, this time alleging claims of copyright infringement, violation of the DMCA, and unjust enrichment based on Viacom's alleged use of his treatment in the 2007 season of "Charm School."

Sims again claimed that Viacom copied his "Ghetto Fabulous" treatment and pointed to various alleged similarities between his treatment and episodes of the show. The Court granted Viacom's motion to dismiss Sims' claims with prejudice, finding that Sims failed to comply with the Copyright Act's registration requirement; that his copyright and DMCA claims were barred by the Copyright Act's three-year statutory limitation period; and that his unjust enrichment claim was preempted under federal copyright law.

Ten days after dismissal of his second lawsuit, Sims filed a third action in the Western District of Pennsylvania against Viacom. As he did in the second suit, Sims alleged claims

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for copyright infringement, DMCA violations, and unjust enrichment, but this time sought to recover for Viacom's alleged use of his treatment during the 2009 season of "Charm School" and the 2009 season of another Viacom reality show airing on VH1, "From G's to Gents."

Sims again pointed to the same alleged similarities between his treatment and the two VH1 shows that he complained about in his two prior suits.

On January 29, 2013, Sims' third lawsuit was dismissed with prejudice, when the District Court adopted the report and recommendation of the Chief Magistrate Judge, who had concluded that Sims' claims were barred by the doctrine of res judicata. Sims appealed this judgment to the U.S. Court of Appeals for the Third Circuit.

Third Circuit Ruling

On November 14, 2013, the Court affirmed the district court's dismissal of Sims' complaint. Specifically, the Court

found that the case met each of the three res judicata requirements.

First, the *Sims I* and *Sims II* courts entered final judgments on the merits against Sims. Second, Sims' third lawsuit involved the same parties as in *Sims I* and *Sims II*. Third, the lawsuit was based on the same cause of action as the two prior suits.

In assessing this third requirement, the Court rejected Sims' argument that the 2009 episodes of "Charm School" and "From G's to Gents" had not yet aired at the time of *Sims*

I and were not at issue in either of the prior lawsuits. The Court explained that the gravamen of Sims' third complaint was the same as *Sims I* and *Sims II* – the contention that Viacom copied his concept for a reality television show from his "Ghetto Fabulous" treatment.

Despite the fact that the *Sims III* complaint focused only on the 2009 seasons of "Charm School" and "From G's to Gents," the Court found that an "essential similarity of the underlying events" formed the basis for all three of Sims'

suits.

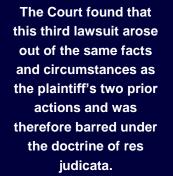
The Court also discounted Sims' contention that he should be permitted to file separate suits for each season of the shows because the essence of Sims' claims was that Viacom copied his concept for the show, not particular episodes.

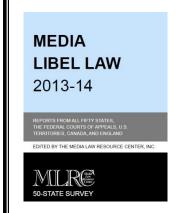
In addition, the Court held that the claims in *Sims III* arose from the same series of transactions that gave rise to the earlier proceedings—beginning with Sims' allegation that Viacom stole his idea for a reality television show—and were therefore based on the same cause of action as *Sims I*

and Sims II.

Finally, the Court noted that Sims could have included the 2009 seasons of both shows in *Sims I* or *Sims II*, as Sims filed an amended complaint in *Sims I* after the 2009 seasons had already aired, and he did not file his complaint in *Sims II* until 2011.

Viacom, Inc. was represented by Robert Penchina, Michael Berry, and Shaina Jones Ward of Levine Sullivan Koch & Schulz, LLP. Plaintiff was represented by Darrell E. Williams of Bridgeville, Pennsylvania.





Recently Published by MLRC

Media Libel Law 2014-15 (November 2013) is a comprehensive survey of defamation law, with an emphasis on cases and issues arising in a media context. Topics covered include: Defamatory Meaning, Opinion, Truth/Falsity, Fault, Republication, Privileges, Damages, Motions to Dismiss, Discovery Issues, Trial Issues, Appellate Review, Remedies for Abusive Suits, Retraction, Constitutional/Statutory Provisions, and Summary Judgment. Visit medialaw.org for more information.

New York High Court: Don't Send Journalists to Testify In States with Weak Shield Laws

Subpoena to Jana Winter Rejected

By Dori Ann Hanswirth and Patsy Wilson

New York-based journalists received good news when the State's highest court reversed a lower court order requiring FoxNews.com investigative reporter Jana Winter to appear for testimony in Colorado because of the substantial likelihood that she would be compelled to identify confidential sources there. *Holmes v. Winter*, No. 245 (N.Y. Dec. 10, 2013).

Demonstrating New York's leadership in protecting newsgathering, the Court held that New York's policy against compelled disclosure of confidential sources – grounded in the State's Constitution and embodied in its statutory shield law – was violated when the lower court did not consider Winter's rights under New York law before issuing a subpoena calling for her appearance and testimony in Colorado. This is because New York law "provides a mantle of protection for those who gather and report the news – and their confidential sources – that has been recognized as the strongest in the nation."

In states with less robust shield laws, like Colorado, a reporter could be jailed for the same conduct that is absolutely protected in New York. The decision protects New York journalists from this quandary, and holds squarely that New York journalists can rely on their "mantle of protection" when they conduct out-of-state reporting: "The outcome of this case does not (and should not) turn on whether Winter received the information while she was in Colorado or obtained it over the telephone or via computer while sitting in her New York office." The ruling dissolves Winter's obligation to appear in Colorado, along with the attendant prospect of incarceration for her anticipated refusal to testify.

Background

Winter was haled into court by accused mass murderer James Holmes, who killed and wounded dozens of people in a Colorado movie theater on July 20, 2012. Fox News assigned New York-based Winter to cover the story. On July

23, 2012, the Colorado court issued what would become the first of three gag orders prohibiting law enforcement from speaking about the case. On July 25, 2012, Fox News published Winter's report about a notebook that Holmes sent to a psychiatrist before the massacre. Winter cited two unnamed law enforcement sources in her report.

Arguing that those sources violated the gag orders, Holmes sought sanctions against the prosecution. On December 10, 2012, he questioned 14 law enforcement personnel under oath; all denied any knowledge of the alleged leak. Holmes then obtained a certificate from the Colorado court pursuant to the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, which stated that Winter's testimony was material and necessary to his sanctions motion and that Holmes' fair trial rights had been violated. Certificate in hand, Holmes petitioned a New York court to issue a subpoena compelling Winter to appear and testify in Colorado. Over Winter's objection, on March 7, 2013, the Supreme Court issued the subpoena. Winter immediately appealed.

Both the trial court and Appellate Division refused to stay enforcement of the subpoena pending appeal, so on March 29, Winter moved to quash the subpoena in Colorado under that state's shield law. She would eventually appear in Colorado under protest on four occasions in the next seven months, but she was never called to the witness stand. On August 20, the Appellate Division affirmed the decision to issue the subpoena, but with two of the five justices in dissent. Winter immediately appealed as of right under CPLR § 5601(a) to the New York Court of Appeals. On September 3, the Colorado court granted Winter's motion to postpone her next appearance date to January 3, 2014 so that New York's highest court could consider her case. Her motion to quash the subpoena was to be heard on that date.

On appeal, Winter argued that it would impermissibly violate New York public policy to issue a subpoena mandating her to testify in another state's proceeding, where

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she would be subject to contempt for refusal to disclose confidential sources. Winter also explained that the subpoena constituted an undue hardship under the Uniform Act, because its existence, and the appearance and testimony it called for, would effectively end her career as an investigative journalist.

Court of Appeal Ruling

On December 10, 2013, the Court reversed the lower court's issuance of the subpoena. Citing New York's constitutional, statutory, and common law tradition, the Court held that "there is no principle more fundamental or well-established than the right of a reporter to refuse to divulge a

confidential source." The Court reiterated the history behind the journalists' shield, stating that New York's Legislature "intended the [Shield Law] to provide the highest level of protection in the nation" and recognized that the protections provided by the Shield Law were "essential to maintenance of our free and democratic society." The Court also reminded readers that the New York Constitution guaranteed a free press in 1831, even before the First Amendment applied to the states. As for New York's common law tradition, the Court harkened back to the seditious libel trial of John Peter Zenger, in which a jury of colonial New Yorkers acquitted Zenger after he refused to name his anonymous sources.

These considerations spurred the Court to elevate lofty language from earlier concurrences into its majority opinion, including Judge Wachtler's observations regarding the historical importance of the Zenger incident (*Beach v. Shanley*) and Judge Bellacosa's admonition that "[j]ournalists should be spending their time in newsrooms, not in courtrooms as participants in the litigation process" (*O'Neill v. Oakgrove Construction, Inc.*). Those considerations also led the Court to conclude that "protection of the anonymity of confidential sources is a core – if not the central – concern underlying New York's journalist privilege, with roots that can be traced back to the inception of the press in New York."

The majority rejected the dissent's view that the location of Winter's conversations with her source was crucial to determining the strength of New York's policy interest. Rather, the Court found that the realities of modern newsgathering require reporters to cross state lines to report on global stories, and New York's public policy was sufficiently strong to protect confidential sources obtained without the State.

Accordingly, the Court found that "as a New York reporter, Winter was aware of – and was entitled to rely on – the absolute protection embodied in our Shield Law when she made the promises of confidentiality that she now seeks to honor."

The Court warned that this "is precisely the harm sought to be avoided under our Shield Law for it is fear of reprisal of

> this type that closes mouths, causing news sources to dry up and inhibiting the future investigative efforts of reporters."

> The Court did suggest, though, that New York's policy would not be offended by forcing a reporter to testify in a state with absolute or even robust protection for confidential sources similar to those in New York.

In setting forth the broad reach of New York's policy, the Court also limited a prior decision, *Matter of Codey*, where it held that a New York court should not determine under the Uniform Act whether the testimony sought from a New York reporter would actually be admissible in the other jurisdiction.

testimony sought from a New York reporter would actually be admissible in the other jurisdiction.

Winter relied upon a footnote in *Codey* positing a future case in which a strong New York public policy would justify refusing to help a sister state obtain testimony. The Court held that this was indeed such a future case and distinguished *Codey* on several grounds, including the "most important"

Christopher Handman of Hogan Lovells argued the appeal for Winter, with Dori Ann Hanswirth, Theresa House, Nathaniel Boyer, Benjamin Fleming, and Sean Marotta on the briefs. Daniel Arshack of Arshack, Hajek & Lehrman represented Holmes.

fact that the source in Codey was no longer confidential by

the time the subpoena issued.

"Protection of the anonymity of confidential sources is a core – if not the central – concern underlying New York's

journalist privilege,

with roots that can be

traced back to the

inception of the press

in New York."

2013 Issue 4

New California Law Criminalizes Photography of Celebrities' Children

California has increased the criminal penalties for harassment directed toward the children of celebrities or other children harassed because of their parents' or guardians' line of work. The new statute increases the crime of general harassment as well as sets up a derivative civil cause of action.

Senate Bill 606, which was signed into law in late September, now makes intentional harassment a crime that can be punished by imprisonment in county jail for up to a year, with a fine of up to \$10,000, or a combination of imprisonment and a fine. Previously, the intentional harassment of children on the basis of their parents' or guardians' employment was punishable by only six months in jail or a fine of \$1,000 or less.

According to the statutory definition, harassment:

"means knowing and willful conduct directed at a specific child or ward that seriously alarms, annoys, torments, or terrorizes the child or ward, and that serves no legitimate purpose, including, but not limited to, that conduct occurring during the course of any actual or attempted recording of the child's or ward's image or voice, or

both, without the express consent of the parent or legal guardian of the child or ward, by following the child's or ward's activities or by lying in wait. The conduct must be such as would cause a reasonable child to suffer substantial emotional distress, and actually cause the victim to suffer substantial emotional distress."

The definition of harassment was expanded to "include conduct occurring during the course of actual or attempted recording of the child's image or voice without express consent of the child's parent or legal guardian, by following the child's activities or by lying in wait," according to the bill's analysis.

A second violation of the law would now be punishable by a fine up to \$20,000 and county-jail imprisonment of at least five days but not more than one year. A third violation of the law would be punishable by a fine up to \$30,000 and county-jail imprisonment of at least 30 days but not more than one year.

Opponents of the bill included the California Broadcasters Association, the California Newspaper Publishers Association, and the National Press Photographers Association. Mickey H. Osterreicher, the NPPA's general counsel, wrote in a letter that the definitions are vague and "susceptible to subjective interpretation." The law also burdens substantially more speech than is necessary to advance a governmental interest.

"We believe the increased penalties and liabilities related to such actions improperly abridges First Amendment protected activity occurring in traditional public forums and other places where a person normally has no reasonable expectation of privacy," Osterreicher wrote.

The CNPA joined in the NPPA's First Amendment concerns raised by NPPA and also argued that the bill would "sanction nuisance lawsuits by disgruntled subjects of news photographs," according a bill analysis.

Supporters of the bill included the California Medical Association, the California National Organization for Women, Crime Victims United, the California Psychological Association, the Screen Actors Guild, American Federation of Television and Radio Artists, and five law enforcement groups.

Two celebrities, actresses Jennifer Garner and Halle Berry, testified in favor of the legislation in August.

Garner described having "a gang of shouting, arguing, law-breaking photographers who camp out everywhere we are, all day, every day." A mentally ill stalker, who Garner said threatened to cut her baby out of her belly, was arrested waiting among a throng of paparazzi gathered at Garner's

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California has increased the criminal penalties for harassment directed toward the children of celebrities or other children harassed because of their parents' or guardians' line of work.

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older daughter's playschool. Another family's three-year-old was knocked over in another incident at the playschool, Garner also testified.

"We're not just whiny celebrities," Berry testified. "We're moms who are just trying to protect our children. It's not about me. Take my picture. I get it. But these little innocent children ... they're not actors. They didn't ask to be thrown into this game."

The law also allows for celebrity parents to bring civil lawsuits on the basis of alleged violations of the harassment

law. Remedies under the new statute are: actual damages, punitive damages, reasonable attorney fees, costs, disgorgement of any compensation derived from the dissemination of a celebrity's child's image or voice, and injunctive relief.

However, the law immunizes the transmission, publication or broadcast of a child's image or voice. The bill's analysis said that the prior statute was adopted to protect children of health care employees who work at abortion clinics, and the new law would also protect the children of law enforcement officials.

Recent MLRC Publications

Articles and Reports on Significant Developments

Bulletin 2013 Issue 3 - December 2013

Sex, Lies and Section 230 • Literary License(s)? Why the First Amendment Protects Fiction, and What This Means For Video Games • Making Fair Use More Client-Friendly: The Set Of Principles In Fair Use For Journalism • Fair Use Is Foul and Foul Use Is Fair: Legal Certainty Or Witches' Cauldron? • New Developments 2013

Access to Public Employee Pension Records

In 2012 and 2013, the MLRC Newsgathering Committee examined the issue of access to public employees' pension records and researched the various statutes and case law that allow for or prohibit public disclosure. This paper summarizes some of the committee's findings and offers suggestions to counsel dealing with the issue both in the courts and in the state legislatures.

Can I Use This Clip? A Guide to Audio/Video Use

A presentation from the Pre-Publication/Pre-Broadcast Committee on the legal issues arising from the use of audio or video clips. The presentation consists of a powerpoint to be used for training purposes. The powerpoint can be customized to suit the needs of a particular client. Slides that are not relevant to the organization's needs/issues can be deleted, and other information could be added, if desired.

2013 State Legislative Highlights

MLRC State Legislative Committee reports on some of the most significant pieces of legislation (good and bad) passed in 2013 in various state legislatures.

International Media Law Developments: Reform, Regulation and Rebalancing

The New Defamation Act 2013: What Difference Will It Really Make? • Australian Media Law Round-Up • The Supreme Court of Canada and Free Expression 2008-13: Tidal Wave or Tidal Wash? • Liability in Germany for Foreign Web Hosts and Content Providers: Summary of Recent German Supreme Court and European Court of Justice Decisions • Media Defence in Ireland: An Update • Canada's Copyright Modernization Act: A Delicate Rebalancing of Interests • Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates • Use of Unmanned Aerial Vehicles in Newsgathering: The Sky's the Limit – Or Is It? • A Guide For American Lawyers to Prepublication Review of European-Based Publications

Prosecutors' Online Posts and Leaks Grounds for New Trial in Murder Case

Use of Social Media and Leaks Prejudiced Fair Trial Rights

Describing it as a "bitter pill to swallow," a federal judge granted a new trial to five former New Orleans police officers convicted of murder and civil rights violations in the aftermath of Hurricane Katrina. *United States v. Bowen*, 2013 U.S. Dist. LEXIS 134434 (E.D. La. Sept. 17, 2013) (Engelhardt, J.).

In what the judge called a "bizarre and appalling turn of events," federal prosecutors in New Orleans and Washington, D.C., were found to have posted dozens of pseudonymous messages on the Times Picayune website during pretrial and trial proceedings. The messages repeatedly asserted that defendants were guilty and that the New Orleans police department was corrupt. The court also found that prosecutors leaked confidential case information to the newspaper and Associated Press. The comments and leaks not only violated professional conduct rules but created a "poisonous atmosphere" that prejudiced defendants' fair trial rights.

Background

The defendants, five former New Orleans police officers, were involved in the notorious Danizger Bridge shootings in the days after Hurricane Katrina struck the city. They were convicted in 2011 of shooting and killing two unarmed men trying to cross the bridge and then trying to cover up those murders.

The defendants moved for a new trial arguing that 1) online postings by the prosecution inflamed public opinion against the defendants and prejudiced their rights to a fair trial; and 2) that leaks to the *Times-Picayune* and the Associated Press improperly disclosed "the government's theories regarding the defendants' alleged guilt, the status of plea negotiations, and the upcoming guilty plea" of a cooperating witness in violation of the professional rules for federal prosecutors.

A special investigation into alleged prosecutorial misconduct revealed that federal prosecutors in New Orleans and at the Justice Department in Washington had been posting dozens of messages about the case on Nola.com, the website of the Times-Picayune newspaper. Many of the postings are detailed in the courts 129 page opinion. Among

the many, Assistant U.S. Attorney Sal Perricone in New Orleans, himself a former New Orleans police officer, frequently accused the New Orleans police department of corruption, commented on trial testimony, and asserted that defendants were guilty.

The government argued, among other things, that no actual prejudice occurred because the comments were pseudonymous and there was no evidence the comments were read or influenced anyone on the jury. The court, however, found that under the circumstances actual prejudice on the jury need not be shown because of the extensive and deliberate misconduct. But the court went on to find that actual prejudice was in fact established where seven of twelve jurors were readers of Nola.com. The judge said it was difficult to conceive that the defendants' constitutional right to a fair trial with an impartial jury could withstand the "ferocity" of the multiple online comments made by prosecutors. Prosecutors have appealed the ruling to the Fifth Circuit.

Press Issues

In dicta, the judge wrote that the news organizations should have been pressed to disclose the identities of commenters and sources of the leaks. Citing to the recent Fourth Circuit decision in the James Risen reporters privilege case, <u>U.S. v. Sterling</u>, the judge suggested that any assertion of journalistic privilege would have been inapplicable. Earlier in the proceedings, the Department of Justice decided not to pursue a subpoena it issued to Nola.com seeking the identity of online commenters.

More recently, the *Times-Picayune* and Associated Press filed motions to intervene in the case to obtain access to certain sealed and undocketed filing. The judge found the access request "ironic" in light of news organizations' decision to keep information "hidden" from the public. Moreover, the judge suggested that by withholding information about commenters and leakers, the news organizations supported by implication the criminal defendants' prosecutorial misconduct claims.