

MULRC Media Law Resource Center
MEDIA LAW LETTER

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Legal Frontiers in Digital Media

May 15-16, 2014
Mountain View, CA

MLRC/NAA/NAB Media Law Conference

September 17-19, 2014
Reston, VA

MLRC Annual Dinner

November 12, 2014
New York, NY

DCS Annual Lunch & Meeting

November 13, 2014
New York, NY

More information at medialaw.org
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Other Side of the Pond: UK Media Law Developments

No Special Constitutional Rights for Journalists; Prince Charles' Diary and More

By David Hooper

On 18 August 2013 David Miranda the partner (referred to in the judgment as the spouse of Glenn Greenwald) was detained for a period which totalled nine hours at Heathrow airport under the Terrorism Act 2000. He was carrying 58,000 highly classified documents, many of them secret or top secret, related to British Intelligence which had been stolen by Edward Snowden who had fled to Russia. Miranda had been tasked seemingly by his partner Greenwald to transport this material from Rio de Janeiro to another journalist in Berlin.

Security Services had evidently got wind of this as a Port Circulation Sheet had been issued on 16 August to counter-terrorism police requesting that Miranda be detained for questioning. Miranda was duly stopped and questioned for no more than nine hours to determine if he was concerned in the commission, preparation or instigation of acts of terrorism. The Snowden documents had been the basis of Guardian articles published on 6 and 7 June 2013.

The detention of Miranda was challenged on the basis that paragraph 2(1), Schedule 7 Terrorism Act 2000 did not permit questioning for such purpose, alternatively if it did, it was suggested that the use of this power was disproportionate and alternatively that if such a power was granted under paragraph 2(1), that would offend against Article 10 European Convention of Human Rights.

The Court headed by Lord Justice Laws firmly rejected the idea that Miranda had been detained for an improper purpose or that the exercise of these powers was disproportionate, referring to established case law that the means used to justify limiting the relevant right or freedom should be no more than was necessary to meet the legislative objective and in the Court's view there should be no inconsistency with Article 10. [*Miranda v Secretary of State for Home Department*](#) (2014) EWHC 255 (Admin)

Laws LJ agreed with Lord Steyn that freedom of speech was the "life blood of democracy". However, a journalist enjoys no heightened protection for his own sake. Miranda was not himself a journalist but the protection of journalists extended to those involved in collaborative activity with journalists. The judges rejected any idea that the police had acted in bad faith. The Court also firmly rejected some fairly extravagant claims that the role of journalists was akin to that of judges in scrutinising actions by governments.

One felt that the number of interveners resulted in the role of the press being talked up to an extent that the Court found unacceptable. The material being carried by Miranda was not as such journalistic material, although he was acting in assistance of Greenwald's activities as a journalist. A balance had to be struck in the security field between the responsibility of the government and the responsibility of journalists.

The power under Schedule 7 had been created to provide a reasonable but limited opportunity for the ascertainment of the possibility that a traveller at a port may be concerned directly or indirectly in the commission, preparation or instigation of acts of terrorism. The case was all about balancing the needs of security against the freedom of speech. In freedom of speech the Court held one has to balance the rights of the individual with the rights of the community. Free speech is a collective and not an individual interest and as Laws LJ stated a servant of democracy. In this case the Court came down very firmly on the side of national security.

Will Prince Charles's Musings See the Light of Day?

Prince Charles as heir to the British throne is an assiduous letter-writer and has sent a number of letters to ministers

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The Court headed by Lord Justice Laws firmly rejected the idea that Miranda had been detained for an improper purpose.

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regarding government policy on matters such as environmental issues in which he has a strong interest rather than, it would appear, the more lower level political issues of the day. A Guardian journalist, Rob Evans, sought to obtain copies of Prince Charles' letters under the Freedom of Information Act. His application had been resisted by the government departments. However, the Upper Tribunal had after a hearing lasting six days, ruled in favour of Rob Evans and ordered their disclosure.

Rather than the departments seeking permission to appeal this ruling, the Attorney General had - to the surprise of many - exercised his powers under section 53 Freedom of Information Act and vetoed the release of these documents. A Divisional Court had reluctantly upheld the Attorney General's action expressing surprise that the Attorney General could act in this way.

However, the Court of Appeal ruled that the Attorney General had not acted reasonably in making a section 53 order and had used a flawed approach in the exercise of his power. [R \(Evans\) v Attorney General](#) 2014 EWCA 254. The Court of Appeal was also of the view that there was a breach of article 6 of the European Convention of Human Rights in that Mr Evans had been denied his right of access to a Court. The Court of Appeal also felt that the exercise of the powers under section 53 was incompatible with EU Regulations relating to access to environmental information.

The Attorney General's approach was held to be defective by the Court of Appeal. The fact that he would have reached a different decision in weighing the competing interests of press access to the information and the confidentiality of the communications on governmental issues with which the Prince of Wales would be ultimately dealing in his role as constitutional monarch was insufficient to issue an order under Section 53. The Attorney General could point to no error of law or fact made by the Upper Tribunal in its judgment after the six day hearing nor had the government department sought to appeal. The Court of Appeal therefore quashed the order made by the Attorney General. The Attorney General has obtained permission to appeal to the Supreme Court - so more anon.

A Guardian journalist, Rob Evans, sought to obtain copies of Prince Charles' letters under the Freedom of Information Act.

No Disclosure Orders Behind Closed Doors

Sam Kiley a reporter for BSkyB had while embedded in a unit in Afghanistan met two officers who were subsequently arrested under the Official Secrets Act 1989 accused of leaking material which had come into their possession from the Cabinet Security Committee, COBRA. In the course of the criminal investigation against the two officers, BSkyB were asked to produce in accordance with section 9 and paragraph 4 of Schedule 1 of the Police and Criminal Evidence Act 1984 (PACE), communications passing between them and the two officers, it being alleged that these communications had threatened military security.

An application under PACE required that there should be reasonable grounds for suspecting that an indictable offence had been committed, that the special procedure permitted by

PACE should result in the production of special procedure material at the relevant premises (in this case BSkyB television) and that it was likely to be of substantial value to the investigation and likely to constitute relevant and admissible evidence.

However, when the application was made at the Central Criminal Court (the Old Bailey) successfully as it turned out - the judge had surprisingly taken evidence from the Police to determine whether the criteria set out in PACE were fulfilled but he had done so *in the absence of representatives of BSkyB* having been persuaded that this was necessary in the interests of national security.

The Administrative Court had quashed the order made by the Old Bailey judge and this was upheld by the Supreme Court. [R \(BSkyB\) v Commissioner of Police](#) [2014] UKSC17. The Court applied the principles in [Al Rawi v Security Service](#) [2011] UKSC 34, [2012] 1 AC 531 requiring that evidence used in such trials must be disclosed to all. The Supreme Court stated that the statutory procedure under PACE was highly sensitive and difficult and affected journalists' rights. Parliament had set up a procedure under which the application *must be between parties* and those faced with PACE application should know what evidence the Court would take into account and have an opportunity to challenge it.

The Old Bailey judge had been at error in excluding BSkyB. It was noted that in matters of particular sensitivity it

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would be open to the authorities to issue a Public Interest Immunity Certificate in which case there *could* have been an ex parte application, but such certificates are rare and government ministers may be held accountable in Parliament for their issue.

Damages for Unauthorised Photographs of Children in Public

This is an interesting decision on the question of whether the media are entitled to publish photographs of the children of celebrities in public places. The Mail Online published a series of pictures of the singer Paul Weller relaxing in a café in Santa Monica, California with his daughter aged 16 and his twins aged 10 months. This was a public place and there were no features of the pictures which were particularly intrusive. However, there were a series of pictures of the facial expressions of the children. [Weller v Associated Newspapers](#) [2014] EWHC 1163.

Dingemans J held that the children did have a reasonable expectation of privacy following the case of [Murray \(JK Rowling\) v Express Newspapers](#) [2008] EWCA Civ 446. Children should be protected from intrusive publicity and their faces were one of the chief attributes of their publicity.

It was, in the judge's ruling, a wrongful misuse of private information and a breach of the Data Protection Act on the basis that personal information must be gathered, processed and used fairly and lawfully. There was in the judge's ruling no public interest in the sense of contributing to public debate in publishing these photographs which had been taken by paparazzi and where the singer had requested that they be not photographed.

The newspaper made the point that these photographs were lawful under California law and that there was nothing intrinsically objectionable about the photographs and made the point that the daughter had modelled in Teen Vogue. This cut no ice with the judge who awarded the daughter £5,000 and the babies £2,500 each. The newspaper has stated that it will appeal.

Judges Will Increasingly Throw Out Weak or Ill-Founded Cases

[McEvoy v Michael](#) [2014] EWHC 701 concerned a fierce political dispute between local councillors. Election material had been circulated by one political party against the incumbent councillors under the heading "Snouts in the Trough." The leaflet included allegations of hypocrisy and accusations of money needlessly spent on "jollies." The leaflet was accompanied by a cartoon with the face of one of the councillors superimposed on a picture of a character in a well-known TV series who would be perceived as a loveable rogue. It was a fairly rare case of libel in Wales heard at first instance.

The judge robustly protected political speech pointing out the European Court of Human Rights had made it clear that the limits of acceptable criticisms are wider in relation to politicians acting in their public capacity than in relation to private individuals, [Jerusalem v Austria](#) [2003] 37 EHRR 25.

Some of the comments were defamatory but were permissible as statements of opinion. In other instances it was clear that the Court would be slow to spell out allegations of dishonesty which would have to be proved to be true in what was essentially political speech. These cases pre-date the coming into force of the Defamation Act 2013 on 1 January 2014 as the Act is not retrospective, but already the Courts are

implementing the spirit of the Defamation Act 2013.

Vile Abuse Is Not Libel

Ms Uppal was a former Miss India who one can only imagine had fallen on slightly hard times when she agreed to appear in a reality television series called Big Brother which involves a period of voluntary imprisonment in a house with a number of self-publicising misfits in the hope of the prize of £100,000 and 15 minutes of fame. One of the contestants took the opportunity when interviewed to abuse Ms Uppal in vile and racist terms of which perhaps the most repeatable was calling her a "piece of shit." The programme-makers had shut him up and disassociated themselves from his remarks.

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Understandably offended she unwisely sued for libel seeking to spell out meanings that it was being suggested that she was sexually promiscuous or socially or intellectually inferior. The Court was having none of this and said that this was simply vile abuse where the situation had been mitigated by the prompt act of the television company. It was not, however, libel. [Uppal v Endemol UK Limited](#) [2014] EWHC 1063

Limits of Parliamentary Privilege

The Court of Appeal upheld an earlier ruling that in certain circumstances the rule against being sued for libel which attaches to what is said in Parliament under Article 9 Bill of Rights 1689 (proceedings in Parliament cannot be questioned or impeached in courts outside of Parliament) can in certain circumstances extend to the repetition of those remarks outside Parliament. [Makudi v Triesman](#) [2014] EWCA Civ 179

The Claimant was a member of the Executive Committee of FIFA and Lord Triesman was a leading official in the English Football Association concerned with the unsuccessful English bid to hold the World Cup in 2018. As is well-known, there were extensive allegations of corruption or unethical behaviour on the part of certain FIFA delegates. The result of their deliberations had – to the surprise of some – been to award the 2018 competition to Russia and the 2022 competition to Qatar.

Lord Triesman had given evidence to the Culture Media and Sports Committee in the House of Commons in which he had to the displeasure of Mr Makudi suggested that there had been improper and unethical behaviour in Thailand in relation to the FIFA bid. The English Football Association set up an enquiry under James Dingemans QC – now a libel judge – and Lord Triesman had given broadly similar evidence to his committee of enquiry whereupon he was sued by Mr Makudi.

The claim was struck out as violating Article 9 Bill of Rights 1689. Parliamentary privilege can extend outside Parliament if there is a legitimate interest in the repetition of the Parliamentary utterance, a close nexus between the speaking inside and outside Parliament and an obligation to speak about the subject on the second occasion.

Removing Archive Material Under Contempt of Court Powers

I wrote earlier about proposals to remove archive material accessible online during the currency of a criminal trial to avoid undue prejudice to the defendant. See [MediaLawLetter December 2013](#). The power had been exercised in the case of [R v Harwood re Associated Newspapers](#) where details of earlier disciplinary proceedings concerning a previous act of violence against a police officer on trial for manslaughter were ordered to be taken down during his trial.

The whole issue of contempt of court including how to deal with jurors who disobey the instructions of judges not to do their own internet research was reviewed by the Law Commission. The question of allegedly, contemptuous archive material has now come before Parliament in Clauses 37 and 38 of the Criminal Justice & Courts Bill.

Under Clause 37 the Attorney General can request removal of material which he considers to be prejudicial from an online archive.

Where media have previously published material in their online archive they will in the normal course of events have a defence to a claim of strict liability under the Contempt of Court Act but they would lose this if the Attorney General serves a take-down notice under the proposed new

legislation.

The issue would then become whether the online material constituted a substantial risk of serious prejudice of a trial. It would be open to the media to argue that it did not, but they would have an uphill struggle as the Attorney General would have decided that it did have such a risk and the Attorney General is of course the person who triggers any prosecution for contempt of court. It would therefore be a brave paper that maintained the online archive in the face of a take-down notice by the Attorney General.

Under Clause 38 there is provision for the courts to have injunctive powers to order the temporary removal of such material during the currency of the trial. If such an injunction was issued, the paper would have to comply as failure to do so would of itself be contempt. British media organisations are currently strongly lobbying against these proposals and I shall report the outcome in due course.

David Hooper is a partner at RPC LLP in London.

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Journalist's Conviction for 'Scandalising the Court' Overturned by Privy Council

Offense Can No Longer Be Treated as a Strict Liability Crime

By Anya Proops

Should judges be able to jail their critics? This is the stark question which was posed in the recent Privy Council case of [Dhooharika v Director of Public Prosecutions \[2014\] UKPC 11](#). In a judgment which is likely to give considerable comfort to responsible journalists who speak out about judicial wrong-doing, the Privy Council has held that it is only those who publish in bad faith, with the aim of undermining the administration of justice itself, who will fall within the purview of the criminal law.

Background

Mr Dhooharika is a journalist and editor in chief of the Mauritian newspaper *Samedi Plus*. In 2010, he published articles and editorial containing allegations against the Chief Justice of Mauritius. The published materials were based on interviews with a former barrister and Member of Parliament, Mr Hurnam. Mr Hurnam claimed that the Chief Justice had been biased when deciding a case behind closed doors.

The editorial suggested that the allegations were sufficiently serious to call for a tribunal of enquiry on the question of whether there had been a violation of the code of judicial conduct. Mr Dhooharika was subsequently prosecuted by the Mauritian Director of Public Prosecutions on the basis that, through his publications, he had committed the offence of 'scandalising the court'. In particular, it was alleged that the materials he had published had brought the judiciary into disrepute and lowered public confidence in the courts.

Mr Dhooharika was convicted by the Supreme Court of Mauritius following a hearing at which he was not permitted to give oral evidence in his defence. He was sentenced to three months in prison. Mr Dhooharika appealed his

conviction to the United Kingdom's Privy Council, the court of final appeal for UK overseas territories and many Commonwealth countries.

The Offence of 'Scandalising the Court'

The offence of 'scandalising the court' has a rather unhappy pedigree. It originally emerged as an offence in England in the 18th century, where it was used as a weapon to suppress the radical John Wilkes and other critics of the government. By the end of the 19th century, it was regarded by the Privy Council in the case of *McLeod v St. Aubyn* [1899] AC 549 as being obsolete in England, where courts were 'satisfied to leave to public opinion attacks and comments derogatory to, or scandalous to them'. However, the Privy Council also took the view that the offence was still necessary in 'small colonies consisting principally of coloured populations', particularly so as 'to preserve in such a community the dignity and respect for the court'. And so the 'small islands' principle was born.

In 2013, the United Kingdom Parliament formally recognised that the offence was a dead letter in England and Wales and removed it from the statute books. However, whilst the offence may officially have become history in its country of origin, it remains alive and well in the Commonwealth and elsewhere, where it is commonly used as a means of suppressing those who voice legitimate criticisms of the judiciary.

As recently as 1999, in the case of *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, the Privy Council declined to strike down the 'small islands' principle. Its view was that, in newer, more fragile democracies, judges needed the additional protection afforded by the offence. But how is

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The Privy Council clearly recognised the potential for the offence to have a serious chilling effect on journalism.

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this principle to be reconciled with the fundamental and universal right to freedom of speech? Moreover, why should judges, uniquely amongst State officials, be permitted to both silence and punish those speak out against them?

It was precisely these questions which the Privy Council was called upon to address in *Dhooharika*, where it was argued on behalf of Mr Dhooharika that the offence of scandalising the court was unconstitutional and represented an unjustified interference with the right to free speech.

The Privy Council Judgment

In its judgment, the Privy Council clearly recognised the potential for the offence to have a serious chilling effect on journalism. However, it also took the view that it could not go so far as to say that this rendered the offence unconstitutional or otherwise unlawful, particularly as ‘local conditions’ in countries such as Mauritius may justify retention of the offence. The Privy Council specifically noted in this context that, whilst the offence may have been abolished in England, it continued to subsist in a wide range of common law jurisdictions, including Scotland where it carries the rather arcane name of ‘Murmuring Judges.’ It also noted that the European Court of Justice had not declared the offence to be per se incompatible with right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights, provided that any restrictions on free speech were proportionate.

However, having declined to rule that the offence was unconstitutional, the Privy Council then went on to recast it to the point that it is now likely to apply only in the most extreme and exceptional cases, thus depriving the offence of much of its practical effect. In particular, the Privy Council held that the offence could no longer be treated as a strict liability offence or one where the editor bore the burden of proving that he acted in good faith. Instead, it is now very clearly for the prosecution to prove, beyond reasonable doubt,

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that the editor or journalist published in bad faith. In other words, it is not enough that a journalist has been simply ‘wrong-headed’. He or she must have published with the intention of undermining the administration of justice. It will surely be only in the most exceptional cases that the prosecution will be able to discharge the burden of proving this form of wrongful intent.

In addition to this *mens rea* element, the Privy Council has made clear that the published materials must themselves be of a kind that they create a real risk of undermining public confidence in the administration of justice. Again this will be a high threshold for any prosecutor to meet. Certainly, in many cases, the more extravagant the allegations, the less likely they are to be believed and, hence, the less likely they are to pose a real risk to the administration of justice.

The Privy Council went on to overturn Mr Dhooharika’s conviction. It held that, whilst the published materials were ‘plainly ill-judged’, there was no proper basis upon which the Supreme Court could have held that Mr Dhooharika acted in bad faith. This was particularly in view of the fact that Mr Dhooharika had not himself espoused the views expressed by Mr Hurnam and had expressly conceded that it was not for *Samedi Plus* to judge the Chief Justice. The Privy Council also held that the conviction in any event fell to be quashed as Mr Dhooharika had not received a fair trial from the Supreme Court, not least because of the Court’s failure to permit Mr Dhooharika to give oral evidence in his defence.

The overall effect of the judgment is that the offence of scandalising the court, whilst still a feature of the common law landscape, no longer casts such a long and chilling shadow.

Anya Proops acted on behalf of Mr Dhooharika, instructed by Mark Stephens of HKFSI. She is a leading expert on freedom of information and data protection/privacy and is co-founder of panopticonblog.com, the leading information law blog. She regularly acts for media organisations and has acted in over 60 cases for the UK Information Commissioner.

Researcher-Participant Privilege Is Established in Canada

Court Recognizes Need to Protect Promises of Confidentiality in Academic Research

By Peter Jacobsen and Tae Mee Park

A recent landmark decision from a Canadian court has, for the first time, recognized a confidentiality privilege between researchers and participants. *Parent c. R.*, 2014 QCCS 132 (CanLII).

The decision, from the Quebec Superior Court, is seen as a reassurance to those who participate in academic studies where confidentiality is justifiably promised. The court followed the principles set out by the Supreme Court of Canada in two seminal decisions from 2010 where the Supreme Court discussed the confidentiality privilege between journalists and their confidential sources through the application of the Wigmore test. *See R v National Post*, 2010 SCC 16 (CanLII); *Globe and Mail v Canada (Attorney General)* 2010 SCC 41 (CanLII).

Background

The case related to Luka Rocco Magnotta who is currently awaiting trial for several alleged crimes which in May 2012 including first degree murder, interfering with a dead body and the ghoulish act of sending body parts to various public officials including the Prime Minister. The nature of the alleged crimes including the fact that Magnotta apparently recorded the murder and uploaded it onto the internet has attracted massive international attention.

The underlying facts of the case rendered the decision of particular interest to the public and posed a difficult balancing exercise for the court. At the heart of the case was an audio recording and paper transcript of that audio recording which were seized by the Montreal police pursuant to a search warrant.

The seized items recorded a confidential interview from March 2007 with Magnotta which was part of a large-scale academic study titled “Sex Work and Intimacy: Escorts and Their Clients.” The study was conducted by two prominent University of Ottawa professors over a four year period. Magnotta was interviewed by a student who was hired and supervised by one of the professors to assist in gathering data for the Research Project. After seeing the media coverage on Magnotta, the student contacted the Montreal police and tipped them off to the existence of the interview. This resulted in the seizure of the audio recording and transcript of the interview from the office of the professors’ lawyers. The professors claimed researcher-participant privilege and the seized material was put in a sealed packet pending review by the court. The professors then brought an application for *certiorari* to quash the search warrant on the basis that the seized items were protected by researcher participant confidentiality privilege.

Wigmore Test Applied

The judge applied the Wigmore case-by-case test for common law confidentiality privilege, the same test as is applied in the journalist-source confidentiality privilege decisions. The test requires the person asserting the privilege to satisfy the four prongs of the Wigmore test: (1) the communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the

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The court recognized that research involving human subjects in the health and social sciences will often delve into sensitive areas and few, if any, would agree to participate in a study soliciting such personal and possibly damning information without a promise of confidentiality.

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communications must be greater than the benefit gained for the correct disposal of litigation.

The judge was convinced on the evidence that Magnotta along with all the other participants in the Research Project, was promised and expected confidentiality as a condition of participating in what she found to be an important study which involved disclosing very personal, sensitive issues and vulnerable participants. The judge held that the participants could face multiple risks of harm ranging from criminal prosecution to social ostracism if the promise of confidentiality was not upheld.

On the third prong, the judge accepted the value of the relationship between researchers and participants who are promised confidentiality. Like journalists who require the ability to offer anonymity in situations where sources would otherwise dry-up in order to facilitate freedom of expression, the court recognized that research involving human subjects in the health and social sciences will often delve into sensitive areas and few, if any, would agree to participate in a study soliciting such personal and possibly damning information without a promise of confidentiality. This finding was based on significant evidence filed by a renowned social scientist as well as the applicants themselves. The academic community was particularly gratified to read that the court recognized the high social value of this kind of research.

Finally, on the fourth prong, which requires the court to balance the interests at stake, the court held that the public

interest in protecting such important research and academic freedom outweighed the probative benefit of this evidence to the trial of Magnotta. The applicants argued, and the Crown did not dispute, that the 2007 interview would not shed any light on whether the crime itself was committed. Thus the court found that there was little probative value in the seized items to the investigation and prosecution of the alleged crime.

To cover off the possibility that the Crown might assert that the contents of the recording might assist in a psychiatric evaluation of Magnotta and a possible defence of not criminally responsible (NCR) on account of mental disorder the applicants submitted and the court accepted, the expert evidence of a renowned forensic psychiatrist who opined that the information contained in a 2007 confidential interview would likely be of “minimal assistance” to a psychiatric assessment of the individual in 2012 or 2013 as it would relate to any NCR defence.

The court also recognized the value in preventing unnecessary intrusion into academic freedom and the reasonable expectation of privacy of the research participants and balanced the likely minimal probative value of the recording against the convincing evidence that the relationship between a researcher and her confidential research participant, in the circumstances of this case, should be protected.

Peter Jacobsen and Tae Mee Park are partners at Bersenas Jacobsen Chouest Thomson Blackburn LLP in Toronto, CA. They represented the petitioners in this case.

The court recognized the value in preventing unnecessary intrusion into academic freedom and the reasonable expectation of privacy of the research participants.

RECENT MLRC PUBLICATIONS

Non-Competes in the Broadcast Industry

Eight states and the District of Columbia have laws that target the broadcast industry and limit broadcast employers' ability to enforce non-compete agreements with their on and off screen talent. This paper describes the elements of those laws and their impact. It also addresses several alternative approaches for broadcast employers' efforts to retain employees and the impact of the broadcast non-compete ban laws on those alternatives.

Law Of “Opinion” Practice Guide 2013 Supplement

Practice Guide collecting some of the leading positive opinion cases.

Articles and Reports on Significant Developments

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

MLRC Joins Amicus Effort in Grand Chamber Appeal in *Delfi v. Estonia* *Can News Websites Be Liable for User Comments?*

This month, MLRC and an international coalition of media organizations, press associations, and other NGO's asked the President of the European Court of Human Rights for permission to file an amicus brief in the Grand Chamber review of the judgment in [Delfi v. Estonia](#) (Application No. 64569/09), the Section Court judgment holding that an Estonian news portal could be liable for defamatory comments made by users.

As reported in October, courts in Estonia held the news portal liable for defamatory user comments, even though the comments were removed upon notification. The case was taken to European Court and in October 2013, the First Section ruled that Estonia was within the margin of appreciation to hold the website liable and there was no Article 10 violation. For more background see "[ECHR Rules That News Portal Can Be Held Responsible for User Comments](#)," MediaLawLetter (Oct. 2013).

As the first case on the issue to be decided by the Grand Chamber, the Court's decision in this case is likely to be pivotal in the development of the law on intermediary liability. Given the practical experience the coalition members have with the regulation of user content, they believe that a submission of written comments on these issues would assist the Court in its consideration of the issues raised by this case, in accordance with "the interests of the proper administration of justice".

The coalition requests leave to submit written comments on comparative law on the issue of liability for third party content on media websites, and to provide an overview of emerging good practice on the issue of moderating user content. If leave is granted, the submission will provide an overview of the laws of the European Union and its Member States and of the United States on this issue. This would address the relevant legislative provisions as well as subsequent interpretation by the courts, and would also elaborate on the policy choices that lay behind the introduction of legal regimes in the respective countries.

Furthermore, the coalition would submit comments showing how the respective legislative regimes in the EU and the US have allowed media outlets to develop their own practices for the regulation of user content, and provide examples of emerging good practice. This would provide evidence to the court regarding the practice of media outlets based in countries across Europe and the US, including Germany, France, the UK, the US and elsewhere.

New from the MLRC Employment Law Committee: Non-Competes in the Broadcast Industry

Eight states and the District of Columbia have laws that target the broadcast industry and limit broadcast employers' ability to enforce non-compete agreements with their on and off screen talent. This paper describes the elements of those laws and their impact. It also addresses several alternative approaches for broadcast employers' efforts to retain employees and the impact of the broadcast non-compete ban laws on those alternatives. [Click to read or visit \[medialaw.org\]\(http://medialaw.org\).](#)

Singapore Court of Appeal Rejects Request For Pre-Action Disclosure of Journalist's Sources

Court Took Note of Public Interest in Exposing Corruption

By George Hwang and Intan Krishanty Wirayadi

The Singapore Court of Appeal in [James Dorsey v World Sports Group](#) [2014] SGCA 4, has on 14 January 2014 handed down a decision on pre-action 3rd party interrogatories which has wide implications on the disclosure of journalists sources. This is the first time the Court of Appeal has heard such a case.

Background

The appellant, James Dorsey, blogs about football (soccer) in the Middle East. The article in question covered the corruption scandal which rocked the sport in 2011. In a blog posted on 28 August 2012, he cited an audit report by Price Waterhouse Cooper, a Master Rights Agreement between the World Sports Group (“WSG”) and the Asian Football Confederation (“AFC”), and “sources close to AFC” to paint a picture of an undervalued deal which does not seem to serve AFC’s interest. WSG would like Dorsey to reveal his sources, claiming that they are contemplating actions for breach of confidence and defamation against his sources. This took the form of a pre-action 3rd party discovery and interrogatory application against Dorsey.

Singapore’s rules on civil procedure have codified what in common law jurisdiction is called a Norwich Pharmacal Order. Discovery was refused by the Registrar who heard the matter. However, all the interrogatories were allowed. On appeal, the High Court judge allowed some of the interrogatories. They relate to the identity of the “sources close to AFC” and the Master Rights Agreement. The Court of Appeal reversed the High Court’s decision. No information now needs to be disclosed.

Court of Appeal Decision

Given the dearth of precedents on such cases, the Court of Appeal took the opportunity to clarify the principles applicable. It states that a multi-factorial approach should be taken. The court needs to balance the interest of the Plaintiff

with that of the Defendant. Also, whether there is a real grievance which the Plaintiff should be allowed to pursue against the public interest of preserving the identity of the source. The court cautions that the highly intrusive nature of such an order needs to be taken into account.

The factors to be considered include:

- the public interest in allowing the Plaintiff to vindicate its legal rights;
- the strength of the possible cause of action contemplated by the Plaintiff;
- whether it is a necessary and proportionate response in all the circumstances;
- whether the information could be obtained from another source;
- the degree of confidentiality of the information sought;
- whether it will deter similar future wrongdoing.

The Court of Appeal decided that WSG has not adequately proven that it will be left without a remedy if the sources are not disclosed. It could sue Dorsey for both defamation and breach of confidence. This is the essence of the Norwich Pharmacal order, i.e., the lack of a party who the Plaintiff can proceed against when its rights are obviously infringed.

The court is not satisfied that WSG has a real interest in obtaining the sources identity since there is no evidence that they are in Singapore or linked to Singapore. As the order is draconian, the court needs to be satisfied that the source’s act of defamation and breach of confidence were committed within Singapore’s jurisdiction or that action can be taken within Singapore against the source. Also, the information that WSG alleged was leaked to Dorsey was already in the public domain by the time Dorsey published his blog post.

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The court drew the analogy between an injunction in the Spycatcher case and such an interrogatory. Once the information comes into the public domain, the damage is done. Therefore, it is futile to order the disclosure of source's identity if other remedies can be pursued. Further, if the Plaintiff has been genuinely interested in protecting its reputation, it should have commenced action against Dorsey, immediately.

The ramification is that someone in the Plaintiff's shoes should commence an action against the journalist before applying to the court for discovery or interrogatory to get the source's identity. How the court will decide is unclear, especially, if parallel proceedings are taken overseas. We can only take heart in the court's 4 page dicta on exposing corruption. The Plaintiff did not contest on this point.

“Significantly, the wider interest in exposing corruption was not a point that WSG contested.... it may be difficult for WSG (Plaintiff) to insist that its interests in confidentiality would override the wider interest in exposing corruption... There is compelling public interest consideration every present in Singapore to encourage whistle blowing against corruption ... Sunlight is the best disinfectant for corruption”

The Court was strongly persuaded by the public interest towards protecting Dorsey's source when the article in question exposes corruption in a body as big as the AFC. Singapore's interest in encouraging whistle blowing and discouraging corruption can be distilled from statutes such as

the Prevention of Corruption Act (Cap 241, 1993 Rev Ed), as well as being a member state of the United Nations Convention Against Corruption.

The court referred to the iniquity rule developed under common law and states that it might apply. This is a public policy defense when sued for breach of confidence. Corruption is not protectable as confidential information. The first ingredient to be proven if one is to succeed in a breach of confidential information case is that the information is protectable as one.

Whilst the court did not discuss some public interest points, such as:

- the applicability of the newspaper rule in Singapore;
- whether Dorsey, a consummate and renown journalist specializing in Middle Eastern affairs, who at the material time has a job as an academic, should be considered as one; or
- the argument that it is in the interest of democracy that the balance of factors be tilted in favor of keeping a journalist's source confidential,

The decision has wide implications on the disclosure of journalists sources. This is the first time the Court of Appeal has heard such a case.

The Court's comments on corruption and whistle blowing can be developed. The basis for confidentiality of journalists' sources is to encourage the free flow of information. This supports the freedom of expression as it allows information which is in the public interest to be brought to light and debated. Protection of whistle blowers where there is corruption relies on the same logic.

We will have to wait for another courageous soul before knowing if this can be developed.

George Hwang is a Director, and Intan Krishanty Wirayadi a law intern, at George Hwang LLC in Singapore.

New from the MLRC Employment Law Committee: Non-Competes in the Broadcast Industry

Eight states and the District of Columbia have laws that target the broadcast industry and limit broadcast employers' ability to enforce non-compete agreements with their on and off screen talent. This paper describes the elements of those laws and their impact. It also addresses several alternative approaches for broadcast employers' efforts to retain employees and the impact of the broadcast non-compete ban laws on those alternatives. [Click to read or visit medialaw.org](http://medialaw.org).

The Development of Shield Laws in Australia and the Growing Quest for Journalists' Sources

Peter Bartlett and Amanda Jolson

The Media Entertainment and Arts Alliance has called for uniform national shield laws. Christopher Warren, the Federal Secretary of the Alliance correctly referred to Australia's shield laws as "patchy and disparate."

According to Chris "it is appalling journalists are served with a subpoena that essentially would require them to breach their ethical obligation."

The comments followed this week's decision by Justice Janine Pritchard in the Supreme Court allowing us to seek special legal costs from Hancock Prospecting (Gina Rinehart). Hancock Prospecting had sought disclosure of sources from Fairfax's award winning journalist, Adele Ferguson.

Over recent years a number of Australian jurisdictions have adopted 'shield laws' that provide greater protection to the confidentiality of a source, and make it harder to compel journalists to reveal their sources to a court. These laws do not bestow an absolute privilege, but rather a discretion available to the court to excuse the journalist from identifying an informant.

Where have shield laws been enacted?

The federal government and the state and territory governments of New South Wales (NSW), Victoria, Western Australia (WA), the Australian Capital Territory (ACT), have introduced shield laws through amendments to their respective Evidence Acts. While these laws are not uniform, they represent a significant increase in Australia's protection of freedom of speech and a journalist's right to protect the confidentiality of their sources.

Queensland, South Australia and the Northern Territory do not currently have specific laws to protect the relationship between journalists and their sources.

South Australia has introduced a Bill which would allow a professional journalist to avoid criminal or civil liability for failing to answer questions or produce material that may disclose the identity of an confidential informant. However

an exception will be if the Court is satisfied it is in the public interest or in the interests of justice to make an order for disclosure or if the benefit of disclosing the identity of the informant or answering questions or providing relevant information outweighs the prejudicial effect that the disclosure would have on the informant or the journalist.

Although Queensland has expressed a preference for the adoption of uniform shield laws, journalists can currently rely on protection of their sources where a 'public interest disclosure' has been made – that is, where disclosure is made to a journalist after referral to an entity that had decided not to investigate the matter further.

Tasmania has not enacted journalism-specific shield laws, but does have a general 'professional confidential relationship privilege' which could operate as a shield law for journalists.

In addition, 'public interest disclosure' laws can protect the identities of whistleblowers in certain circumstances, such as by public officials, officers, employees or contractors, or entities that are performing a public function on behalf of the state, a public body or a public officer.

Who can use these laws?

In all cases, the laws can be invoked not only by the journalist but also his or her employer.

The Commonwealth and ACT Acts, and South Australian Bill are notable for their broad definition of a 'journalist'. The definitions cover anyone who 'is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium'. The original proposed definition of someone 'employed' in the publication of news was specifically changed to capture those who work unpaid or at an amateur level. As the definition of journalist does not make reference to the 'profession or occupation of journalism' (unlike the NSW provisions which are narrower),

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Over recent years a number of Australian jurisdictions have adopted 'shield laws' that provide greater protection to the confidentiality of a source, and make it harder to compel journalists to reveal their sources to a court.

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it would seem to cover journalists in mainstream media, citizen journalists, bloggers and independent media organisations. A 'news medium' will include 'any medium for the dissemination to the public or a section of the public of news and observations on news', which seemingly includes a blog or perhaps even publication that only reaches a small audience.

The NSW, Victorian and WA laws define journalists more narrowly, as someone 'engaged in the profession or occupation of journalism'. An amateur blogger would not be included. The NSW and WA jurisdictions are somewhat broadened by a 'professional confidential relationship privilege' law that allows the court to make similar orders in respect of those who are not considered journalists.

The Victorian amendments cover the professional publication of comments, opinions, and analysis, and so are arguably wider than other state laws covering 'news and observations on the news'.

When may shield laws be enforced?

Shield laws do not automatically protect all sources. In all jurisdictions, the journalist *must* have promised anonymity to the source to enliven the laws.

All jurisdictions have an exception that the court can decide against an application if it finds that the public interest in doing so outweighs:

- any likely adverse effect on the informant or any other person; and
- the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, the ability of the news media to access sources of facts.

Therefore the Acts do not provide comprehensive protection for journalists as they rely upon the discretion of the court.

Victoria

The source must provide the information to the journalist 'in the normal course of [the journalist's] work', with the expectation that the information may be published in a news

medium. This means if the journalist has received a tip in a private capacity, such as speaking with family or friends, or in the course of a second job, the source will not be protected.

The Victorian laws will also not apply in certain proceedings including those conducted by the Independent Broad-Based Anti-Corruption Commission or the Office of Police Integrity.

Western Australia

The shielding presumption in WA can be overruled not only by a court, but also by a 'person acting judicially' if it is considered that the public interest outweighs the protection to the individual. It is important to note that 'a person acting judicially' will not include a member of parliament or a parliamentary committee member who has authority to hear, receive and examine evidence. In *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290, which is referred to in more detail below, the Court held that a 'person acting judicially' includes an arbitrator.

WA was one of the first jurisdictions to have its shield laws tested in court in the *Hancock Prospecting* case. Justice Janine Pritchard set aside subpoenas sought by Hancock Prospecting against West Australian Newspapers, ruling them oppressive and an abuse of process in contravention of the shield laws. Though the WA laws do not specifically mention subpoenas for production of documents, her Honour found that failure to use the shield laws in this case would make them nonsensical.

Professional responsibilities

In addition to the protection afforded by statute, journalists have professional responsibilities consistent with the precepts of their profession.

Most journalists are members of the Media Entertainment and Arts Alliance (MEAA). Clause 3 of the MEAA Journalist Code of Ethics states that where confidences are accepted by an MEAA member, they must be respected in all circumstances. The Code also provides that a journalist should:

Aim to attribute information to its source.
Where a source seeks anonymity, do not agree without first considering the source's motives

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and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.

The significance of this principle was acknowledged by Justice Harper in the Victorian Supreme Court of Appeal, who held that *'one mechanism, appropriate in some but not all circumstances, by which journalists elicit the truth is to promise anonymity to those from whom they source their information. This too serves the public interest, an interest advanced not only by the code of ethics of The Age but also by that of the MEAA (of which the applicants are members)'*.

Recent cases

Despite the introduction of the new legislation, journalists' sources are under unprecedented challenge in our courts.

Hancock Prospecting / Steve Pennells and Western Australian Newspapers

Earlier this year, Gina Rinehart's company Hancock Prospecting issued subpoenas against journalist Steve Pennells and his employer Western Australian Newspapers in the Western Australian Supreme Court for the production of documents in an ongoing arbitration, a claim requiring the disclosure of confidential sources. It is one of the first opportunities a court has had to consider the new protections. Justice Janine Pritchard delivered her judgment on 6 August 2013. Justice Pritchard found the protection in section 20 of the WA Evidence Act applied so that a journalist could not be compelled to give evidence identifying confidential sources, accepting that an order of disclosure would *'constitute a breach of a fundamental ethical obligation'*. Despite this 'ethical obligation', Justice Pritchard found the action would have failed but for the enactment of the shield law legislation. *'[T]he so-called newspaper 'rule' is not, in fact, a rule at all'*, she held, stating that the position at common law remained that *'the media and journalists have no public interest immunity from being required to disclose their sources of information when such disclosure is necessary in the interests of justice'*.

Hancock Prospecting / Adele Ferguson and Fairfax Media

Hancock Prospecting also sought disclosure of sources from Adele Ferguson, an award winning journalist employed by Fairfax Media. The application was withdrawn following the Pritchard J decision in the Pennells and Western Australia Newspapers case.

Helen Liu / Nick McKenzie, Richard Baker and Philip Dorling

Three respected investigative reporters employed by Fairfax Media, Nick McKenzie, Richard Baker and Philip Dorling, are facing two applications by businesswoman Helen Liu to disclose documents that would reveal information about their confidential sources for a series of stories published in *The Age* on the relationship between the Chinese-Australian businesswoman and federal Labor MP Joel Fitzgibbon. NSW Supreme Court judge Lucy McCallum ordered the journalists to disclose their sources and held that a journalist's pledge to keep a confidential source *'is not a right or an end in itself'* and could be overridden *'in the interests of justice'*. This decision was upheld on appeal to the Court of Appeal. The High Court refused the journalists' application for special leave to appeal from the Court of Appeal's decision. It is back in court on 11 April 2014. The NSW Shield laws were not in operation at the time of publication.

Note Printing and Securrency / Nick McKenzie and Richard Baker and Fairfax Media

The Magistrates' Court of Victoria re-issued two witness summonses in December 2012 to Nick McKenzie and Richard Baker which required them to give evidence and produce documents in relation to their sources for an article they published. The evidence was sought in a committal proceeding for charges against former executives of Reserve Bank subsidiaries, Note Printing Australia Ltd and Securrency International Pty Ltd. Although the Commonwealth laws were in place, the Victorian shield laws were yet to take affect. The journalists' application to set the summonses aside was refused and they sought judicial review of the Magistrate's decision that would have compelled them to

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comply with the summonses. The Supreme Court refused their application. This decision was appealed to the Court of Appeal, who set aside the witness summons. Justice Harper noted in the judgment that *'investigative journalists have a legitimate interest in uncovering the truth about a story such as this; and they serve an important public interest in having that truth revealed'*.

Nathan Tinkler / Paddy Manning

Paddy Manning, a then journalist with *The Sydney Morning Herald* newspaper was subject to a subpoena requiring him to hand over confidential information about a source relating to the business affairs of mining entrepreneur Nathan Tinkler. Mr Manning had appropriately sent an email to Mr Tinkler's PR team asking for comment prior to publication of a story about Mr Tinkler's liquidity and commercial dealings. A super-injunction was successfully imposed on the publication of information received from the source. An agreement between Mr Tinkler and Fairfax Media continues to suppress limited details of Manning's report but the super-injunction and the subpoena were lifted.

Sunland / Ben Butler and Fairfax Media

Property developer Sunland threatened Fairfax Media and business reporter Ben Butler with legal action if they did not 'immediately reveal' the source of an article about a controversial property deal in Dubai. The court issued an injunction preventing Fairfax Media reporting further details of a confidential deed. An out of court settlement was reached for non-publication of the deed.

Glenn Crisp / Adele Ferguson

Chartered accountancy firm RSM Bird Cameron issued proceedings for fraud and misappropriation of funds in the County Court of Victoria against Glenn Crisp, a former partner and an insolvency practitioner, liquidator and chartered accountant. Adele Ferguson obtained copies of the Writ and Statement of Claim. Crisp made an urgent inter parties application to the Supreme Court of Victoria for an injunction restraining *The Age* newspaper, Fairfax Media and Adele Ferguson from publishing any allegations defamatory

of Crisp in the County Court documents. Crisp's application was eventually unsuccessful. However, as a result, in the course of the ongoing proceedings between RSM Bird Cameron and Crisp, Fairfax Media was served with a summons seeking a permanent injunction and disclosure by Ms Ferguson of her source of the court documents. Crisp had requested that each partner of RSM Bird Cameron swear under oath that they were not the source. The primary action settled and the subpoena has lapsed.

Australian Federal Police / Royce Millar, Nick McKenzie and Ben Schneiders

Royce Millar, Nick McKenzie and Ben Schneiders were charged with the offence of gaining unauthorised access to restricted information held on an ALP database. In an attempt to ascertain who provided access to the database, the Australian Federal Police raided *The Age's* offices and the home of one of the journalists. Whilst the journalists refused to disclose their source, the AFP charged a fourth person who they believe had provided the username and password to the journalists which enabled them to access the information on the database. All four accused escaped conviction and were placed on a court diversion program in the Magistrates' Court of Victoria.

ASADA

The Australian Sports Anti-Doping Authority wrote to *The Age* newspaper requesting the source of a leaked confidential report on its doping investigation at the Essendon Football Club.

Conclusions

We acted for the reporters in all of these claims save for that against Steve Pennells. These applications were made against some of the best reporters in Australia, reporters who were just doing their job and doing it well.

These cases highlight the need for shield laws and uniformity. Despite some wins for the media, we are still left questioning why is it that the NSW law specifically covers subpoenas and the W.A. law does not, and why the definitions of "journalist" differs?

Peter Bartlett and Amanda Jolson are lawyers with Minter Ellison in Australia.

Wall Street Journal Wins UK Access Motion

Phone-hacking Prosecutors Must Supply Exhibits, No Strings Attached

By Jason P. Conti and Jacob P. Goldstein

In October 2013, as the criminal phone-hacking trial commenced in London, the Crown Prosecution Service refused to provide “overseas media outlets” with copies of trial exhibits and other materials unless they signed an agreement that the materials are “only to be used in accordance with the reporting restrictions as they apply to UK based media outlets.”

The Wall Street Journal, which publishes online and in separate US, European, and Asian print editions, objected to this effort to impose English legal restrictions on content published outside the Court’s jurisdiction.

The Honorable Mr. Justice Saunders ultimately granted the *Journal*’s motion. Noting that the purpose of providing access to trial documents is “to promote open justice and to assist the press to report the proceedings both accurately and fairly,” Justice Saunders found “no good reason why they should not have the documents in the same way as the national press does.”

This seemingly straightforward and successful motion nevertheless sparked multiple hearings and much debate about how to balance freedom of the press and the integrity of the judicial process when international media interest in a case extends far beyond the Old Bailey.

The *Journal* had initially tried to negotiate with the Crown Prosecution Service and the Attorney General, offering to agree to adhere to court-imposed reporting restrictions with respect to material it publishes in the UK, including material it publishes on the internet.

After this offer was refused, the *Journal* applied to the Court, arguing that the prosecutors’ insistence on imposing English law on anything the *Journal* published anywhere in the world was an improper and discriminatory effort to apply their laws outside their jurisdiction. 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 law also authorizes judges to impose reporting restrictions to postpone or prohibit news coverage of court proceedings, even fair and accurate reports, in order to ensure a fair trial.

While the *Journal* agreed to abide by the Court’s reporting restrictions for content it made available in England, it objected to the prosecutors’ demands in order to preserve its right to publish freely in other parts of the world. The *Journal* also objected to the discriminatory aspect of the prosecutors’ preconditions for access to trial materials, as there was no similar insistence that UK media outlets agree not to publish reports outside the UK that did not comply with the Court’s restrictions.

At a hearing in early December, Justice Saunders encouraged the parties to negotiate a pragmatic solution, while advising them to return if necessary. The *Journal* tried to address prosecutors’ concerns by promising to inform them if it subsequently decided to put geo-filters on its websites and publish online and outside the UK information that would be restricted in the UK. This was unacceptable to the prosecutors, who feared that online material the *Journal* might seek to

keep out of the UK would nonetheless be “proliferated by others beyond [the *Journal*’s] control” who might copy or comment on the online content on other websites; such third parties might themselves be beyond the Court’s control and not deterred by the Contempt of Court Act.

The negotiations failed, and the *Journal* returned to Court. In January, Justice Saunders then issued his ruling. He fully appreciated the prosecutors’ concerns:

Such is the power of the internet that anything, wherever it is published, can find its way onto the

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The Journal applied to the Court, arguing that the prosecutors’ insistence on imposing English law on anything the Journal published anywhere in the world was an improper and discriminatory effort to apply their laws outside their jurisdiction.

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internet and be available world wide and more importantly in this country. The inability of domestic courts to control the flow of information on the internet has been apparent in this trial. While the Wall Street Journal have said that they will take steps to ensure that the information is excluded from any of their publications appearing on the internet, they will not be in a position to prevent a third party who acquires this information abroad, posting it on the internet.

Nevertheless, Justice Saunders granted the *Journal's* motion in full:

There is a strong public interest in enabling the press to report as fully and as accurately as possible the proceedings in this trial. That applies as much to the foreign press as it does to the national media. The proceedings are of interest not only in this country but also abroad. The supply of documents with such redactions as may be necessary will assist the foreign press to report the matter accurately and, at the moment, I can see no good reason why they should not have the documents in the same way as the national press does. I do not consider that the signing of the agreement should be a pre-condition of that supply.

At a hearing, two UK reporters objected to the Court's ruling, arguing that granting the *Journal's* motion would provide it with an unfair advantage because it would somehow not need to comply with UK law. The Court nevertheless issued its ruling, which declined to make the *Journal* agree to confirm its compliance with reporting restrictions when reporting within the jurisdiction, as that goes without saying and "is not properly a matter for agreement." At a subsequent hearing, Justice Saunders also denied the prosecutors' request for a formal undertaking from the *Journal* promising not to publish on the internet anything covered by reporting restrictions, as he was satisfied with the *Journal's* assurances to this effect.

However, in his ruling, Justice Saunders noted that even material published only in the US or Asian print editions could still pose a risk of contempt of court: "The issue may arise as to where exactly publication takes place. The information is no doubt sent in a report from the court to the local office and from there to America for inclusion in the American or Asian editions. In those circumstances it may well be that a publication of the information takes place in this country." Resolution of that issue will have to await another day.

Jason P. Conti and Jacob P. Goldstein are counsel for Dow Jones. Dow Jones & Company, Inc. was represented by Adam Wolanski, 5RB, and Caroline Kean, Wiggin LLP. Andrew Edis represented the CPS. Angus McCullough represented the Attorney General.

MEDIA LIBEL LAW 2013-14

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European Court of Justice Rules on Hyperlinks and Copyright Liability

How Does Decision Compare to US and Canadian Approaches?

By Paul Joseph and Adam Cusworth

Svensson Decision

The European Court of Justice issued an important decision on copyright liability for hyperlinking to online content. See [Svensson v. Retriever Sverige AB](#) (Feb. 13, 2014).

Referring to its previous decision in *TVCatchup* (C-607/11 *ITV Broadcasting Ltd v TVCatchup Ltd* [2013] ECR), the Court noted that a communication to the public requires two criteria to be fulfilled: (1) an act of communication of a work; and (2) the communication of that work to the public.

Background

Svensson and a number of other journalists wrote press articles that were published in the Göteborgs-Posten, a Swedish newspaper, and on its website. Retriever Sverige, a separate website, provided its users with a list of hyperlinks to articles published by other websites, including those of the journalists.

It is an established principle of EU law that the first requirement, an act of communication, must be construed broadly. See Copyright Directive, recitals 4 and 9 and Joined Cases C-403/08 and C-429/08 [2011] ECR I-9083 *FAPL v QC Leisure*.

The journalists brought an action against Retriever Sverige before the Stockholm District Court alleging infringement of their exclusive right to make their respective works available to the public. The action escalated to the Swedish Court of Appeal, which stayed the proceedings and referred a number of questions to the Court of Justice of the European Union (ECJ) for a preliminary ruling. The substance of three of those questions was:

The Court's ruling means that, where works are made freely available online, rights holders cannot control how users of their content access that content.

More interestingly however, the Court also ruled that for there to be an act of communication it is sufficient that a work is made available to the public, irrespective of whether the public actually access the work. This seems to leave no room to distinguish the act of communication with the act of making available, even though the Copyright Directive refers to them separately (albeit both within Article 3). In the circumstances, the provision of hyperlinks by Retriever Sverige was an act of communication of a work.

- whether the supply of a hyperlink constitutes a communication to the public (and so a copyright infringement) within the meaning of the Copyright Directive;
- whether the assessment under question 1 is affected if access to the work to which the link refers is restricted in some way (for example, if it sits behind a paywall); and
- whether the assessment under question 1 is affected if the impression given after clicking the link is that the work appears to be on the same website as the link (what is often referred to as 'framing').

In relation to the second requirement, the Court again followed its interpretation of the 'public' in *TVCatchup*: "an indeterminate number of potential recipients which implies a fairly large number of persons". The communication of the hyperlinks by Retriever Sverige was aimed at all potential users of the site, which were indeterminate and of fairly large number, and therefore constituted a public. However, EU caselaw has provided that a communication, communicated by the same technical means as the original work (here, over the Internet), must also be directed to a 'new public'. This means a public not taken into account by the copyright holders when they authorised the initial communication to the public. See case C-306/05 *SGAE* [2006] ECR I-11519,

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paragraph 43. In the circumstances, the public targeted by the initial communication of the works consisted of all potential visitors to the newspaper website who were the same potential visitors to the hyperlinks contained on the Retriever Sverige website. As a result, there was no 'new' public. Whether the hyperlinked to content appeared 'framed' in Retriever Sverige's website was also not relevant to whether there was a new public.

The Court noted one circumstance (though there are others) where a hyperlink could constitute a communication to a new public: where the hyperlink makes it possible for users of a website on which the hyperlink is contained to circumvent restrictions put in place by the host site on which the protected work appears, if those users would not otherwise be able to access the protected work.

Impact on Rights Holders and Linkers

The Court's ruling means that, where works are made freely available online, rights holders cannot control how users of their content access that content. As a result, the ability of rights holders in the EU to monetise their content, for example through the use of advertisements on the site which hosts the content, will be adversely affected in circumstances where users can access that content through third party websites which 'frame' that content without including those advertisements.

This could represent a boon for aggregation websites (websites such as Retriever Sverige that aggregate online content through hyperlinks to a range of content), where the linked-to content does not itself infringe any rights. Rights holders can be expected to respond by making content less 'freely available', for example by placing content behind paywalls limiting access to pre-approved members.

Where there was previously uncertainty over whether hyperlinks which frame content, or indeed any kind of hyperlink, could constitute a breach of the communication to the public right under the Copyright Directive, the Court has created a good degree of certainty. (With respect to the previous uncertainty see, for instance, the judgment in *Paramount v Sky* [2013] EWHC 3479 (Ch).)

Remaining Uncertainty in the EU

The meaning of 'freely available', i.e. the extent of the restriction on availability of content required to render a hyperlink to that content a communication to a new public, is likely to be the subject of future debate. Would there, for instance, be a 'new public', where copyright works were first published on an obscure, infrequently visited blog, and then linked to by a major newspaper publisher's website? The jury's still out on this type of factual scenario.

What is also not yet clear in the EU is whether linking to content which *does* infringe copyright would constitute a communication to a new public. In this scenario the website which hosts the content is clearly committing an infringement by communicating the work to a new public, but is the website which links to that content also responsible for this? In *Paramount v Sky*, [2013] EWHC 3479 (Ch), Mr Justice Arnold noted that it is "arguable that it makes no difference whether the source of the copyright work to which the hyperlink links is licensed by the copyright owner."

The US Approach in *Perfect 10*

When the European Court of Justice does come to consider this question, it may choose to follow the approach of the United States Court of Appeals for the Ninth Circuit in *Perfect 10 v Amazon*. Perfect 10 was the publisher of photographs in a 'members' area' behind a paywall. Some third-party websites republished those images without Perfect 10's authorisation. Google crawled, cached and indexed those images from the third party websites (but not from Perfect 10's website) so that when a user clicked on an image, Google linked to the website containing the image, but also framed the image within its own website.

Although Google was *prima facie* liable for direct copyright infringement for storing thumbnail copies of the images, Google ran a successful 'fair use' defence. Further, the framing of and linking to the thumbnail images in its search function was held not to be an infringement of copyright, despite the fact that the framed and linked to content was itself infringing. The reason was quite technical:

"When a user clicks on a thumbnail image, the user's browser program interprets HTML instructions on Google's webpage... [which] gives the user's browser

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the address of the website publisher's computer that stores the full-size version of the thumbnail. By following the HTML instructions to access the third-party webpage, the user's browser connects to the website publisher's computer, downloads the full-size image, and makes the image appear...on the user's screen."

In summary, Google did not communicate the images to the user, it simply provided HTML instructions directing a user's browser to access a third-party website.

Google was also not liable, as a matter of contribution or vicariously, for the copyright infringement committed by the third party websites which hosted the images.

It will be interesting to see if the European Court of Justice adopts the same approach as the US Courts of Appeal in *Perfect 10* in subsequent judgments, particularly on the question of whether it matters whether the linked to content is itself infringing.

A Canadian Perspective

In the Canadian Supreme Court decision in *Crookes v Newton* [2011] SCC 47, the question was not whether there was an infringement of copyright, but rather whether an article entitled "Free Speech in Canada" defamed the claimant. The article contained hyperlinks to two websites which contained allegedly defamatory material about the claimant. The claimant contended that the inclusion of the hyperlinks amounted to publishing the allegedly defamatory material, which the defendant was therefore liable for.

The court held that a hyperlink by itself is not a publication of the material to which it refers, but it could be a publication when a hyperlink presents content from the hyperlinked material in a way that repeats the content. This is the case even where the linked to material is defamatory, and where the hyperlinker adopts or endorses the material accessed via the hyperlink, so long as the hyperlinker does not actually repeat the defamatory material. Hyperlinks are, using the Canadian Supreme Court's analogy, like footnotes: they are a communication that something exists. They are content neutral.

What is really remarkable in *Crookes* is that the court held that a hyperlink that repeats the content to which it links would be a publication and could therefore be defamatory. How this can be aligned with the EU and US positions on framing in the copyright area is tricky. For example, had the hyperlink framed the allegedly defamatory material, would that equate to publishing?

The US line of reasoning in *Perfect 10* suggests that it would not, because the framing of content does not involve the framer replicating the content, but rather consists of the execution of HTML instructions on behalf of the user accessing the link. This technical analysis of what is actually going on when content is framed, if applied to the facts of *Crookes*, could mean that framing defamatory material does not involve a repetition of that content.

Although the court in *Crookes* did not consider whether framing content involves replication of that content and therefore whether framing content could give rise to liability under the laws of defamation, the case neatly displays the need for consistency in future decisions on linking and framing across the spectrum of legal rights.

Conclusions

Svensson is decided under a different framework of copyright law to *Perfect 10*, and so neatly avoids the technical arguments which consumed the US Courts of Appeal in *Perfect 10*. Instead, the European Court of Justice looked to who could access the hyperlinks, asking whether they were the same public the linked to content owner envisaged when it communicated the work. In *Svensson*, the Court focussed on the intention of the copyright holders and created a framework around which their intention could be protected.

Juxtapose this with *Perfect 10*, where the intention of the copyright owners meant nothing. Even though the public interest in allowing Google to continue to make available to the public a highly beneficial function of "improving access to information on the Internet" is worthy of protection, the intention of the rights holders should not so easily have been cast aside.

Paul Joseph is a partner and Adam Cusworth, an associate, at RPC in London. Counsel in the case are listed in the hyperlinked opinion.

Ninth Circuit Orders Take-Down of “Innocence of Muslims” Video in Novel and Controversial Application of Copyright Law

By Thomas J. Williams and Vincent P. Circelli

Reminding one of the expression that bad facts can make, at least in the eyes of many, bad law, the Ninth Circuit Court of Appeals ordered Google to remove from YouTube all or part of a film entitled “Innocence of Muslims” based on an actress’ claim that she retained a copyright interest in her independently copyrightable contribution to a joint work. [Garcia v. Google, Inc.](#), No. 12-57302, slip op. at 4, 14 (9th Cir. Feb. 26, 2014).

Many commentators have expressed alarm over the ruling, but the Ninth Circuit has declined to rehear *en banc* its panel’s denial of a stay of its order directing Google to remove all or part of the film from its platforms worldwide.

The Dispute and the Lawsuit

Cindy Garcia was paid \$500 for three and a half days of filming for a minor role in what she was told would be “an adventure film set in ancient Arabia” with the working title “Desert Warrior.” Instead of “Desert Warrior,” however, Garcia’s scene was used in a film entitled “Innocence of Muslims,” which, unbeknownst to Garcia, contained Arabic dubbing and subtitles which made it appear that Garcia was speaking words offensive to many Muslims.

The dubbed version, which Garcia first saw after it was uploaded to YouTube.com, sparked protests in Egypt and elsewhere, and an “Egyptian cleric issued a fatwa, calling for the killing of everyone involved in the film.” *Id.* at 4. Garcia received death threats and immediately began efforts to have the film removed from YouTube.

Garcia initially filed takedown notices with Google under the Digital Millennium Copyright Act. *See* 17 U.S.C. § 512.

Google refused, so Garcia sued and applied for a temporary restraining order (which the district court treated as a motion for preliminary injunction), seeking removal of the film from YouTube.

The district court denied Garcia’s request, concluding that Garcia (1) delayed in bringing the action; (2) failed to demonstrate “that the requested preliminary relief would prevent any alleged harm;” and (3) was “unlikely to succeed on the merits” of her copyright claim.

Ninth Circuit Majority

On appeal to the Ninth Circuit, a 2-1 majority reversed and ordered Google to remove immediately all copies of “Innocence of Muslims” from YouTube.com and any other platforms under Google’s control. The panel later modified its order to allow posting of other versions of the film if they did not include Garcia’s performance.

The majority opinion by Chief Judge Alex Kozinski first examined the district court’s finding that Garcia was unlikely to succeed on the merits of her copyright claim. The majority found that “just because Garcia isn’t a joint author of ‘Innocence of Muslims’ doesn’t mean she doesn’t have a copyright interest in her own performance within the film.” *Id.* at 6-7. The majority disregarded Google’s argument that Garcia made no protectable contribution to the film because she did not write the dialogue or manage the production, and her few speaking roles were dubbed over. *Id.* 7-8. Citing a 1930s acting handbook, the majority noted that “an actor does far more than speak words on a page; he must ‘live his part

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inwardly, and then ... give to his experience an external embodiment.” The majority found that Garcia’s performance thus met the “minimal degree of creativity” to constitute a copyrightable performance. *Id.*

The majority then concluded in, an odd and contradictory statement, that “while the matter is fairly debatable, Garcia is likely to prevail.” *Id.* at 10.

The majority next examined whether Garcia had shown sufficient likelihood of irreparable harm. Noting that “[i]rreparable harm isn’t presumed in copyright cases,” the majority found the death threats Garcia received were “real and immediate,” and concluded that “to the extent the irreparable harm inquiry is at all a close question, we think it best to err on the side of life.” *Id.* at 15-17.

Finally, the majority examined the balance of equities, noting that “the First Amendment doesn’t protect copyright infringement,” and that because “Garcia has demonstrated a likelihood of success on her claim that ‘Innocence of Muslims’ infringes her copyright” the balance of equities “clearly favors Garcia.” *Id.* at 18. The majority concluded that to the “extent the public interest is implicated at all, it, too, tips in Garcia’s direction.” *Id.*

Dissent

In a strongly worded dissent, Judge N.R. Smith charged that “the majority makes new law in this circuit in order to reach the result it seeks.” *Id.* at 21. The dissent argued that mandatory injunctions are “particularly disfavored,” *id.* at 19, and vehemently disagreed that Garcia was likely to succeed on the merits, given a long list of Ninth Circuit cases finding that acting and singing performances do not constitute copyrightable works. *Id.* at 26-27. The dissent argued the majority’s ruling created “an impenetrable thicket of copyright” in every created work that would be untenable and unpredictable. *Id.* at 27.

Subsequent Activity and Reactions

Numerous commentators have questioned the majority opinion’s logic and potential impact on the field of copyright, entertainment, and First Amendment law, *see, e.g.,* Donahue, [9th Circ.’s Google Ruling Leaves Copyright Attys Speechless](#); Boston Herald, [YouTube ordered to take down anti-Muslim](#)

[film](#). Google promptly filed an emergency motion to stay the order requiring removal of the film. The panel which decided the case denied the motion, but one Ninth Circuit judge *sua sponte* requested a vote on whether to rehear *en banc* the panel’s order denying the stay.

However, a majority of the Court’s non-recused active judges did not vote in favor of rehearing the denial of the stay *en banc*, leaving intact, at least for now, the order that the film be removed. *Garcia v. Google, Inc.*, No. 12-57302, Order (9th Cir. March 14, 2014).

Meanwhile, Google also filed a petition for rehearing *en banc*, and the Court ordered Garcia to respond by April 3, 2014. The Court also announced it would entertain *amicus* briefs if filed within ten days after Garcia’s response, and numerous *amici* have already weighed in and more are likely to follow. On March 13, 2014, a group of media *amici* urged the Court to stay the injunction pending disposition of Google’s petition for *en banc* review of the panel opinion, and on March 20, 2014, Public Citizen submitted an *amicus* letter brief suggesting that because Garcia “seeks to suppress publication of the film because of its content,” the doctrine of copyright misuse, which the panel opinion did not address, should be considered in evaluating Google’s petition for rehearing.

Not all observers are critical of the panel’s opinion: on March 13, 2014, Los Angeles entertainment lawyer Charles J. Harder, writing “individually” and not “on behalf of any ... clients,” submitted an *amicus* letter brief arguing that the panel “correctly decided” the case and that “*en banc* review of that decision is unnecessary.”

On March 25, plaintiff filed an [emergency motion](#) to hold Google and YouTube in contempt for disobeying the Ninth Circuit’s order.

In a strongly worded [brief in response](#), defendants call this allegation “false” and argue they have complied with the injunction, but note that the injunction is not sufficiently specific to even be enforced by contempt.

Thomas J. Williams is a partner and Vincent P. Circelli is an associate in the Fort Worth office of Haynes and Boone, LLP. Google and YouTube are represented by Timothy L. Alger and Sunita Bali, Perkins Coie LLP, Palo Alto, CA; and Neal Katyal, Dominic F. Perella, and Sean Marotta, Hogan Lovells US LLP, Washington D.C. Plaintiff is represented by M. Cris Armenta, The Armenta Law Firm APC, Los Angeles, CA; and Credence Sol, Chauvigny, France.

Second Circuit Protects News Organizations That Report on Copyrightable Material

Publication of Analyst Call a Fair Use

By William M. Ried and Thomas H. Golden

Background

In its recent decision upholding Bloomberg News's right to publish the contents of an analyst call held by a publicly-traded company, the Second Circuit made clear that newsmakers will have a hard time precluding the media from reporting on newsworthy disclosures by claiming ownership of copyrights in them. [*The Swatch Group Management Services Ltd. v. Bloomberg L.P.*](#), Nos. 12-2412-cv and 12-2645-cv (Jan. 27, 2014 (Katzman, Kearse, Wesley, JJ.)), affirming 861 F. Supp.2d 336 (SDNY 2012) (Hellerstein, J).

On January 27, 2014, the court issued its opinion in *Swatch v. Bloomberg* affirming the district court's grant of summary judgment that Bloomberg's publication of a transcript and recording of an analyst call held by the Swiss watch maker Swatch, which Swatch claimed was protected by copyright, was a permissible "fair use."

In doing so, the court recognized both that Bloomberg's "overriding purpose here was not to 'scoop[]' Swatch or 'supplant the copyright holder's commercially valuable right of first publication'... but rather simply to deliver newsworthy financial information to American investors and analysts." Citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985).

It also recognized that such reporting, "whose protection lies at the core of the First Amendment, would be crippled if the news media and similar organizations were limited to authorized sources of information." (pp. 22-23) citing *New York Times Co. v. United States*, 403 U.S. 713 (1971). The court's decision builds on its 2011 ruling in the *Flyonthewall.com* case that a company's ability to make news by issuing information likely to affect the market price of a security "does not give rise to a right for it to control who breaks that news and how." (p.42) quoting *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 907 (2d Cir. 2011).

Swatch argued that Bloomberg was entitled to lesser protection because, in the context of the analyst call, Bloomberg delivered "data" rather than "news."

The *Swatch* case concerned a February 2011 conference call that Swatch held to discuss its recent financial results with over one hundred invited analysts. Swatch's vendor recorded the call, and an operator warned the analysts that the call "must not be recorded for publication or broadcast." Neither Bloomberg nor any other press organization was invited to the call but, after it was concluded, Bloomberg distributed a recording and transcript of the call, without commentary, to subscribers of its BLOOMBERG PROFESSIONAL® service. Swatch quickly demanded that Bloomberg take down the transcript and recording, Bloomberg refused, and Swatch sued, claiming that Bloomberg had infringed its exclusive rights to reproduce and distribute its recording. (In its Second Amended Complaint, Swatch did not challenge Bloomberg's preparation and distribution of the written transcript of the call.)

In May 2012, after listening to the audiotape, U.S. District Judge Alvin Hellerstein granted Bloomberg's motion for summary judgment on the basis of the affirmative defense of "fair use," finding that Bloomberg's "work as a prominent gatherer and publisher of business and financial information serves an important public interest, for the public is served by the full, timely and accurate dissemination of business and financial news."

Second Circuit Analysis

Reviewing that decision *de novo*, and "resolving all ambiguities and drawing all reasonable inferences against" Bloomberg, the Second Circuit affirmed. In doing so, the court noted that the four statutory factors for assessing fair use, though mandatory, are non-exclusive elements of the ultimate test of "whether the copyright law's goal of

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promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it.” Quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006) (additional citations omitted).

Applying those four factors, the court concluded that Bloomberg’s reporting on the entirety to the call served a significant editorial purpose and did not meaningfully interfere with any of Swatch’s interests.

With respect to the first fair use factor, the purpose and character of the defendant’s use, Swatch argued that Bloomberg was entitled to lesser protection because, in the context of the analyst call, Bloomberg delivered “data” rather than “news.” The court concluded that this was a semantic rather than a factual dispute, and noted that, regardless of how Bloomberg’s use was characterized, “there can be no doubt that Bloomberg’s purpose in obtaining and disseminating the recording at issue was to make important financial information about Swatch Group available to American investors and analysts.”

In reaching this conclusion, the court noted that, through Reg FD (17 C.F.R. § 243.000), the “SEC has mandated that when American companies disclose this kind of material nonpublic information, they must make it available to the public immediately.” While Swatch, a Swiss Company, may not be subject to Reg FD from an SEC enforcement perspective, the court found that the rule’s underlying policy “provides additional support for a proposition that would be clear in any event: American investors and analysts have an interest in obtaining important information about companies whose securities are traded in American markets.”

The court also rejected Swatch’s argument that, because it claimed Bloomberg had provided the analyst call to the subscribers of the BLOOMBERG PROFESSIONAL® service, there was a factual question as to whether such use was merely “commercial.” It found that, while there was no dispute that Bloomberg is a commercial enterprise that charges customers for access to its information service, “it would be misleading to characterize the use as ‘commercial exploitation’ and it ‘would strain credulity to suggest that

providing access to Swatch Group’s earnings call more than trivially affected the value of that service.”

Turning to the issue of good faith, the Second Circuit accepted for purposes of the appeal the truth of Swatch’s allegation that Bloomberg had somehow “surreptitiously gained access to” and recorded the call. (In fact, as Bloomberg stated in its pleadings in the district court, at the request of a party who had been invited to participate on the call, a third party transcript service created a sound recording and prepared a written transcript of the call, which Bloomberg lawfully obtained.)

The court further assumed that Bloomberg had been fully aware that its use of the recording was contrary to Swatch’s instructions. Even so, the court found that Bloomberg acted not with the intent to gain a commercial advantage over Swatch, but rather to report on information generated by Swatch that was itself newsworthy and of interest to Bloomberg’s readers.

The court also addressed, and rejected, Swatch’s argument that Bloomberg did not “transform” the call and therefore could not claim fair use. It found that, while transformative use generally qualifies as fair use, “some core examples of fair use can involve no transformation” and, in the context of news reporting, “the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant

to faithfully reproduce an original work rather than transform it.” As the court explained:

Here, Bloomberg provided no additional commentary or analysis of Swatch Group’s earnings call. But by disseminating not just a written transcript or article but an actual sound recording, Bloomberg was able to convey with precision not only *what* Swatch Group’s executives said, but also *how* they said it. This latter type of information may be just as valuable to investors and analysts as the former, since the speaker’s demeanor, tone, and cadence can often elucidate his or her true beliefs far beyond what a stale transcript or summary can show. (At p. 24).

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The court’s decision is notable for finding fair use in a commercial, non-transformative use of an entire, unpublished copyrighted work.

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Nor was Bloomberg's "fair use" defense undermined by the fact that it copied the entirety of the call, given that doing so served an important journalistic interest. As the Second Circuit noted, "the public interest in the information contained in the recording is better served by the dissemination of the information in its entirety."

Against this backdrop, the court found that Bloomberg's legitimate interest in reporting on the call outweighed Swatch's interest in maintaining exclusive rights to what was said on the call. In that regard, the court found that Swatch's copyright was "thin" at best because of its "manifestly factual character and purpose to convey financial information." And, while the call was not "published" under the statutory definition of "publication," the court found that Swatch "was not deprived of the ability to "control the first public appearance of [its] expression," including "when, where, and in what form" it appeared. In addition, the court noted that Swatch had admitted in its answer to Bloomberg's counterclaims that it "did not seek to profit from the publication of the [call] in audio or written format."

Moreover, Swatch's claim that it had the right to know and control precisely who heard its call "is far outweighed by the public interest in the dissemination of important financial information." The court also found inapplicable those cases, relied upon by Swatch, which "concerned the appropriation of secondary sources that had compiled or commented on financial news." Here, by contrast, Bloomberg's reporting reflected "the use of a primary source that itself *was* financial news."

The court concluded that Bloomberg's use:

served the important public purpose, also reflected in Regulation FD, of ensuring the wide dissemination of important financial information. In addition, Swatch's copyright is exceedingly thin, as the recording is thoroughly factual in nature. Indeed, the whole purpose of the conference call was to convey financial information about Swatch Group to analysts and investors around the world. And while Bloomberg used the recording in its entirety, doing so was reasonably necessary in light of Bloomberg's purpose. Finally, we are confident that this type of use will neither significantly impair the value of earnings calls to foreign companies that convene and record them, nor appreciably alter the incentive for the creation of original expression. In sum, Bloomberg's use is fair use.

From a copyright perspective, the court's decision is notable for finding fair use in a commercial, non-transformative use of an entire, unpublished copyrighted work. In a broader sense, the decision marks a victory for the news media in the United States and establishes important precedent protecting news organizations in seeking to serve the public purpose by bringing transparency to the markets and reporting on matters of legitimate concern to their readers.

Thomas Golden and William Ried, Willkie Farr & Gallagher LLP in New York, represented Bloomberg L.P. in this case. Swatch was represented by Joshua Paul, Collen IP, Ossining, NY.

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Seventh Circuit Reinstates Trademark and Publicity Claims Over Sports Illustrated Page

Supermarket's Page Congratulating Michael Jordan Ruled Commercial Speech

The Seventh Circuit held that a magazine page designed by a Chicago-area supermarket to commemorate Michael Jordan's induction into the Basketball Hall of Fame was commercial speech and potentially actionable. [*Jordan v. Jewel Food Stores, Inc.*](#), No. 12-1992 (7th Cir. Feb. 19, 2014) (Flaum, Skyes, Randa, JJ.).

The Court reinstated Jordan's trademark and publicity claims, which had been dismissed by the trial court on First Amendment grounds. The Court wrote that "The notion that an advertisement counts as 'commercial' only if makes an appeal to purchase a particular product makes no sense today, and we doubt it ever did."

Instead looking at the content and context of the page, the Court held it was "a form of image advertising aimed at promoting the Jewel-Osco brand."

Background

In 2009, *Sports Illustrated* published a special commemorative issue to honor Michael Jordan on the occasion of his induction into the Basketball Hall of Fame. Publisher Time Inc. asked businesses to design pages paying tribute to Jordan for the special issue.

Defendant Jewel-Osco, a Chicago-area supermarket chain, designed a page for the issue. Time did not charge for the page, instead, Jewel-Osco agreed to sell the commemorative issue at its stores in a special display for approximately three months.

The magazine page entitled "A Shoe In!" contains a pair of basketball shoes with Jordan's number 23, the store's logo, and the following message:

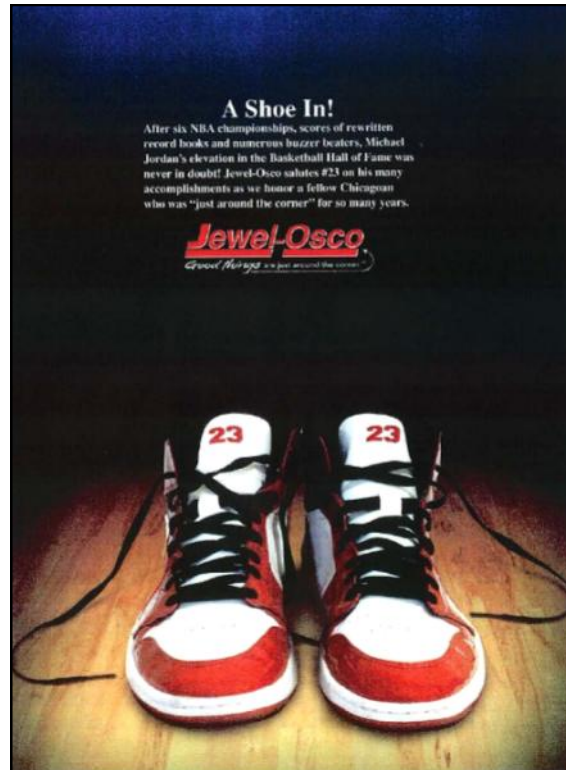
After six NBA Championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.

"Just around the corner" was part of the store's slogan: "Good things are just around the corner."

Jordan sued Jewel-Osco in state court, alleging the unauthorized use of his name violated the Illinois Right of Publicity Act, the Lanham Act, the Illinois Consumer Fraud and Deceptive Trade Practices Act, and the common law tort of unfair competition. Jewel-Osco removed the case to federal court. (Jewel-Osco also filed a third-party suit against Time for indemnification

and contribution.)

The district court held that the page was not commercial speech. See [*Jordan v. Jewel Food Stores*](#), No. 10 C 340, 2012 WL 512584 (N.D. Ill. Feb 15, 2012) (Feinerman, J.). The court later granted summary judgment to Jewel-Osco,



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holding that Jordan's lawsuit was barred by the First Amendment.

Analyzing whether the page was commercial speech, the district court concluded that the page celebrated Jordan, the page did not highlight the supermarket, and the logo merely identified the speaker. Using part of the store's slogan was simply a "play on words." "It is difficult to see how Jewel's page could be viewed, even with the benefit of multiple layers of green eyeshades, as proposing a commercial transaction."

The district court also rejected Jordan's claim that the supermarket's profit motive made the page commercial speech. Anything done by a corporation presumably has a profit motive, thus the economic motivation for speech is insufficient to automatically make it commercial speech. Finally, even if the page contained some commercial elements, "that element is intertwined with and overwhelmed by the message's noncommercial aspects, rendering the page noncommercial as a whole." *Citing Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

Seventh Circuit Reverses

Reversing, the Court began by observing that whether speech proposes a commercial transaction is only a starting point in determining whether the speech is "commercial" for First Amendment purposes.

We know from common experience that commercial advertising occupies diverse media, draws on a limitless array of imaginative techniques, and is often supported by sophisticated marketing research. It is highly creative, sometimes abstract, and frequently relies on subtle cues. The notion that an advertisement counts as "commercial" only if it makes an appeal to purchase a particular product makes no sense today, and we doubt that it ever did. An advertisement is no less "commercial" because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service. Applying the "core" definition of commercial speech too rigidly ignores this reality.

The Court found it clear that Jewel-Osco's page had an unmistakable commercial function: to enhance its brand in the minds of consumers. The district court erred in looking at whether the page invited readers to buy a specific product. Instead, the page promotes brand loyalty and invites consumers to buy whatever they need from their local Jewel-Osco store.

The Seventh Circuit panel also faulted the district court for finding that the use of defendant's logo on the page merely identified it as the speaker. This ignored the significance of the logo – and the store slogan – as advertising tools. A contrary holding, the Court explained, would have "sweeping and troublesome implications for athletes, actors, celebrities, and other trademark holders seeking to protect the use of their identities or marks."

The district court also erred in applying the "inextricably intertwined" doctrine. That doctrine properly understood:

applies only when it is legally or practically impossible for the speaker to separate out the commercial and noncommercial elements of his speech. In that situation the package as a whole gets the benefit of the higher standard of scrutiny applicable to noncommercial speech. But simply combining commercial and noncommercial elements in a single presentation does not transform the whole into noncommercial speech.

The Ninth Circuit in *Hoffman* simply got it wrong, according to the panel. "[N]o law of man or nature prevented the magazine from publishing a fashion article without superimposing the latest fashion designs onto film stills of famous actors." Likewise, according to the Court, any noncommercial elements in the Jewel-Osco page could have been separated out. But how those non-commercial elements can be published as protected speech remains a puzzle given the Court's encompassing view of "image advertising."

The case was remanded to the district court to consider the merits of the Lanham Act and related state law claims.

Michael Jordan is represented by Clay A. Tillack, Frederick J. Sperling, and Sondra A. Hemeryck of Schiff Hardin LLP in Chicago. Jewel is represented by Anthony Richard Zeuli of Merchant & Gould P.C. in Minneapolis and David E. Morrison and Oscar L. Alcantra of Goldberg Kohn Ltd. in Chicago.

DC Circuit Strikes Down FCC's Open Internet Rules

But the FCC Will Live to Fight Another Day

By Judith Endejan

On January 14, and to much attention, the D.C. Circuit Court of Appeals struck down the FCC's so-called Net Neutrality rules. [Verizon v. FCC](#), (D.C. Cir. Jan. 14, 2014) (Tatel, Rogers, Silberman, JJ.).

The brouhaha over the decision striking down the FCC's open Internet rules boils down to buckets. Long ago the FCC adopted rules that distinguish between "telecommunications," services and "enhanced" services. The former placed services that involve a "pure transmission" into the "basic" services bucket. The latter, "enhanced" services bucket cover services that involve "computer processing applications used to act on the content, code, protocol, and other aspects of the subscriber's information." The Commission placed services needed to connect to the Internet in the "enhanced" services bucket.

The FCC exempted "enhanced" service providers such as broadband providers (including cable, DSL and wireless) from Title II common carrier obligations. A common carrier is required to offer service indiscriminately and on general terms to the public.

Enter the Internet Age. Congress adopted §706 of the 1996 Telecommunications Act, directing the FCC to encourage the deployment of broadband telecommunications capability. The Commission views §706 as a grant of authority to adopt rules to protect "the virtuous circle of innovation" that had long driven the growth of the Internet. (Open Internet Order, 25 F.C.C.R. 17905 (2010) at 17910-11.) The FCC claimed that this circle arises when Internet openness spurs investment development by edge providers (i.e. Netflix), which leads to increased user demand for broadband access, which leads to increased investment in broadband network infrastructure and technologies (which in

turn leads to further innovation and development by edge providers).

In the Open Internet Order the FCC adopted three rules to protect this virtuous circle for fixed and mobile broadband providers. The first imposes a transparency requirement on both sets of providers requiring them to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of [their] broadband Internet access services." *Id.* at 17937.

The second rule imposes anti-blocking requirements on both types of broadband providers prohibiting the blocking of access to lawful content and applications. The third rule imposes an anti-discrimination requirement only on fixed broadband providers. The FCC rules require such providers to "not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service."

The Majority Opinion, written by Judge Tatel, used a classic APA/ *Chevron* analysis to find that the FCC had reasonably interpreted §706 to give it authority to adopt regulations for Internet service providers. That was the good news for the FCC.

The bad news for the FCC was the court's conclusion that the anti-blocking and anti-discrimination provisions were invalid. The Court vacated them but preserved the disclosure rules.

The anti-discrimination and anti-blocking rules were struck down because they imposed common carrier obligations from the "basic" services bucket on broadband providers that are in the "enhanced" service provider bucket. 47 USC §153(51) precludes this because "a telecommunications carrier shall be treated as a common carrier under this [act] *only to the extent that it is engaged in providing telecommunications services.*" Furthermore, 47

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The bottom line is that the DC Circuit said you cannot classify broadband service providers for regulation one way and then impose rules that are inapplicable to that classification.

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USC §332(c) (2) provides mobile broadband providers with statutory immunity from treatment as a common carrier.

The anti-discrimination rule prohibited broadband providers from granting preferred status or services to edge providers who might pay for such benefits, or for their own services. The anti-discrimination rule language mirrors the language in 47 USC §202 which establishes the basic common carrier obligation not to “make any unjust or unreasonable discrimination.” The Court reasoned that the new rule imposed a common carrier obligation and found that the anti-blocking rules that preclude broadband providers from blocking access to edge providers did so as well.

The bottom line is that the DC Circuit said you cannot classify broadband service providers for regulation one way

and then impose rules that are inapplicable to that classification.

FCC’s Chairman, Thomas Wheeler, has said that he was pleased that the DC Circuit held that §706 give the Commission with affirmative authority to enact measures to encourage the deployment of broadband infrastructure. He did not rule out further appeal of the Decision, but indicated that the FCC did not intend to abandon its network neutrality efforts.

Judith Endejan is a partner with Garvey Schubert Barer in Seattle, WA. Helgi C. Walker, Gibson, Dunn & Crutcher LLP, argued the case for Verizon. Sean A. Lev, FCC General Counsel, argued the case for the Commission. Pantelis Michalopoulos argued the case for the intervenors, Independent Telephone & Telecommunications Alliance, et al. A full counsel list is available in the hyperlinked opinion.

Recent MLRC Publications

[Non-Competes in the Broadcast Industry](#)

Eight states and the District of Columbia have laws that target the broadcast industry and limit broadcast employers’ ability to enforce non-compete agreements with their on and off screen talent. This paper describes the elements of those laws and their impact. It also addresses several alternative approaches for broadcast employers’ efforts to retain employees and the impact of the broadcast non-compete ban laws on those alternatives.

[Law Of “Opinion” Practice Guide 2013 Supplement](#)

Practice Guide collecting some of the leading positive opinion cases.

[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.

MLRC Miami Conference Explores Challenges and Opportunities in Cross-Border Publishing

Legal Issues Concerning Hispanic and Latin American Media

On March 10, approximately 70 lawyers convened at the University of Miami School of Communication for MLRC's second annual conference on Legal Issues of Concern for Hispanic and Latin American Media.

The Conference was a unique opportunity for lawyers from North and South America to meet and educate one another on the wide-range of issues that arise in cross-border content creation, newsgathering, and distribution. The conference included two dynamic news executives as speakers. And interactive conference sessions examined libel, privacy, and newsgathering laws; licensing and distribution under Latin American intellectual property and related laws; and advertising issues for the Spanish language market -- all through the lens of cross-border publication and deal-making.



Myriam Marquez, el Nuevo Herald



Isaac Lee, Univision and Fusion

The opening speaker was **Myriam Marquez**, Executive Editor of el Nuevo Herald. Myriam discussed the evolution of el Nuevo Herald which started by translating articles from the Miami Herald into Spanish and has grown to be a market leader in Spanish language coverage of Hispanic and Latin American news. She described Spanish language media as a throwback to the old days of competitive newspaper markets. This is evidenced not only by el Nuevo Herald's large hard copy circulation, but by a large online readership in Spain and Latin America. She also offered a reminder of troubling regional press freedom issues, noting the difficulties her paper's reporters face to get into Cuba – and the recent detention of a reporter in Venezuela.

Lunch speaker **Isaac Lee**, the President of News for Univision, and CEO of Fusion, a Disney–Univision partnership, began with a sobering reminder of the press freedom challenges in Latin America – most pressing the problem of “immunity” – the unsolved killing of journalists. Over the past 20 years, 144 journalists have been killed in Latin America and 100 cases remain unsolved. Moreover, coverage of certain people and topics in Latin America is a danger zone for journalists. Isaac cited Univision's coverage of the arrest in Mexico of fugitive drug

lord el Chapo as an example of a story his network can tell, while colleagues in Latin America would be at risk for reporting. He also spoke eloquently of his own background as an investigative reporter in Colombia – where engaging in journalism can get you killed.

On the media business side, he spoke of Fusion's efforts to reach English and Spanish speaking millennials by being "nimble, fast, and flexible" in reporting the news in a timely way. Millennials, he said, "are interested in the non-boring" and he will use his entrepreneurial journalistic style to reach them.

Libel, Privacy & Newsgathering

Gary Bostwick (Bostwick Law, Los Angeles) and **Ashley Messenger** (NPR, DC) led the morning discussion session on Cross-border Libel, Privacy and Newsgathering issues. They began by describing the breakout-style interactive format which they deployed with great skill to achieve debate and discussion among the delegates. To launch discussion, they played a video clip of a [PBS News Hour report](#) about a women in El Salvador who was charged and convicted of having an abortion and jailed for ten years under the country's stringent anti-abortion laws. Among other things, the report stated that the women denied having an abortion and her father blamed her abusive boyfriend for causing the death of the child.

The clip raised numerous libel and privacy law issues for discussion. To what extent would this broadcast be protected in Latin American jurisdictions as a fair report of trial proceedings? Would accusations against the unnamed boyfriend be actionable? Would it be legal to disclose that a women had an abortion? Would there be a public interest to report such information? What about the use and legality of hidden recordings?

Lawyers from Argentina, Brazil, Chile, Colombia, Mexico, and Venezuela participated in the discussion, debating and sparring over the hypothetical and related media law issues in their jurisdictions.

Cross Border Licensing and Distribution

Beatriz Roth (Vice President, Chief Counsel, Reuters Agency and Consumer Digital, New York) and **Jose Sariego** (Senior Vice President, Business & Legal Affairs, Telemundo Media, Miami) led an interactive discussion on practical issues for cross border content deals. They began with a hypothetical situation of a U.S. producer trying to do a co-production in Brazil. The hypothetical raised multiple issues – agency and compensation claims by distributors; whether online distribution via Netflix constitutes a change to content; and laws on country quotas on foreign content. In addition, the session touched on copyright complexities caused by the recognition of moral rights in works. The moderators noted the way in which copyright, privacy law and antitrust law have been used in tandem to assert protection for content, in Mexico for example.

Hispanic and Spanish-Language Advertising Platforms

Lynn Carrillo (Vice President Media Law, NBCUniversal, Miami) led a panel and group discussion session on custom content deals, integrations, cross-platform material and executing contests and sweepstakes. The panel included in-house lawyer **Ana Salas Siegel**, SVP & Deputy General Counsel Fox International Channels, and two advertising executives – **Isabella Sanchez**, Zubi Advertising, and **Caroline Turner**, MediaVest.

In addition to highlighting the growth of Spanish language media and advertising, the panel discussed a real integrated advertising campaign by Proctor & Gamble to sponsor a sweepstakes for Telemundo's show "La Voz Kids," a Spanish language version of the popular reality talent show "The Voice." The complicated campaign involved integration with entrants' Facebook accounts and concerns over right of publicity claims.

CONFERENCE CO-CHAIRS

The Conference was programmed and led by Conference co-chairs:

- Gary Bostwick, Bostwick Law, Los Angeles
- Lynn Carrillo, NBCUniversal, Miami
- Maria Diaz, Thomson Reuters, New York
- Adolfo Jimenez, Holland & Knight LLP, Miami

CONFERENCE SUPPORTERS

We especially like to thank our sponsors for their support of the Conference.



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2014 MLRC/Southwestern Law School 11th Annual Media and Entertainment Law Conference

On January 16, 2014, MLRC members and friends gathered in Los Angeles, California at the Los Angeles Times Building for the eleventh annual MLRC/Southwestern Law School Biederman Institute Conference on Media and Entertainment Law Issues. The Conference included sessions on Fair Use, Right of Publicity, and legal issues surrounding Apps.



Aggregating Entertainment Content: How Much Re-Use is Fair Use

Left to right: **Charles Steinberg**, The Walt Disney Co.; **Jody Zucker**, Warner Bros. Television;
Jordan Gimbel, Yahoo! Inc.; **Regina Thomas**, AOL/Huffington Post

Additional materials from conference panels can be [accessed here](#).

Full conference program can be [accessed here](#).

Photos courtesy of Southwestern Law School



Right of Publicity Litigation: Sports Videogames Go Down: Will Hollywood Be Saved by the First Amendment?

Left to right: **Deborah Drooz**, Southwestern Law School; **Michael Rubin**, Altshuler Berzon LLP; **Jessica Kantor**, Legendary Entertainment; **Alonzo Wickers**, Davis Wright Tremaine LLP



App-Titude: Legal Issues On Apps That Matter

Left to right: **Jonathan H. Anshell**, CBS Television; **Bryony Gagan**, Netflix; **David S. Figatner**, Microsoft Corporation (Microsoft Studios); **Sheila Jambekar**, Zynga Inc.

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MLRC UPCOMING EVENTS

Legal Frontiers in Digital Media
May 15-16, 2014 | Mountain View, CA

MLRC/NAA/NAB Media Law Conference
September 17-19, 2014 | Reston, VA

MLRC Annual Dinner
November 12, 2014 | New York, NY

DCS Annual Lunch & Meeting
November 13, 2014 | New York, NY

More information at medialaw.org or medialaw@medialaw.org.