



# MEDIA LAW LETTER

Reporting Developments Through October 25, 2015

## MLRC

**From the Executive Director's Desk: Preparing for a Busy November.....08**  
*Annual Dinner, Forum, and Planning Meetings; Plus: the Dinner Panelists Who Got Away*

## INTELLECTUAL PROPERTY

**2d Cir. Second Circuit Affirms Fair Use Win for Google Books .....12**  
*Judge Leval's Restatement of the Law of Fair Use*  
Authors Guild v. Google, Inc.

## LIBEL & PRIVACY

**1st Cir. First Circuit Allows Defamation Action by Railway Against Rail Industry Trade  
Publication to Continue.....22**  
*The Train Rolls On*  
Pan Am Systems, Inc. et al. v. Hardenbergh

**Del. Court Holds That Hyperlink Can Restart Statute of Limitations for Libel.....25**  
*Getting Hyper Over the Single Publication Rule*  
Perlman, et al. v. Vox Media, Inc.

**EDNY In Wolf of Wall Street Claim, EDNY Dismisses Statutory Privacy, Common Law  
Privacy, and Private Figure Defamation Claims.....28**  
Greene v. Paramount Pictures Corp.

## INTERNATIONAL

**CJEU The EU-US "Safe Harbor" for Personal Data: No Longer Safe.....31**  
*Agreement Is Invalid, With Immediate Effect*  
Schrems v. Data Protection Commissioner



<b>ECHR</b>	<b>Criminal Conviction for Denying The Armenian Genocide in Breach with Freedom of Expression.....</b>	<b>35</b>
	<i>Fierce Controversy Within Court on How to Apply the Convention</i>	
	<i>Perinçek V. Switzerland</i>	
<b>ACCESS</b>		
<b>D.D.C.</b>	<b>New York Times Moves Forward With Suit Seeking Torture Memos.....</b>	<b>42</b>
	<i>Why Was No One Charged?</i>	
	<i>The New York Times Company v. U.S. Dept. of Justice</i>	
<b>Utah</b>	<b>Supreme Court Orders Disclosure of Criminal Investigation Documents.....</b>	<b>46</b>
	<i>Citizen Activist Wins Public Records Fight</i>	
	<i>Schroeder v. Utah Att’y General’s Office</i>	
<b>Cal. App.</b>	<b>Newspaper Reports on New Evidence of Priest Abuse and Diocese Inaction .....</b>	<b>49</b>
	<i>Appeals Court Affirms Modification of Protective Order to Allow “Access” to Unfiled Discovery</i>	
	<i>John RJ Doe v. Roman Catholic Bishop of Monterey</i>	

## MLRC FALL EVENTS

### November 11, 2015

2:30 - 3:30 p.m.: **MLRC Board Annual Meeting (open to all)**

3:45 - 5:45 p.m.: **MLRC Forum: Controversial, Offensive and Threatening Content: In the News and On Your Site**

6:00-7:00 p.m.: **Cocktail Reception (sponsored by AXIS PRO)**

7:30-10:00 p.m.: **Dinner: A Night at the Movies: Media Law & Ethical Issues in Recent Documentaries and Films**

*All meetings on November 11 are at the Grand Hyatt New York, 109 E. 42nd St.*

### November 12, 2015

12:00-2:00 p.m.: **DCS Annual Meeting and Lunch**

*Proskauer Rose, 11 Times Square (visitor entrance on NE corner of 41st St. and 8th Ave.)*

5:30-6:30 p.m.: **2016 Media Law Conference Planning Meeting (open to all)**

*Davis Wright Tremaine, 1251 Ave. of the Americas*



# MEDIA LAW RESOURCE CENTER

## ANNUAL DINNER

WEDNESDAY, NOVEMBER 11, 2015

### **A Night at the Movies:** *Media Law & Ethical Issues in Recent Documentaries and Films*

#### **Marty Baron**

Executive Editor, The Washington Post; Former Editor, The Boston Globe;  
Played by Liev Schreiber in “**SPOTLIGHT**”,  
a new movie about The Globe’s coverage of the Boston Catholic priest sex abuse scandal

#### **Erin Lee Carr**

Director, “**THOUGHT CRIMES: THE CASE OF THE CANNIBAL COP**”

#### **Victor A. Kovner**

Davis Wright Tremaine LLP,  
Attorney for “**THE JINX: THE LIFE AND DEATHS OF ROBERT DURST**”

#### **Laura Poitras** (*Invited*)

Producer and Director,  
“**CITIZENFOUR**”  
2015 Academy Award Winner for Best Documentary Feature, about Edward Snowden

*Moderated by:*

#### **Cynthia McFadden**

Senior Legal and Investigative Correspondent, NBC News

*(Excerpts of all Films Noted Above will be Shown)*

Cocktail Reception at 6:00 P.M.

*Sponsored by AXIS PRO*

Dinner at 7:30 P.M.

*Grand Hyatt New York*

Empire Ballroom, 109 East 42nd Street at Grand Central Station

*RSVP by Friday, October 23, 2015*

**Business Attire**



# MEDIA LAW RESOURCE CENTER

## ANNUAL DINNER — WEDNESDAY, NOVEMBER 11, 2015

*RSVP for Dinner by Friday, October 23, 2015*

**Reservations are not refundable for cancellations received after Monday, November 2, 2015**

Firm/Organization: \_\_\_\_\_

Contact Person: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_

Please reserve: \_\_\_\_\_ Single seat(s) at \$450 each

\_\_\_\_\_ Table(s) for 10 at \$4,500 each

\_\_\_\_\_ Table(s) for 11 at \$4,950 each

\_\_\_\_\_ Table(s) for 12 at \$5,400 each

Amount Enclosed for Dinner Reservations: \$ \_\_\_\_\_

Please make checks payable to:

Media Law Resource Center, Inc.

266 W 37th Street, 20<sup>th</sup> Floor, New York, NY 10018

*If you prefer to pay by credit card please go to our website, [www.medialaw.org](http://www.medialaw.org), and click on MRLC Annual Dinner. Please note that online payments will be 2.9% higher to cover credit card fees.*

Dietary restrictions/requests: \_\_\_\_\_

In honor of the Media Law Resource Center's 35th Anniversary, the 2015 Dinner Program will include a special section of commemorative ads. Please see next page for Dinner Program ad details.

*For further information please contact Debra Danis Seiden at [dseiden@medialaw.org](mailto:dseiden@medialaw.org) or 212-337-0200 ext. 204*



# MEDIA LAW RESOURCE CENTER

## DINNER PROGRAM JOURNAL

**In honor of the Media Law Resource Center's 35th Anniversary,  
in addition to details of the evening's presentation,  
the 2015 Dinner Program will include a special section of  
historical articles about MLRC as well as commemorative ads.**

**We invite you to purchase ads in the following sizes:**

☐ Quarter Page: \$500

☐ Half Page: \$750

☐ Full Page: \$1,500

Amount Enclosed for Dinner Program Ad: \_\_\_\_\_

Sorry, but we will be unable to refund for any cancellation of journal ads.

***Please e-mail your ad copy no later than Friday, October 30, 2015  
to [jwunsch@medialaw.org](mailto:jwunsch@medialaw.org) for inclusion in bound program journal.***

*(If we need to build an ad, contact us.)*

Ad specifications:	Dimensions:	Accepted formats:
	Full page: 7.5" x 9.5"	all standard file types – TIFF, JPEG, EPS, GIF
	Half page: 7.5" x 4.5"	<b>Color:</b> Black and white only
	Quarter page: 3.5" x 4.5"	<b>No PDFs, no full bleed images</b>
		<b>Borders:</b> None

Please make checks payable to:

Media Law Resource Center, Inc.  
266 West 37th Street, 20th Floor  
New York, NY 10018

Media Law Resource Center, Inc.

212-337-0200 fax: 212-337-9893 [www.medialaw.org](http://www.medialaw.org)

*For technical questions regarding Program ads contact Jake Wunsch at [jwunsch@medialaw.org](mailto:jwunsch@medialaw.org)*

*For questions regarding Dinner reservations contact Debra Danis Seiden at [dseiden@medialaw.org](mailto:dseiden@medialaw.org).*



# **MLRC DEFENSE COUNSEL SECTION 2015 ANNUAL MEETING**

***Thursday, November 12, 2015***

Lunch will be served 12:00 NOON to 2:00 P.M.

Meeting will begin promptly at 12:30 P.M.

**Proskauer Rose  
Eleven Times Square - Conference Room 2700**

Visitor entrance is on the NE corner of 41st Street and Eighth Avenue.

Price per person: \$40.00

**RSVP by November 2, 2015**

Reservations are not refundable for cancellations received after Friday, November 6, 2015.

*We are required to submit a list of attendees prior to the event for security purposes  
so please send in your reservation as soon as possible!*

**MEDIA LAW RESOURCE CENTER, INC.**  
266 W 37TH STREET — 20TH FLOOR  
NEW YORK, NY 10018

TELEPHONE: 212-337-0200 • FAX: 212-337-9893 • [WWW.MEDIALAW.ORG](http://WWW.MEDIALAW.ORG)

*For further information contact Debra Danis Seiden at [dseiden@medialaw.org](mailto:dseiden@medialaw.org).*



# MLRC DEFENSE COUNSEL SECTION

## 2015 ANNUAL MEETING

*\$40.00 per person includes lunch.*

**To reserve your seat and pay by credit card**  
**go to [www.medialaw.org](http://www.medialaw.org) and click on DCS Annual Meeting**

— OR —

Complete the form below and send payment by check payable to:

**Media Law Resource Center, Inc.**  
266 W 37th Street — 20th Floor, New York, NY 10018

**Payment enclosed @ \$40.00 per person:** \_\_\_\_\_

Please reserve \_\_\_\_\_ seats at the DCS Annual Lunch Meeting for:

Firm Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Please list names of individuals attending below (print clearly)

Name: \_\_\_\_\_ E-mail: \_\_\_\_\_

Name: \_\_\_\_\_ E-mail: \_\_\_\_\_

Name: \_\_\_\_\_ E-mail: \_\_\_\_\_

Name: \_\_\_\_\_ E-mail: \_\_\_\_\_

Name: \_\_\_\_\_ E-mail: \_\_\_\_\_

*Reservations are not refundable for cancellations received after Friday, November 6, 2015.*

*For further information contact Debra Danis Seiden at [dseiden@medialaw.org](mailto:dseiden@medialaw.org).*

*TELEPHONE: 212-337-0200 FAX: 212-337-9893 [WWW.MEDIALAW.ORG](http://WWW.MEDIALAW.ORG)*



*From the Executive Director's Desk*

## **Preparing for a Busy November**

*Annual Dinner, Forum, and Planning Meetings;  
Plus: the Dinner Panelists Who Got Away*

Our wonderful London Conference already feels like the distant past as we prepare for our busiest week of the year, our mid-November series of meetings surrounding the MLRC's Annual Dinner. The MLRC staff is humming as we prepare for the open MLRC Board meeting at 2:30 on November 11, the [Forum](#) which immediately follows, and then the [cocktail reception and Dinner](#), all at the Grand Hyatt. On Thursday, we are preparing for a [Defense Counsel Section lunch](#) (at Proskauer) which all outside counsel and members of our 15 committees may attend, and then at 5:30 our Virginia Conference '16 planning meeting at Davis Wright Tremaine's sparkling new offices which also is open to all.

Five meetings over two days entail a fair amount of work: speakers have to be chosen and prepared, food and drink are painstakingly chosen and even tasted, A/V (which in the past has been problematic in the vast ballroom) must be perfected, registration processes have to be fine-tuned, agendas must be drafted, materials prepared, and so on. Btw, the food and wine tasting is not the bacchanal it might seem; substantive questions are seriously debated: will the appetizers we choose still be warm and fresh if they are put on the tables before the attendees walk in? Is the menu too heavy (not surprisingly, that tends to be my predilection)? Are there too many green vegetables or should we choose vegetables of differing colors to make a nicer presentation? Should we feature a plate with half meat and half fish or go with a full single course? Can we repeat last year's dessert (as if anyone remembers- do they?) or does that show a lack of imagination and willingness to embrace change? You get the picture.

But, of course, the key to the [Dinner](#) is the program, not the food, so the more important questions concerned the potential speakers and nature of the dinner program. For years I had chided Sandy Baron when, at the Annual Dinner's after-party, she already was worrying about the next year's Dinner. It turned out she was right, as I used last year's conclave in New York to poll numerous attendees (as well as my suburban neighbors) as to whom they would choose, among all possible people to talk about journalism, media and the law, to be our next dinner speaker. Fascinatingly, there was an almost unanimous consensus on three somewhat similar



**George Freeman**



(Continued from page 8)

persons. (To not give the answer away here, the three are named at the end of this column.) In any event, none of the three was available, so it was on to Plan B.

It was during a staff meeting when we were swapping ideas for the Dinner that we noticed that many of the suggestions dealt with recent movies and documentaries. That gave birth to “A Night at the Movies,” our theme for next week. We decided we could show excerpts of three or four recent films raising legal or ethical issues, and have one speaker from each movie on our panel. The question then became: which films? Through the ensuing months, many documentaries and movies were proposed, but almost as many were discarded: the legal issues weren’t important enough; there was pending litigation which deterred the creators – and their lawyers – from wanting to speak publicly; some potential speakers already had conflicts with our date.

In the end, we chose *The Jinx: The Life and deaths of Robert Durst* and *Thought Crimes: The Case of the Cannibal Cop*, both of which raise similar questions about the propriety of getting the cooperation of a subject who the filmmaker suspects will be negatively prejudiced by his/her documentary (The Jinx also raises intriguing questions of whether a filmmaker or journalist should volunteer crucial bits of evidence about heinous murders to the authorities, and when); and this year’s winner for the Oscar for best Documentary Feature, *CitizenFour*, the film portraying Edward Snowden as he releases voluminous classified and sensitive material about the NSA’s treasure trove of private information about Americans – with the obvious question: is Snowden a whistleblowing hero or a traitorous criminal?;



**Marty Baron, portrayed by Liev Schreiber (second from left) in the film *Spotlight*, will be among the panelists at the Annual Dinner.**

Finally, we will show clips of the movie I am very excited about, *Spotlight*, about the Boston Globe’s coverage of the Boston Catholic priests sex abuse scandal, which, based on screenings at the Toronto and Telluride film festivals, is an early frontrunner for next year’s Best Movie Oscar. Two asides: kudos to MLRC director Jonathan Anschell who put us on to *Spotlight* before anyone really heard of it; second, I (along with my former colleague Adam Liptak) vetted many of the Globe’s sex abuse scandal articles (since the Times Company then owned The Globe), but apparently neither of us made it off the cutting-room floor. Marty Baron, now editor of the Washington Post and former editor of the Globe, who is portrayed by Liev Schreiber in the movie, will be on our panel. It promises to be a fun and interesting evening.

(Continued on page 10)



(Continued from page 9)

Allow me to mention a somewhat more playful, recent decision. Since it is the 35<sup>th</sup> Anniversary of the MLRC, we decided that a tchotchke was appropriate. But what should such a gift to our attendees be? At the last few anniversary fetes, MLRC t-shirts were given out, so that idea was eliminated. Ultimately, we considered lighted luggage tags, flasks and the eventual winner – a First Amendment beer mug. So to all attendees: enjoy your brewski while pondering the text of the First Amendment.

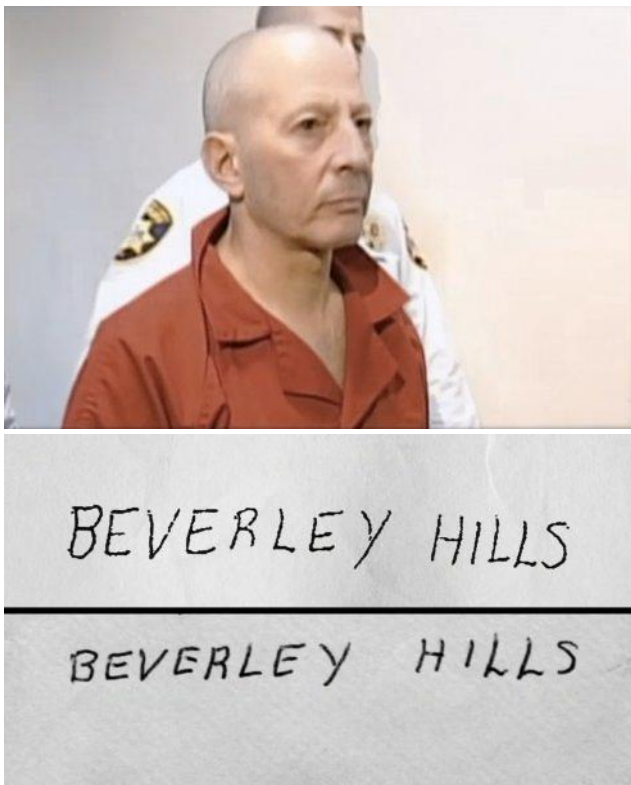
Planning for the Forum we hold each year before the reception and Dinner on a timely topic was also an interesting process. Our plan for the Forum, which we're calling [Hate Speech, Threats, & Terror: In the News and On Your Site](#), came together from a number of different ideas. As we were discussing a bunch of potential topics -- how the news media covered the *Charlie Hebdo* attacks, the U.S. Supreme Court's decisions in *Elonis* and *Walker*, the troubling ruling of the European Court of Human Rights in *Delfi AS v. Estonia*, the trend among news websites to shut down comments -- Jeff Hermes and I realized that there was a common theme across these issues. That is, they all touch on questions of how to handle offensive, hateful, or threatening speech. That led us to take a close look at the old adage that there's no exception for hate speech under the First Amendment, wonder if those concepts weren't nevertheless finding their way into other areas of the law, and decide it might be time to examine this issue and how it affects the media.

As it happens, Jeff led a session back in

September for in-house counsel in Silicon Valley on how hate speech and terror are affecting social media, and accepted my suggestion that he moderate the broader discussion at the Forum. I'm confident it will be thought-provoking.

And before the Forum, on 2:30 on Wednesday at the Hyatt, we run an open meeting of the MLRC's Board of Directors. Generally, the Board meets about nine times a year, but this is our one open session. So beyond taking care of normal Board business -- financial results, new members, coming conferences, and the like -- we introduce the fantastic MLRC staff to those in attendance, and ask them to talk a little about the work they do and their part in our upcoming

(Continued on page 11)



**Robert Durst, profiled in *The Jinx*, claims to have written one of the misspelled names above, but not the other. *Jinx* lawyer Victor Kovner will discuss the legal issues behind the movie at the Dinner.**



*(Continued from page 10)*

plans. Please come, as it's a great way for you to meet those who are so responsible for the MLRC's success and give your input on MLRC activities to the Board.

On Thursday at lunch, we hold a [meeting of the DCS membership](#), ie, all law firm members, but since the meeting is focused on reports from our substantive committees, members of those committees are welcome as well. Our committees do a lot of valuable legal work, not only holding frequent conference calls to bring members up to date on recent cases and issues, but writing guidebooks giving legal advice, reacting to legislation and policy initiatives, etc. This lunch is a good way of learning what this fulcrum of MLRC activities has done in the past year and is planning for the next 12 months.

Finally, Thursday at 5:30 we are holding an open planning meeting for our Virginia Conference next September ( 21-23, but who's counting). Our planning committee has already been at work coming up with ideas for plenary sessions, breakouts and boutiques, but this is an opportunity for the membership at large to make suggestions and help form the agenda. For example, the planning committee has proposed some 17-18 boutique sessions, but we only have slots for 14, so which topics get included and which get eliminated will be largely a matter of the response at this meeting.

In sum, it will be a busy week, but, at least from my point of view, all these activities are positive ones – exciting for me and the MLRC staff to put together, and, I am confident, interesting, engaging, educational and fun for all our members who attend. I hope to see you there.

(The three speakers whom a huge majority wanted to see on the Dinner program were not Bob Woodward, Dan Rather and Tom Brokaw, but Jon Stewart, Stephen Colbert and John Oliver.)

## **SCHEDULE OF EVENTS**

### **November 11, 2015**

2:30 - 3:30 p.m.: **MLRC Board Annual Meeting (open to all)**

3:45 - 5:45 p.m.: **MLRC Forum: Controversial, Offensive and Threatening Content: In the News and On Your Site**

6:00-7:00 p.m.: **Cocktail Reception (sponsored by AXIS PRO)**

7:30-10:00 p.m.: **Dinner: A Night at the Movies: Media Law & Ethical Issues in Recent Documentaries and Films**

*All meetings on November 11 are at the Grand Hyatt New York, 109 E. 42nd St.*

### **November 12, 2015**

12:00-2:00 p.m.: **DCS Annual Meeting and Lunch**

*Proskauer Rose, 11 Times Square (visitor entrance on NE corner of 41st St. and 8th Ave.)*

5:30-6:30 p.m.: **2016 Media Law Conference Planning Meeting (open to all)**

*Davis Wright Tremaine, 1251 Ave. of the Americas*



# Second Circuit Affirms Fair Use Win for Google Books

## *Judge Leval's Restatement of the Law of Fair Use*

By Jeff Hermes

On October 16, 2015, the U.S. Court of Appeals for the Second Circuit issued its long-awaited decision in [Authors Guild v. Google, Inc.](#), No. 13-4829 (“Google”). Affirming a ruling of the Southern District of New York, the Second Circuit held that Google’s digital copying of millions of texts as part of its Library Project and Google Books project, and its provision of a public search function for those texts, constituted fair use. The opinion, written Judge Pierre Leval, arguably does not break new ground in copyright law but does forcefully restate the nature of the fair use analysis and the role of transformative use in that doctrine.

### Background

Since 2004, Google's Library Project has scanned and indexed more than 20 million books, in conjunction with public and university libraries around the world that provided books for scanning. The scan extracts a machine-readable text which can be used for automated searching of the contents. Copies of the digital scans were also made available to the libraries that provided the original texts (but not to the other libraries in the project) for their own educational and research purposes, subject to these libraries' agreement to abide by copyright law.

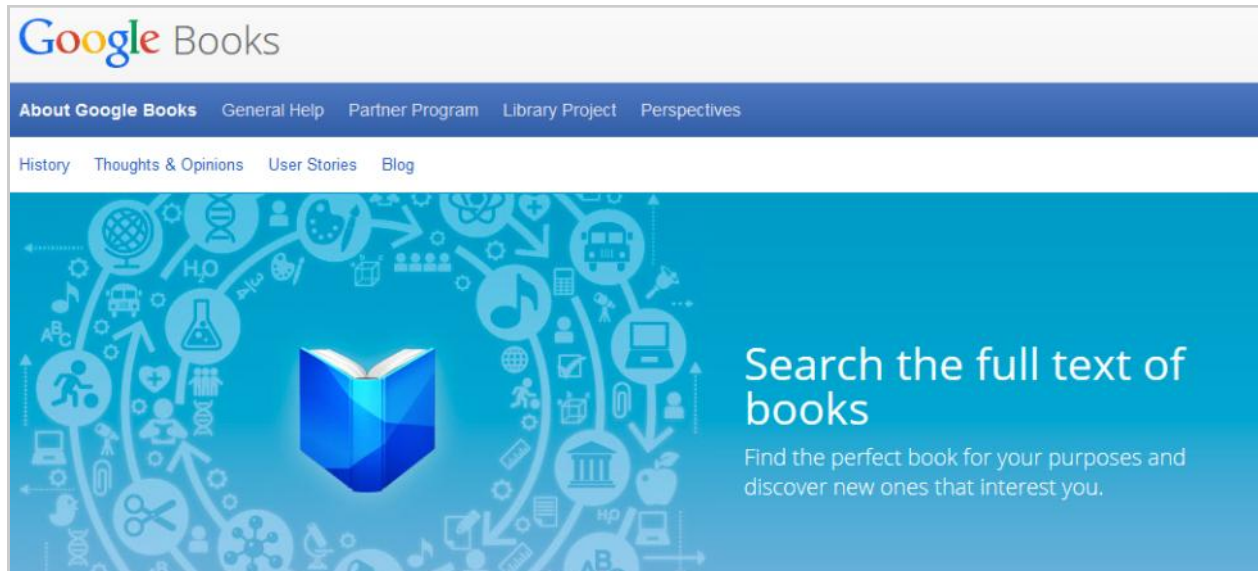
Google also offers research tools powered by this digital corpus. Google's "ngrams" feature provides statistical information about word and phrase usage over time. The Google Books search engine allows users to search for particular terms across the digital corpus. A search for a given term will result in a list of texts containing the term, the number of times the term appears in each text, and other information about the text.

Selecting one of these search results will return one-eighth-page-long "snippets" from the text containing the search term. No more than three snippets are displayed, and the same snippets will be displayed for a given search term regardless of the number of computers on which the search is conducted. Only the first appearance of the search term on a given page is provided, and subsequent searches for the same term will not reveal more of the text (although searches for other terms may do so). One portion from each page and one page out of every ten

**Since 2004, Google's Library Project has scanned and indexed more than 20 million books, in conjunction with public and university libraries around the world that provided books for scanning.**

(Continued on page 13)





(Continued from page 12)

in a given text are "blacklisted" by Google, meaning they are unavailable to be viewed in search results. Snippets are unavailable for works where a few lines are likely to satisfy a searcher's need for a text, such as dictionaries and cookbooks.

The Library Project and Google Books search engine were launched without the permission of the authors of the books. In September 2005, three authors of nonfiction works filed a putative class action against Google alleging that its activities in connection with these efforts violated their respective copyrights and those of authors similarly situated. The Authors Guild also appeared as a plaintiff, seeking declaratory and injunctive relief for its members, but was held not to have standing under the Copyright Act to assert such claims in the Second Circuit's earlier decision in *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 94 (2nd Cir. 2014). The court noted but did not revisit the issue of the Authors Guild's standing in this case, finding that the existence of standing on the part of the individual authors was sufficient for the court to address the merits of their claims. *Google*, slip op. at 5 n.1.

After extensive litigation, including a failed attempt at a class action settlement, the certification of a class in the district court, and the provisional vacatur of the class by the Second Circuit, the issue of whether Google's activities constituted a fair use came before the district court on Google's motion for summary judgment. The district court (Chin, J.) granted the motion, and this appeal followed.

### Foundation of the Fair Use Doctrine

Judge Leval, as might be expected of the author of the seminal article *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990), took the opportunity in the court's opinion to restate the rationale behind the fair use doctrine and its antecedents in the common law of copyright.

(Continued on page 14)



The opinion emphasizes that fair use is a necessary corrective lest the financial incentives granted by copyright law expand beyond their intended purpose:

The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption. ... Thus, while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship.

For nearly three hundred years, since shortly after the birth of copyright in England in 1710, courts have recognized that, in certain circumstances, giving authors absolute control over all copying from their works would tend in some circumstances to limit, rather than expand, public knowledge. ... Courts thus developed the doctrine, eventually named fair use, which permits unauthorized copying in some circumstances, so as to further copyright's very purpose.

*Google*, slip op. at 12-13. In that light, Judge Leval reviewed the history of § 107 of the Copyright Act and the four-factor test set forth therein. Noting that the Supreme Court had identified the first (“purpose and character of the secondary use”) and fourth (“effect of the use upon the potential market”) as more important than the others, he wrote that each factor nevertheless

stands as part of a multifaceted assessment of the crucial question: how to define the boundary limit of the original author's exclusive rights in order to best serve the overall objectives of the copyright law to expand public learning while protecting the incentives of authors to create for the public good.

*Id.* at 15-16.

**The opinion emphasizes that fair use is a necessary corrective lest the financial incentives granted by copyright law expand beyond their intended purpose.**

### **First Factor: Clarifying “Transformative Use”**

Although he did not directly mention *Toward a Fair Use Standard* anywhere in the court's opinion, when discussing the first fair use factor – the purpose and character of the secondary

(Continued on page 15)



(Continued from page 14)

use -- Judge Leval relied strongly on the concept of transformative use as set forth in his article and adopted by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The court's analysis began by stating that "transformative uses tend to favor a fair use finding because a transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright's overall objective of contributing to public knowledge." *Google*, slip op. at 17.

And, as with fair use as a whole, Judge Leval took the opportunity to clarify the doctrine. First, he distinguished transformative uses from mere textual alterations and the use of another's work to avoid the need for creative thought:

The word "transformative" cannot be taken too literally as a sufficient key to understanding the elements of fair use. It is rather a suggestive symbol for a complex thought, and does not mean that any and all changes made to an author's original text will necessarily support a finding of fair use. ... "If ... the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish)." [*Campbell*] at 580-81. In other words, the would-be fair user of another's work must have justification for the taking. A secondary author is not necessarily at liberty to make wholesale takings of the original author's expression merely because of how well the original author's expression would convey the secondary author's different message.

**Judge Leval relied strongly on the concept of transformative use as set forth in his article and adopted by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.***

*Id.* at 17-18. He further responded to the potential confusion between fair use for a transformative purpose and derivative works over which an original author maintains control, noting that they were analytically distinct questions: derivative works involve "transformations in the nature of *changes of form*," while "copying from an original for the purpose of criticism or commentary on the original or provision of information about it[] tends most clearly to satisfy *Campbell*'s notion of the 'transformative' purpose involved in the analysis of Factor One." *Id.* at 19 (emphasis in original).

Turning to Google's activities, the court had no difficulty in declaring that creating the digital corpus for the purpose of enabling the Google Books search engine and ngrams tool was a fair use of the original works. Noting that the court had considered a closely related use of

(Continued on page 16)



(Continued from page 15)

scanned texts in *HathiTrust*, it held that the same logic applied here. As in the earlier case, scanning and creating machine-readable texts was essential to allow the search and ngrams tools to operate. Moreover, the purpose of these tools was to make information available about the books themselves, not to communicate the authors' original message; thus, their purpose was transformative. *Id.* at 21-22.

The court also held that the presentation of snippets from the scanned texts was for a transformative purpose, namely, helping users of the Google Books search to determine whether a particular text was of interest. The court noted that the display of snippets provided an important additional layer of information about each text, giving the user not only the frequency of a term's use in a text but the context in which it was used. Foreshadowing its analysis of the third fair use factor, the court found that "Google's division of the page into tiny snippets is designed to show the searcher just enough context surrounding the searched term to help her evaluate whether the book falls within the scope of her interest (without revealing so much as to threaten the author's copyright interests)." *Id.* at 23.

Finally, the court rejected the argument that Google's profit motive should weigh against it in the analysis of the first factor. Acknowledging that the Supreme Court had suggested in *Sony Corp. of Am. v. Universal City Studios, Inc.*, that "every commercial use of copyrighted material is presumptively . . . unfair," 464 U.S. 417, 451 (1984), Judge Leval wrote:

[W]hile the commercial motivation of the secondary use can undoubtedly weigh against a finding of fair use in some circumstances, the Supreme Court, our court, and others have eventually recognized that the *Sony* dictum was enormously overstated. ... In explaining the first fair use factor, the [Supreme] Court clarified that "the more transformative the [secondary] work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." [*Campbell*] at 59.

*Google*, slip op. at 24-25. The Second Circuit found that "many of the most universally accepted forms of fair use, such as news reporting and commentary, quotation in historical or analytic books, reviews of books, and performances, as well as parody, are all normally done commercially for profit," *id.* at 26, while also commenting that "[j]ust as there is no reason for presuming that a commercial use is not a fair use ... , there is likewise no reason to presume categorically that a nonprofit educational purpose should qualify as a fair use," *id.* at 26 n.20.

**The court had no difficulty in declaring that creating the digital corpus for the purpose of enabling the Google Books search engine and ngrams tool was a fair use of the original works.**

(Continued on page 17)



(Continued from page 16)

### **An Aside: Sparring with Judge Easterbrook**

In a lengthy footnote, Judge Leval also criticized the Seventh Circuit's rejection of the concept of transformative use in cases such as *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014) in favor of an inquiry into whether the respective uses were "complementary":

The Seventh Circuit takes the position that the kind of secondary use that favors satisfaction of the fair use test is better described as a "complementary" use, referring to how a hammer and nail complement one another in that together they achieve results that neither can accomplish on its own. ... We do not find the term "complementary" particularly helpful in explaining fair use. The term would encompass changes of form that are generally understood to produce derivative works, rather than fair uses, and, at the same time, would fail to encompass copying for purposes that are generally and properly viewed as creating fair uses. ... [W]hen a secondary work quotes an original for the purpose of parodying it, or discrediting it by exposing its inaccuracies, illogic, or dishonesty, such an undertaking is not within the exclusive prerogatives of the rights holder; it produces a fair use. Yet, when the purpose of the second is essentially to destroy the first, the two are not comfortably described as complementaries[.]

*Google* at 20 n.18.

### **Second Factor: Fact and Fiction**

The court treated the second factor, the nature of the copyrighted works, fairly briefly, stating that "[t]he second factor has rarely played a significant role in the determination of a fair use dispute." *Id.* at 27. Judge Leval rejected the idea that the second factor expressed a substantive preference for highly creative works, instead approaching it as an echo of the idea/expression dichotomy in the fair use context:

Courts have sometimes speculated that this might mean that a finding of fair use is more favored when the copying is of factual works than when copying is from works of fiction. However, while the copyright does not protect facts or ideas set forth in a work, it does protect that author's manner of expressing those facts and ideas. At least unless a persuasive fair use justification is involved, authors of factual works, like authors of fiction, should be entitled to copyright protection

(Continued on page 18)



(Continued from page 17)

of their protected expression. The mere fact that the original is a factual work therefore should not imply that others may freely copy it.

*Id.*

The court therefore rejected the argument that the second factor weighed in Google's favor merely because the plaintiff authors had all written works of fact rather than fiction. *Id.* at 28. However, it did note that the nature of the copyrighted work must be considered as part of the transformative use analysis as the baseline to which the defendant's use is compared; thus, to the extent the first and second factors are considered together in evaluating transformativeness, the second factor would weigh in Google's favor for the reasons discussed above. *Id.*

### **Third Factor: Beyond Raw Percentages**

The court's analysis suggested that the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, primarily serves as an indicator of problems when it comes to the fourth factor, the effect on the market for the original: "The larger the amount, or the more important the part, of the original that is copied, the greater the likelihood that the secondary work might serve as an effectively competing substitute for the original, and might therefore diminish the original rights holder's sales and profits." *Id.* at 29. However, the court also made clear that the raw percentage of the original copied might not be determinative on the third factor, depending on the nature of the defendant's use:

[C]ourts have rejected any categorical rule that a copying of the entirety cannot be a fair use. Complete unchanged copying has repeatedly been found justified as fair use when the copying was reasonably appropriate to achieve the copier's transformative purpose and was done in such a manner that it did not offer a competing substitute for the original.

*Id.* at 29-30.

Thus, the court held that Google's digitizing of the entirety of the texts in its corpus did not tilt the third factor in the plaintiffs' favor:

If Google copied less than the totality of the originals, its search function could not advise searchers reliably whether their searched term appears in a book (or

(Continued on page 19)



(Continued from page 18)

how many times). While Google makes an unauthorized digital copy of the entire book, it does not reveal that digital copy to the public.

*Id.* at 30. On the other hand, with respect to Google’s display of snippets, the court held that “what matters ... is not so much ‘the amount and substantiality of the portion used’ *in making a copy*, but rather the amount and substantiality of *what is thereby made accessible* to a public for which it may serve as a competing substitute.” *Id.* at 31 (emphasis in original).

In that regard, the court found determinative the steps that Google had taken to prevent users from assembling substantial portions of a given text using multiple searches. While noting that Google’s “blacklisting” of selected content nevertheless left approximately 78% of most books “*theoretically* available to a searcher,” it found that “it does not follow that any large part of that 78% is in fact accessible.” *Id.* at 32. It noted that the plaintiffs’ researchers, “over a period of weeks,” were able to access less than 16% of a particular text, and moreover held that the aggregate 16% revealed could not be considered “substantial” because the portions revealed were fragmentary and scattered: “At least as important as the percentage of words of a book that are revealed is the manner and order in which they are revealed.” *Id.* at 32-33.

#### **Fourth Factor: The Impact of a “Snippet”**

Turning to the impact on the potential market for, or value of, the original work, the court warned against allowing the transformative use analysis to trump the fourth factor: “Even if the purpose of the copying is for a valuably transformative purpose, such copying might nonetheless harm the value of the copyrighted original if done in a manner that results in widespread revelation of sufficiently significant portions of the original as to make available a significantly competing substitute.” *Id.* at 34.

Nevertheless, the court held that the snippet view function did not do so. “Snippet view, at best and after a large commitment of manpower, produces discontinuous, tiny fragments, amounting in the aggregate to no more than 16% of a book. This does not threaten the rights holders with any significant harm to the value of their copyrights or diminish their harvest of copyright revenue.” *Id.* at 35.

The court acknowledged that snippets might in some cases satisfy a researcher’s need for the original text, but held that “the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute.” *Id.* Moreover, the court noted the importance of the idea/expression dichotomy in considering the impact of the display of snippets:

(Continued on page 20)



(Continued from page 19)

A snippet's capacity to satisfy a searcher's need for access to a copyrighted book will at times be because the snippet conveys a historical fact that the searcher needs to ascertain. ... [C]opyright does not extend to the facts communicated by [a] book. It protects only the author's manner of expression. ... [W]e think it would be a rare case in which the searcher's interest *in the protected aspect* of the author's work would be satisfied by what is available from snippet view, and rarer still—because of the cumbersome, disjointed, and incomplete nature of the aggregation of snippets made available through snippet view—that snippet view could provide a significant substitute for the purchase of the author's book.

*Id.* at 35-36 (emphasis in original).

As a result, the court held that Google's full-text scans and its provision of the Google Books search engine with snippet view were protected as a fair use, and did not infringe the plaintiffs' copyrights.

### Other Issues

*Derivative Works.* As an alternative theory, the plaintiffs asserted that the application of search and snippet view functions to their works created a derivative use in which they had exclusive rights. The court rejected that argument, echoing the distinction that Judge Leval had drawn earlier in the opinion between transformative use and derivative works:

[D]erivative works over which the author of the original enjoys exclusive rights ordinarily are those that re-present the protected aspects of the original work, i.e., its expressive content, converted into an altered form[.] ... If Plaintiffs' claim were based on Google's converting their books into a digitized form and making that digitized version accessible to the public, their claim would be strong. ... Nothing in the statutory definition of a derivative work, or of the logic that underlies it, suggests that the author of an original work enjoys an exclusive derivative right to supply information about that work of the sort communicated by Google's search functions.

*Id.* at 38-39.

**The opinion is notable for Judge Leval's efforts not only to apply the four-factor fair use test but to restate the reasoning behind each factor, address confusion regarding their application and their interaction with other copyright doctrines, and provide a foundation for his view of fair use as a whole.**

(Continued on page 21)



(Continued from page 20)

*Risk of Hacking.* The court was more sympathetic toward the plaintiffs' concern that, by creating digital copies of their works and storing those copies on networked servers, Google increased the risk of those copies being accessed without authorization and distributed. But while the court acknowledged this concern in the abstract, it found little evidence that such hacking was likely in light of the exceptionally strong security measures taken by Google to protect those copies against public access. *Id.* at 41-43.

*Risk of Infringement by Library Partners.* The plaintiffs also raised similar concerns about Google's sharing of digital copies of texts with the libraries that provided the original texts for scanning. The court found these arguments unavailing, noting that (1) Google's contract with the libraries required them to use the digital copies only in a non-infringing fair use manner and protect against hacking; (2) the creation of digital copies for fair use purposes would not have been infringing had the libraries made the copies themselves; and (3) any concern that the libraries would not adequately protect the digital copies against unauthorized access was speculative on the record before the court. *Id.* at 44-45. The court acknowledged that Google might be liable as a contributory infringer if it were aware that the libraries, despite their contractual commitments, were using the digital texts in an infringing manner, but found that there was no basis in the record to find that this was occurring. *Id.* at 45.

### Conclusion

While this case was obviously an important win for Google, as far as the legal analysis is concerned it was a fairly straightforward application of the fair use and transformative use doctrines as they have evolved to date. Nevertheless, the opinion is notable for Judge Leval's efforts not only to apply the four-factor fair use test but to restate the reasoning behind each factor, address confusion regarding their application and their interaction with other copyright doctrines, and provide a foundation for his view of fair use as a whole.

*Jeff Hermes is a Deputy Director at MLRC. The Authors Guild was represented by Paul Smith, Jenner & Block, Washington, D.C.; and Edward H. Rosenthal, Jeremy S. Goldman, Anna Kadyshevich, Andrew D. Jacobs, Frankfurt Kurnit Klein & Selz PC, New York. Google was represented by Seth Waxman, Wilmer Hale, Washington, D.C.; and Daralyn J. Durie and Joseph C. Gratz, Durie Tangri LLP, San Francisco, CA.*



# *The Train Rolls On*

## **First Circuit Allows Defamation Action by Railway Against Rail Industry Trade Publication to Continue**

**By Sigmund D. Schutz and Benjamin S. Piper**

The First Circuit Court of Appeals gave new life to a four-year-old defamation action brought by a railway against a rail industry trade publication. [\*Pan Am Systems, Inc. et al. v. Hardenbergh\*](#). On October 9, the First Circuit affirmed in part and reversed in part an order granting summary judgment in favor of Atlantic Northeast Rails & Ports and its editor and writer Chalmers Hardenbergh on claims arising from four articles published between December 2009 and March 2011.

The First Circuit affirmed the district court's order with respect to three of the four articles, but found that the plaintiffs had presented sufficient evidence of a false and defamatory statement in the fourth article to survive summary judgment. Because the parties have yet to conduct discovery on the fault element of defamation, the First Circuit's ruling does not send the case to trial, but it allows the case to proceed in federal district court in Maine.

### **Background**

The case has a lengthy procedural history. In September 2011, Pan Am Systems, Inc., its subsidiary Springfield Terminal Railway Company, and former Pan Am president and CEO David Fink, filed a complaint alleging that the four articles, discussing the railway's service, safety, and leadership, were defamatory. Although the defendants successfully moved to dismiss the complaint for failure to state a claim, the court granted the plaintiffs leave to replead. After the plaintiffs filed an amended complaint, the defendants requested a bifurcated discovery period in light of their concern that discovery related to the fault element of defamation might require them to divulge confidential sources. The court agreed that whether the allegedly defamatory statements were false and defamatory could be dispositive of the claims and could be resolved without inquiry into confidential sources, and, therefore, granted the request citing. Following the First Circuit's guidance in *Bruno v. Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 598 (1st Cir. 1980).

**The First Circuit held that accusations that a railway loses track of cars containing hazardous materials is both “a readily verifiable charge” and “certainly lowers plaintiffs’ standing in the community.”**

(Continued on page 23)



*(Continued from page 22)*

Following the initial phase of discovery, the defendants moved for summary judgment, arguing that they had published nothing defamatory or false. The district court granted the motion, concluding that none of the statements were actionable in defamation.

### First Circuit Decision

On October 9, Judge O. Rogerie Thompson delivered the First Circuit's 33-page decision, affirming the district court's order with respect to three of the four allegedly defamatory articles and reversing with respect to the fourth. The portion of the decision affirming the district court hinged on the First Circuit's holding that the statements at issue pertained to matters of public concern, putting the burden on plaintiffs to prove that the statements are materially false. The First Circuit held that matters of public concern included the defendants' statements related to the safety, efficiency, and viability of the plaintiffs' railway system; the adequacy of its service; and leadership changes tied to railroad improvements.

The court then held that plaintiffs failed to show that three of the articles were materially false.

The fourth article contained statements regarding the plaintiffs' delivery of railcars containing toxic inhalation hazards ("TIH"). It stated, in relevant part—with the ellipses and brackets in the original publication: "The railroad 'loses' cars on a consistent ongoing basis, including one car 'lost' for over 60 days . . . even though certain DHS and DOT statutes require carriers to release [TIH] cars within 48 hours." The district court had found that the statement at issue was too vague to convey any defamatory meaning. The First Circuit disagreed, reasoning that, whatever the specific meaning of "lost" in this context, the defendants conceded that the statement conveyed that plaintiffs had difficulty tracking where certain cars may be at any given time on the system. The First Circuit held that accusations that a railway loses track of cars containing hazardous materials is both "a readily verifiable charge" and "certainly lowers plaintiffs' standing in the community."

Having concluded that the statements could convey defamatory meaning, the First Circuit then considered whether the plaintiffs had presented sufficient evidence that the statements were materially false. The court considered an affidavit by Springfield's superintendent for transportations stating that the railway uses a computerized monitoring program to track all TIH carrying cars, never loses TIH or other railcars on a consistent basis, and has never been accused by any federal agency of losing railcars despite routine audits.

**This case highlights the potential for subjectivity in evaluating the meaning that words convey. While one judge found a statement too vague to convey a defamatory meaning, another found that the statement "certainly lowers plaintiffs' standing in the community."**

*(Continued on page 24)*



(Continued from page 23)

Viewing the evidence in the light most favorable to the plaintiffs, the First Circuit held that plaintiffs had presented sufficient evidence that it never lost railcars carrying hazardous materials. Accordingly, “a sensible juror could find that a more precise explication of the TIH issue would have improved plaintiffs’ public reputation,” meaning the First Circuit was compelled to vacate the grant of summary judgment on that article.

This case highlights the potential for subjectivity in evaluating the meaning that words convey. While one judge found a statement too vague to convey a defamatory meaning, another found that the statement “certainly lowers plaintiffs’ standing in the community.”

The First Circuit’s decision also raises the question of how to handle discovery of the defendants’ confidential sources going forward. As a result of the district court’s bifurcated discovery schedule, discovery as to the defendants’ fault has been delayed. With claims concerning one article surviving summary judgment, the plaintiffs will presumably launch discovery aimed at disclosing defendants’ confidential sources. The commencement of a second phase of discovery should not vitiate *Bruno v. Stillman*’s command for a “sensitive balancing” of the plaintiffs’ need to know with the defendants’ need to preserve confidentiality. But what, if anything, the court does to strike this balance in the second phase of discovery remains to be seen. Regardless of what happens going forward, the bifurcated discovery appears to have accomplished its intended purpose to this point by barring discovery on the sources of articles that were adjudicated as non-defamatory.

*Sigmund D. Schutz and Benjamin S. Piper of Preti Flaherty LLP in Portland, ME; and Russell B. Pierce, Norman Hanson & DeTroy in Portland, ME, represent defendants Chalmers Hardenbergh and Atlantic Northeast Rails and Ports. Plaintiffs Pan Am Systems, Inc., Springfield Terminal Railway Co. and David Andrew Fink are represented by Thad B. Zmistowski of Eaton Peabody in Bangor, ME.*

## MLRC 2015 Forum

### Hate Speech, Threats, and Terror: In the News and On Your Site

Join your fellow MLRC members for an in-depth discussion of evolving attitudes toward hate speech, threats, and terrorism-related content in the United States and Europe. We will consider whether those changes will affect -- or have already affected -- traditional legal protections for freedom of expression, and further explore the implications of these shifts for media outlets.

**[Click for more information and to reserve your seat.](#)**



# Del. Court Holds That Hyperlink Can Restart Statute of Limitations for Libel

## *Getting Hyper Over the Single Publication Rule*

By Jack Greiner & Darren W. Ford

Is creating a hyperlink[1] to defamatory statements a republication under defamation law, and therefore not subject to the single publication defense? Until recently, courts answered this question in the negative.[2] But a recent Delaware Chancery Court decision broke ranks with these decisions, and held a hyperlink could conceivably meet the requirements for republication under California law. The decision raises new concerns about the potential risks to Web content providers when they create hyperlinks to old material.

The decision, rendered in [\*Perlman, et al. v. Vox Media, Inc.\*](#) (“Perlman”), disposed of a motion to dismiss defamation claims against Vox Media, Inc. (“Vox”), a digital media company.[3] The plaintiffs alleged, among other things, that a hyperlink in a 2014 article (“2014 Article”) about plaintiff Stephen Perlman and his wireless technology company, Artemis Networks, LLC, republished two defamatory Vox articles published in 2012 (“2012 Articles”). The plaintiffs alleged that the 2012 Articles defamed Perlman and his online gaming company, OnLive LLC.[4]

Whether a publication constitutes republication of defamatory material can affect whether a libel claim is time-barred, among other issues. Republication is the exception to the single-publication rule,[5] which—under California law—provides that a person may not bring more than one cause of action for libel “founded upon any single publication . . .”[6] The single-publication rule came about with the advent of mass media, because the traditional republication rule would, in theory, allow millions of causes of action based on a single defamatory statement in a newspaper or magazine.[7]

California’s republication standard as applied to Web content provides that “a statement on a website is not republished unless the statement itself is substantively altered or added to, or the website is directed to a new audience.”[8] California’s standard is consistent with the practice in other states.[9]

Hyperlinks, of course, make it easier for internet users to locate Web content. Pre-Perlman courts have analogized the hyperlink to a reference,[10] which under the traditional republication rule is not a republication because a reference does not present the material in its

**The court held that plaintiffs might be able to demonstrate that the 2014 hyperlink enhanced or modified the 2012 statements because the 2014 and 2012 articles were on related subjects; or that Vox intended to communicate the 2012 statements to a new audience.**



(Continued from page 25)

entirety.[11] Courts have held that the fact that a hyperlink makes it easier to access the referenced material does not necessitate a different analysis.[12]

Courts have also expressed concern that accepting the hyperlink-as-republication argument could result in a constant retriggering of the statute of limitations because of the ubiquity of such links, thus giving perpetual life to otherwise stale claims.[13]

Although the *Perlman* court suggested that a hyperlink would not constitute republication in most situations, it nevertheless held that the plaintiffs could conceivably prove that the 2014 hyperlink republished the 2012 Articles.[14] The court held that plaintiffs might be able to demonstrate that the 2014 hyperlink enhanced or modified the 2012 statements because the 2014 and 2012 articles were on related subjects; or that Vox intended to communicate the 2012 statements to a new audience because OnLine and Artemis were in different lines of business. [15] The court did not, however, address the traditional republication rule requiring presentation of the material in its entirety, even though most of the allegedly defamatory 2012 statements did not actually appear in the 2014 Article.[16]

The Perlman court's holding is probably an anomaly. But if other courts find the fact-intensive analysis employed by the Perlman court persuasive, it could become easier for plaintiffs with stale claims to survive early-stage motion practice. If this happens, providers given the choice between helping their visitors find old content, and avoiding the possibility of raising dead libel claims from the grave, may simply choose the latter.

*Jack Greiner & Darren W. Ford are lawyers with Graydon Head in Cincinnati, Ohio. Vox Media is represented by Peter L. Frattarelli, Archer & Greiner, P.C., Wilmington, DE. Plaintiffs are represented by Neville L. Johnson, Johnson & Johnson LLP, Beverly Hills, CA; and Matthew E. Fischer, Jacob R. Kirkham, Jacqueline A. Rogers, Potter, Anderson & Corroon LLP, Wilmington, DE.*

### Notes

[1] “[A]n electronic link providing direct access from one distinctively marked place in a hypertext or hypermedia document to another in the same or a different document[.]” Merriam-Webster, <http://www.merriam-webster.com/dictionary/hyperlink> (last visited Oct. 19, 2015).

[2] See, e.g., *In re Phil. Newspapers, LLC*, 690 F.3d 161 (3d Cir. 2012); *Klayman v. City Pages*, 2015 U.S. Dist. LEXIS 49134 (M.D. Fla. Apr. 3, 2015); *United States ex rel. Klein v. Omeros* (“Klein”), 897 F. Supp. 2d 1058 (W.D. Wash 2012); *Salzer v. Southern Poverty Law Ctr., Inc.*, 701 F. Supp.2d 912 (W.D. Ky. 2009); *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, 2007 U.S. Dist. LEXIS 16356 (S.D. Cal. March 7, 2007).

(Continued on page 27)



*(Continued from page 26)*

[3] No. 10046-VCP, 2015 Del. Ch. LEXIS 248 (Sept. 30, 2015).

[4] Id. at \*\*5-20.

[5] See, e.g., Clark v. E! Entm't TV, LLC, 60 F. Supp. 3d 838, 844 (M.D. Tenn. 2014).

[6] Cal. Civ. Code § 3425.3.

[7] See Restatement (Second) of Torts § 577A, cmt. a (1977). See generally Bradford v. Am. Media Operations, 882 F. Supp. 1508, 1513 (E.D. Pa. 1995) (explaining the evolution of the single publication rule).

[8] Perlman, 2015 Del. Ch. LEXIS 248, at \*55 (quoting Yeager v. Bowlin, 693 F.3d 1076, 1082 (9th Cir. 2012)) (internal quotations omitted).

[9] Internet and Online Law § 2.03 (ALM Media Properties, LLC 2015) (noting courts “have uniformly applied the ‘single publication’ rule to publications on the internet”).

[10] See In re Phil. Newspapers, LLC, 690 F.3d at 175; Salyer, 701 F. Supp.2d at 917. See also Adelson v. Harris, 973 F. Supp. 2d 467, 482-86 (S.D.N.Y. 2013) (describing hyperlink as modern-day footnote).

[11] See Klein, 897 F. Supp. 2d at 1073-74; Salyer, 701 F. Supp. 2d at 916.

[12] See, e.g., Salyer, 701 F. Supp. 2d at 916.

[13] In re Phila. Newspapers, LLC, 690 F.3d at 175.

[14] Perlman, 2015 Del. Ch. LEXIS 248, at \*\*63-64.

[15] Id.

[16] Id. at \*25.



# In Wolf of Wall Street Claim, EDNY Dismisses Statutory Privacy, Common Law Privacy, and Private Figure Defamation

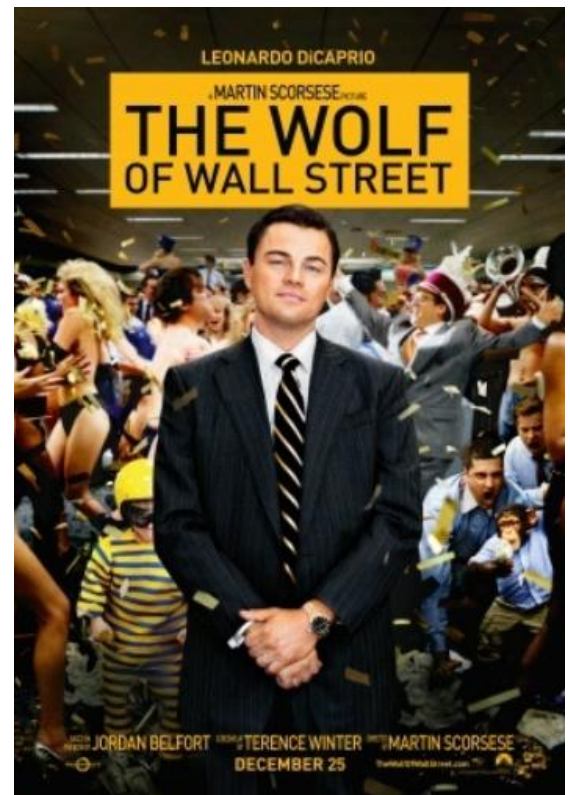
By Vincent Cox

The 2013 film *Wolf of Wall Street*, directed by Martin Scorsese and starring Leonardo DiCaprio, was a black comedy that depicted a multitude of misdeeds attributable to the eponymous Wolf of Wall Street, Jordan Belfort, as well as Stratton Oakmont, the notorious “boiler room” he helped to found. The film is “based on actual events,” and the closing credits also indicate that some of the events depicted are fictional and some of the characters have fictional names or are composites of real-life individuals depicted in the memoir.

The closing credits include the disclaimer that “[w]ith respect to such fictionalization or invention, any similarity to the name or to the actual character or history of any person ... or any product or entity or actual incident, is entirely for dramatic purposes and not intended to reflect on an actual character, history, product or entity.”

The film includes a character named Nicky ‘Rugrat’ Koskoff. In the movie, Belfort hires Koskoff as a broker when Stratton Oakmont opens in the late 1980s. Koskoff later moves into a significant leadership position at Stratton Oakmont upon Jordan Belfort’s resignation from Stratton Oakmont, and is instrumental in arranging a meeting between Belfort and a Swiss banker who launders money for Belfort. In the movie, the Koskoff character is later arrested, along with the Swiss banker, in Miami. In the film, the character Nicky Koskoff has the nickname “Rugrat,” based upon his horrible toupee.

In reality, Andrew Greene did not join Stratton Oakmont until he was three years out of law school, in 1993. He became a director of the company and head of its Corporate Finance Department. Because Greene wore a toupee that some of his colleagues found ridiculous, he was known by the nickname “Wigwam.” Greene did not arrange the meeting between Belfort and the money-laundering Swiss banker. That meeting was arranged by Gary Kaminski, who is described in the underlying Belfort memoir as an individual who also wore a regrettable hairpiece.



(Continued on page 29)





**Plaintiff brought suit in the Eastern District of New York in February 2014, alleging that the Nicky Koskoff character was a depiction of him, and that the production, marketing and distribution of the film invaded his statutory right of publicity under New York law.**

*(Continued from page 28)*

Plaintiff brought suit in the Eastern District of New York in February 2014, alleging that the Nicky Koskoff character was a depiction of him, and that the production, marketing and distribution of the film invaded his statutory right of publicity under New York law, Civil Rights Law §51, as well as his common-law privacy rights, and defamed him by portraying him as “a criminal, drug user, degenerate, depraved, and/or devoid of any morality or ethics.”

The defendants in the action, Paramount Pictures Corporation and the production companies associated with the film, moved to dismiss pursuant to Rule 12(b)(6), arguing that the statutory right of publicity claim is barred because the New York Civil Rights Law prohibits only non-consensual commercial appropriation of the name, portrait or picture of a living person, and defendants cannot be liable, both because they did not use plaintiff’s real name or actual image, and because the use of the Koskoff character was not for advertising purposes or for the purposes of trade. Defendants further argued that the common-law right of publicity claim must be dismissed because plaintiff, as a New York resident, was bound by New York’s common law, which does not recognize a common-law privacy right.

With respect to the defamation claims, defendants were faced with both a claim for public figure defamation, as well as a private figure claim, asserting liability based on negligence.

On the public figure defamation claim, defendants asserted that the allegation that the Koskoff character was “of and concerning” plaintiff was implausible because the Koskoff character was explicitly presented as a fictional composite of various characters from the memoir. As to the private figure claim, defendants moved to dismiss for the additional reason

*(Continued on page 30)*



(Continued from page 29)

that under New York defamation law, speech concerning legitimate matter of public concern cannot give rise to defamation liability unless the defamatory statement is published in “a grossly irresponsible manner.” *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975).

### **District Court Decision**

Judge Seybert granted defendants’ motion to dismiss the statutory right of publicity claims, finding them barred by the defendants’ failure to use plaintiff’s name or likeness, and the absence of any plausibly alleged claim that there had been any use of even the fictional character’s name or likeness for commercial purposes. Similarly, plaintiff’s common-law right of privacy claim was foreclosed by New York’s common law, which has expressly refused to adopt a right of privacy. [\*Greene v. Paramount Pictures Corp. et al.\*](#), No. 14-cv-1044, 2015 WL 5794313 (E.D.N.Y. Sept. 30, 2015).

With respect to the claim for public figure defamation, the court concluded that, at this stage of the litigation, it could not make the determination that the Nicky Koskoff character was not “of and concerning” the plaintiff. It found that, because the film was not a purely fictional work, and was based on a true story, someone who was aware of Stratton Oakmont’s fraud and plaintiff’s role with the company could reasonably associate the Koskoff character with plaintiff.

Despite a finding that the public figure defamation claim could go forward, the court nevertheless determined that the private figure defamation claim must be dismissed because plaintiff had failed to allege that the defendant “acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.” On the private figure defamation count, the court granted leave to amend. Since entry of the dismissal on September 30, 2015, plaintiff has elected not to amend the private figure defamation count, and that claim has now been dismissed with prejudice.

The case will now proceed to discovery and motion practice that will focus upon the “of and concerning” element, substantial truth, incremental harm, and evidence pertaining to the issue of actual malice in the constitutional sense, i.e., reckless disregard for whether or not statements made of and concerning the plaintiff were true.

*Paramount Pictures Corporation and the production company defendants are represented by Louis P. Petrich and Vincent Cox of Leopold, Petrich & Smith, P.C., and by Katherine Bolger and Rachel Strom of Levine Sullivan Koch and Schulz, LLP. Plaintiff is represented by Aaron Goldsmith.*



# The EU-US “Safe Harbor” for Personal Data: No Longer Safe

By Kurt Wimmer

Under European data protection law, the personal data of European nationals can only be transferred outside of the European Union to countries with “adequate protections” for personal data. The list of countries the EU has found to be “adequate” is quite short, and, notably, does not include the United States.

To permit U.S. companies to do business in Europe, the European Commission and the U.S. Department of Commerce negotiated the EU-U.S. Safe Harbor arrangement some 15 years ago (Commission Decision 2000/520, available [here](#)). Under the Safe Harbor, U.S. companies that certify to a set of requirements can transfer data on EU nationals from Europe to the United States freely. About 4,000 companies, including technology giants such as Facebook and Microsoft, have certified to the safe harbor.

## Schrems Decision

In a bombshell decision on October 6, 2015, the Court of Justice of the European Union (the “CJEU”) held that the Safe Harbor agreement is invalid, with immediate effect. [Schrems v. Data Protection Commissioner](#). The CJEU responded to questions referred to it by the [Irish High Court](#) in the *Schrems* case, in which an Austrian student, Max Schrems, had challenged Facebook’s transfer of his data from Ireland to the United States in light of the mass surveillance by the U.S. National Security Agency disclosed in the Snowden revelations.

The Irish High Court had inquired about the powers of European data protection authorities (“DPAs” - the privacy regulators operating in each of the 28 Member States of the European Union) to suspend transfers of personal data that take place under the existing Safe Harbor arrangement. The CJEU ruled both on the DPAs’ powers and the validity of the Safe Harbor, finding that national data protection authorities do have the power to investigate in these circumstances, and that the Commission decision finding Safe Harbor adequate is invalid.

The CJEU [judgment](#) affects all companies that rely on Safe Harbor, which is one of four mechanisms for the transfer of personal data out of Europe.

## The Powers of the DPAs

First, the CJEU empowered the European DPAs, continuing the trend it had begun in the Google Spain decision. It emphasized that the DPAs cannot invalidate a Commission adequacy decision themselves; only the CJEU has this power. However, the DPAs have the power to

(Continued on page 32)



*(Continued from page 31)*

examine complaints brought by data subjects against transfers on the basis of Safe Harbor or other adequacy decisions of the European Commission based on Article 25 (6) of the [EU Data Protection Directive](#).

In addition, the CJEU held that the DPAs have the power to suspend data flows from their countries to the United States of the Directive. This aspect of the decision could badly fracture any multinational's efforts to have a single regulator in charge of its data flows, and raises the specter of individual countries suspending U.S. companies from transferring their citizens' data to the U.S.

### Safe Harbor

Second, the CJEU declared the Safe Harbor decision invalid, without providing for a transitional period. The CJEU held that the European Commission must check periodically to ensure that any finding of "adequacy" is factually and legally justified, especially when evidence gives rise to doubt. The CJEU further held that a country's privacy laws must be "essentially equivalent," by reason of the third country's domestic laws or its international commitments. In other words, the legal order of the third country must prove to be effective, in practice, to meet a level of protection that is virtually identical to Europe's legal protections for personal data.

The CJEU decided that the standard of "essentially equivalent" is not met by the United States. The Safe Harbor contains a broad "national security, public interest or law enforcement requirements" exemption, which the CJEU found interferes with the fundamental rights of European nationals whose data is transferred to the United States. The Commission itself had found that the NSA and other U.S. authorities were able to access and use transferred personal data for purposes that go beyond what is strictly necessary and proportionate to the protection of national security. Because the NSA's program of mass surveillance could gather the personal data of Europeans that U.S. companies had transferred to the United States without any limitations prescribed by law, the Safe Harbor failed to adequately protect the personal information of EU nationals.

The CJEU further found that the Safe Harbor decision also fails because European data subjects have no right to challenge the U.S. government's surveillance in court -- the U.S. Privacy Act of 1974 applies solely to American residents. (The House of Representatives



*(Continued on page 33)*



*(Continued from page 32)*

passed a bill to extend the Privacy Act to EU nationals on October 20, 2015, but a Senate companion bill has not been introduced as of this writing.)

The CJEU now has referred the case back to the Irish High Court, which is expected to issue a decision in November.

### **What Does It Mean in Practice?**

Under European law, the CJEU judgment applies to everyone, not only to the parties in the case. It is definitive without the possibility of appeal and has immediate effect.

The judgment will have an important impact on organizations and the broader political discussions regarding EU-U.S. data flows.

- Organizations relying on Safe Harbor to transfer personal data to the U.S. will have to consider alternative transfer mechanisms in order to transfer personal data lawfully to the U.S. Immediate short-term alternatives are likely to include standard contractual clauses and, in more limited instances, consent and possibly other statutory derogations (Article 26 (1) of the EU Data Protection Directive). Binding Corporate Rules are another alternative, but would require more time to put in place.
- Negotiations on the revised EU-U.S. Safe Harbor framework are still under way (that progress is described [here](#) and [here](#)). The leverage of the U.S. Government in these negotiations, of course, has been severely limited by the CJEU's decision. That said, the European Commission is determined to continue these negotiations, as Commissioner for Justice, Consumers and Gender Equality Věra Jourová confirmed in a press conference the day of the decision (available [here](#)).

### **Recent Developments**

***The Article 29 Working Party.*** The [Article 29 Data Protection Working Party](#), an EU advisory body on data protection composed of representatives of each country's DPA, the European Data Protection Supervisor and the European Commission, met on October 15 to discuss the consequences of the judgment of the CJEU. In a press release (available [here](#)) on October 16, the Working Party emphasizes that "it is absolutely essential to have a robust, collective and common position on the implementation of the judgment." They will closely observe the pending procedures before the Irish High Court.

The key take-aways from the Working Party's press release are that:

*(Continued on page 34)*



(Continued from page 33)

- data transfers under the Safe Harbor after the CJEU judgment are unlawful;
- the Working Party will analyze the impact of the CJEU judgment on other transfer tools, but during this period standard contractual clauses and Binding Corporate Rules can still be used;
- There is no formal “grace period,” but the DPAs will take action, including coordinated enforcement action, if no appropriate solution with the U.S. authorities is found by the end of January 2016 (depending on the assessment of the other transfer tools); and
- in the meantime, individual DPAs can investigate in particular cases and exercise their powers to protect individuals, for instance, in case of a complaint.

The EU DPAs will start information campaigns at the national level to inform all stakeholders. The Article 29 WP calls upon businesses to reflect on the risks related to data transfers and to consider putting in place legal and technical solutions in a timely manner to mitigate those risks and to respect the EU data protection *acquis*.

**The European Parliament.** On October 12, the European Parliament’s LIBE Committee held a debate to discuss the aftermath of the *Schrems* ruling. On the same day, the European Commission consulted with key business stakeholders, and a follow-up meeting is expected.

**Negotiations for Safe Harbor 2.0.** The negotiations on the revised Safe Harbor are accelerating. The Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, will be travelling to the United States in November to meet and discuss with her U.S. counterparts at the Department of Commerce.

*Kurt Wimmer is a partner with Covington & Burling in Washington, D.C.*

## Defense Counsel Section Lunch & Annual Meeting

Thursday, November 12, Noon - 2 p.m.  
Proskauer Rose, New York City

Join colleagues for a discussion of the year's  
accomplishments and upcoming projects.

**RSVP Today**



# ECHR: Criminal Conviction for Denying The Armenian Genocide in Breach with Freedom of Expression

By Dirk Voorhoof

On [17 December 2013 the European Court of Human Rights](#) had ruled by five votes to two that Switzerland had violated the right to freedom of expression by convicting Doğu Perinçek, chairman of the Turkish Workers' Party, for publicly denying the existence of the genocide against the Armenian people (see our blogs on [Strasbourg Observers](#) and [ECHR-Blog](#), 7 and 8 January 2014). The Grand Chamber has now, on 15 October 2015, in a 128 page [judgment](#), confirmed, by ten votes to seven, the finding of a violation of Article 10 ECHR.

## Facts

At several occasions in public speeches, Perinçek had described the Armenian genocide as “an international lie”. The Swiss courts found that Perinçek’s denial that the Ottoman Empire had perpetrated the crime of genocide against the Armenian people in 1915 and the following years, was in breach with Article 261*bis* § 4 of the Swiss Criminal Code. This article punishes *inter alia* the denial, gross minimisation or attempt of justification of a genocide or crimes against humanity. According to the Swiss courts, the Armenian genocide, like the Jewish genocide, was a proven historical fact. Relying on Article 10 of the European Convention, Perinçek complained before the Strasbourg Court that his criminal conviction and punishment for having publicly stated that there had not been an Armenian genocide had breached his right to freedom of expression.

**The Swiss courts found that Perinçek’s denial that the Ottoman Empire had perpetrated the crime of genocide against the Armenian people in 1915 and the following years, was in breach of the Swiss Criminal Code.**

## The Chamber judgment of 17 December 2013

In its Chamber judgment, the Court’s second section reiterated that the free exercise of the right to openly discuss questions of a sensitive and controversial nature was one of the fundamental aspects of freedom of expression and distinguished a tolerant and pluralistic democratic society from a totalitarian or dictatorial regime. According to the Chamber, the rejection of the legal characterisation as “genocide” of the 1915 events was not such as to incite hatred or violence against the Armenian people. It found that Perinçek had engaged in speech of

(Continued on page 36)



*(Continued from page 35)*

a historical, legal and political nature which was part of a heated debate, and that historical research is by definition open to discussion and a matter of debate, without necessarily giving rise to final conclusions or to the assertion of objective and absolute truths.

The Chamber took the view that the Swiss authorities had failed to show how there was a social need in Switzerland to punish an individual on the basis of declarations challenging the legal characterisation as “genocide” of acts perpetrated on the territory of the former Ottoman Empire in 1915 and the following years. In conclusion, the Chamber pointed out that it had to ensure that the sanction did not constitute a kind of censorship which would lead people to refrain from expressing criticism as part of a debate of general interest, because such a sanction might dissuade contributions to the public discussion of questions which were of interest for the life of the community. It found that the grounds given by the national authorities in order to justify Perinçek’s conviction were insufficient and that the domestic authorities had overstepped their narrow margin of appreciation in this case in respect of a matter of debate of undeniable public interest. Accordingly there had been a violation of Article 10.



**European Court of Human Rights**

### **The Referral to the Grand Chamber and Third-Party Comments**

The [Chamber judgment](#) was, as expected, highly controversial and the Swiss Government requested that the case be referred to the Grand Chamber. On 2 June 2014 the panel of the Grand Chamber accepted that request. In the Grand Chamber proceedings, third-party comments were received from the Turkish Government, who had exercised its right to intervene in the case (Article 36 § 1 of the Convention). Third-party comments were also received from the Armenian and French Governments (Article 36 § 2). Furthermore, third-party comments were received from the Switzerland-Armenia Association; the Federation of the Turkish Associations of French-speaking Switzerland; the Coordinating Council of the Armenian Organisations in France (“CCAF”); the Turkish Human Rights Association, the Truth Justice Memory Centre and the International Institute for Genocide and Human Rights Studies; the International Federation for Human Rights (“FIDH”); the International League against Racism and Anti-Semitism (“LICRA”); the Centre for International Protection and a group of French

*(Continued on page 37)*



(Continued from page 36)

and Belgian academics. It was at least a peculiar event to see the Turkish Government vehemently arguing in favor of a strong protection of freedom of expression and insisting that the European Court of Human Rights should fulfill its supervisory role in strictly scrutinizing and assessing the “pressing social need” of the interference by the Swiss authorities in this matter.

With some recent judgments in mind in which the ECtHR, and especially the Grand Chamber, left a (very) wide margin of appreciation to the member states in relation to the assessment of the pressing social need justifying interferences with the right to freedom of expression ([Mouvement raëlien suisse v. Switzerland](#), [Animal Defenders International v. United Kingdom](#) and [Delfi AS v. Estonia](#)) and taking into account the actual challenge in European democracies to effectively prevent and combat *hate speech*, it had become doubtful whether the Grand Chamber would confirm the finding of a violation of Article 10 in the *Perinçek* case.

### The Judgment of the Grand Chamber of 15 October 2015

The [Grand Chamber’s](#) assessment and argumentation, the voting and the robust concurring and dissenting opinions give evidence that indeed there is fierce controversy within the European Court of Human Rights on how to apply the Convention in the case at issue. By ten votes to seven, the Grand Chamber confirmed that there has been a violation of Article 10 of the Convention. Seven judges however, including the president of the Court, claim vigorously that the conviction of *Perinçek* in Switzerland did not amount to a breach of his right to freedom of expression. Four of them also argued that Article 17 (abuse clause) should have been applied in this case.

The dissenting judges emphasize “that the massacres and deportations suffered by the Armenian people constituted genocide is self-evident. The Armenian genocide is a clearly established fact. To deny it is to deny the obvious”, immediately admitting however that this is not the (relevant) question in the case at issue. According to the dissenting judges the real issue at stake is

“whether it is possible for a State, without overstepping its margin of appreciation, to make it a criminal offence to insult the memory of a people that has suffered genocide”

**The Grand Chamber’s assessment and argumentation, the voting and the robust concurring and dissenting opinions give evidence that indeed there is fierce controversy within the European Court of Human Rights on how to apply the Convention in the case at issue.**

(Continued on page 38)



*(Continued from page 37)*

And they confirm that in their view, this is indeed possible. The argumentation of the dissenting judges clearly reflects the tendency to narrow down the supervisory role of the European Court and to accept that criminalising free speech and the participation in public debate, is a matter falling within the State's margin of appreciation.

It is extremely relevant to notice that at least still a (modest) majority of judges does not share this approach and chooses to implement and safeguard the mandate of the European Court of Human Rights in a less minimal way, upholding a "heightened" level of freedom of expression on matters of public interest in a democratic society. The majority is of the opinion that the Swiss authorities only had a limited margin of appreciation to interfere with the applicant's right to freedom of expression in this case, and it takes a set of criteria into consideration assessing whether Perinçek's conviction can be considered as "necessary in a democratic society".

To that end, the majority looks at the nature of Perinçek's statements; the context in which they were interfered with; the extent to which they affected the Armenians' rights; the existence or lack of consensus among the High Contracting Parties on the need to resort to criminal law sanctions in respect of such statements; the existence of any international law rules bearing on this issue; the method employed by the Swiss courts to justify the applicant's conviction; and the severity of the interference (§ 228).

The bottom line of the majority's reasoning is that Perinçek's statements had to be situated in a heated debate of public concern, touching upon a long standing controversy, not only in Armenia and Turkey, but also in the international arena. His statements were certainly virulent, but were not to be perceived as a form of incitement to hatred, violence or intolerance. The Grand Chamber emphasizes that it is

“aware of the immense importance attached by the Armenian community to the question whether the tragic events of 1915 and the following years are to be regarded as genocide, and of that community's acute sensitivity to any statements bearing on that point. However, it cannot accept that the applicant's statements at issue in this case were so wounding to the dignity of the Armenians who suffered and perished in these events and to the dignity and identity of their descendants as to require criminal law measures in Switzerland”

The judgment reiterates that statements that contest, even in virulent terms, the significance of historical events that carry a special sensitivity for a country and touch on its national identity cannot in themselves be regarded as seriously affecting their addressees (§§ 252-253).

By analysing and referring to its earlier case law, the Court clarifies that similar to the position in relation to “hate speech”, the Court's assessment of the necessity of interferences

*(Continued on page 39)*



*(Continued from page 38)*

with statements relating to historical events has been “quite case-specific and has depended on the interplay between the nature and potential effects of such statements and the context in which they were made” (§ 220). After setting out the analysis of the set of relevant criteria and case-specific elements (cfr. § 228) and after balancing the conflicting rights at issue (freedom of expression under Article 10 vs. the right of reputation and (ethnic) dignity under Article 8), the majority of the Grand Chamber reaches the conclusion that Perinçek’s right to freedom of expression has been violated by the Swiss authorities.

The Grand Chamber summarises its finding as follows:

“Taking into account all the elements analysed above – that the applicant’s statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland, that there is no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of a criminal conviction – the Court concludes that it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case” (§ 280)

**The bottom line of the majority’s reasoning is that Perinçek’s statements had to be situated in a heated debate of public concern, touching upon a long standing controversy, not only in Armenia and Turkey, but also in the international arena.**

On these grounds 10 of the 17 judges come to the conclusion that the Swiss authorities have breached Article 10 of the Convention. The Grand Chamber rejects Perinçek’s claim in respect of non-pecuniary damages as the finding of a violation of Article 10 by the European Court was considered constituting a sufficient just satisfaction for any harm or damage suffered by him.

### **Brief Comment**

The most important message of the Grand Chamber’s judgment is that the criminalisation of the denial of genocide or other crimes against humanity “as such” cannot be justified from the perspective of Article 10 of the European Convention. The Grand Chamber emphasizes that the criminal offence of denial or gross minimization of the Holocaust is compatible with Article 10

*(Continued on page 40)*



(Continued from page 39)

as it should “invariably be seen as connoting an antidemocratic ideology and anti-Semitism”. The Court argues that Switzerland with its criminalisation of the denial of any genocide, especially without the requirement that it be carried out in a manner likely to incite to violence or hatred, took a position that cannot be reconciled with the standards of the right to freedom of expression as guaranteed by Article 10 ECHR and other international treaties. In this respect the Court also refers to the [General Comment nr. 34](#) of the United Nations Human Rights Committee on Article 19 UN Covenant on Civil and Political Rights, stating in para. 49 that “(l)aws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events”. The Court also clarifies why Switzerland was not required under its international law obligations to criminalise genocide denial as such.

In line with the Chamber judgment, the majority of the Grand Chamber also confirms that Article 17 (abuse clause) can only be applied on an exceptional basis and in extreme cases, where it is “immediately clear” that freedom of expression is employed for ends manifestly contrary to the values of the Convention. As the decisive issue whether Perinçek had effectively sought to stir up hatred or violence and was aiming at the destruction of the rights under the Convention was not “immediately clear” and overlapped with the question whether the interference with his right to freedom of expression was necessary in a democratic society, the Grand Chamber decided that the question whether Article 17 was applicable had to be joined with the examination of the merits of the case under Article 10 of the Convention. As the Court found that there has been a breach of Article 10 of the Convention, there were no grounds to apply Article 17 of the Convention (§§ 281-282) (on art. 17’s abuse clause, see [Cannie en Voorhoof](#)).

**The criminalisation of the denial of genocide or other crimes against humanity “as such” cannot be justified from the perspective of Article 10 of the European Convention.**

The Grand Chamber’s judgment in the case of *Perinçek v. Switzerland* will certainly give cause to further analysis and controversial debate about the (desirable or necessary) limits of the right to freedom of expression in relation to genocide denial, memory laws and *hate speech*. With its judgment of 15 October 2015 the European Court of Human Rights has undoubtedly contributed to safeguarding the right to freedom of expression. Just one day after the closing of the [Council of Europe conference](#) questioning whether freedom of expression still is a precondition for democracy, the Grand Chamber of the Strasbourg made a robust statement that a democratic society must safeguard the right “to express opinions that diverge from those of the authorities or any sector of the population”, refusing to accept the necessity of criminal

(Continued on page 41)



(Continued from page 40)

convictions for speech that does not manifestly incite to hatred, violence or discrimination and by refusing to apply the abuse clause of Article 17 of the Convention.

[Dirk Voorhoof](#) is professor at Ghent University (Belgium) and lecturer on European Media Law at Copenhagen University (Denmark). He is also a Member of the Flemish Regulator for the Media and of the Human Rights Centre at Ghent University. He is the author of the recently published [E-book](#), *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, IRIS Themes, European Audiovisual Observatory, Strasbourg, 2015, 409 p. This article is published with permission of and thanks to [Strasbourg Observers](#) which published the article on Oct. 19.



**520 Eighth Avenue, North Tower, 20 Floor, New York, NY 10018**

**medialaw@medialaw.org | www.medialaw.org | 212-337-0200**

**BOARD OF DIRECTORS**

Lynn B. Oberlander, Chair; Jonathan Ansell;

Marc Lawrence-Apfelbaum; Gillian Phillips;

Kenneth A. Richieri; Mary Snapp; Regina Thomas;

Susan E. Weiner; Kurt A. Wimmer; Samuel Fifer (DCS President)

George Freeman (MLRC Executive Director)

**MLRC STAFF**

George Freeman, Executive Director

Dave Heller, Jeff Hermes, Deputy Directors

Michael Norwick, Staff Attorney

Jake Wunsch, Production Manager

Debra Danis Seiden, MLRC Administrator

Andrew Keltz, Assistant MLRC Administrator



# New York Times Moves Forward With Suit Seeking Torture Memos

By David McCraw and Jeremy Kutner

It has been one of the most perplexing secrets of the post-9/11 era: Why was no one in the CIA ever charged with torturing detainees abroad or with destroying the videos that documented the interrogations?

The answers lie in a series of classified memos written between 2010 and 2012 by John Durham, a career prosecutor appointed by the Department of Justice in 2008 to lead the investigation into the CIA after revelations that videos showing potentially brutal interrogations of terrorist suspects had been destroyed by the agency en masse and without explanation. Durham's mandate expanded in 2009 as further disclosures intensified public scrutiny of the CIA's conduct during terrorist suspect interrogations following 9/11, and he was placed in charge of investigating whether those interrogations violated federal law. At the conclusion of each of his two parallel investigations, Durham wrote to the Attorney General laying out his recommendations that no prosecutions should be pursued.

Those memos are at the heart of a Freedom of Information Act suit filed last year by The New York Times and reporter Charlie Savage. Last month, a federal judge in New York handed down a decision that cleared the way for The Times to continue its pursuit of five of the most critical Durham memos: a Recommendation Memorandum (and two supplements) that explained why criminal investigations should move forward as to only two detainee deaths abroad, and two Declination Memoranda laying out why no criminal charges should be brought in those two cases. [\*The New York Times Company v. U.S. Dept. of Justice\*](#), No. 14-CV-3777 (S.D.N.Y. Sept. 30, 2015).

The decision, written by Judge Paul Oetken, also breathes life into the “express adoption” doctrine of FOIA, a potentially powerful but still evolving tool for attacking agency objections that a document can be shielded as “deliberative” under FOIA’s Exemption 5.

The suit has taken an unusual procedural path. Savage filed two FOIA requests with DOJ seeking separate but related sets of documents: all the memos that Durham had written to the Attorney General and all the FBI summaries of witness interviews conducted during the course of the investigations, the so-called “FBI-302s.” DOJ never responded to the requests until The Times filed suit, after which it cited several FOIA exemptions – most notably, Exemption 5,

**It has been one of the most perplexing secrets of the post-9/11 era: Why was no one in the CIA ever charged with torturing detainees abroad or with destroying the videos that documented the interrogations?**

(Continued on page 43)



(Continued from page 42)

which shields “deliberative” documents and also protects attorney work product, and Exemptions 1 and 3, which pertain to national security materials. By agreement, the parties initially briefed only Exemption 5 with the understanding that the other exemptions would be litigated only if *The Times* prevailed in the first round.

The crux of *The Times*’s argument was that the Durham memos fell under the express adoption exception to Exemption 5. That exemption broadly allows an agency to withhold documents that reflect decision-making advice and evaluations. But the Second Circuit has held that an agency loses the right to invoke Exemption 5 in two circumstances: when the advisory memo is treated as the law to be followed internally by the agency (“working law”) or when government officials publicly refer to a memo as the legal basis justifying government actions (“express adoption”). The two doctrines were treated as one and labeled “working law” until Judge Robert Sack spelled out the difference between the two strands in 2012 in *Brennan Center for Justice v. Dep’t of Justice*, 697 F.3d 184 (2d Cir. 2012).

Over the last four years, *The Times* has repeatedly litigated the two doctrines in a variety of FOIA cases – most significantly, in the paper’s long-running litigation over the legal memos justifying drone strikes – in hopes of more firmly establishing their scope. In the Durham case, *The Times* pointed to statements made by Attorney General Eric Holder and others publicly adopting Durham’s recommendations as the basis for the government’s decision not to indict.

Before actually getting to the analysis of whether the public statements eliminated Exemption 5 protection, *The Times* first had to convince the court that working law and express adoption trumped Exemption 5 when the documents at issue were covered by the attorney work product privilege. While the Second Circuit has held that the doctrines overcome Exemption 5 for deliberative materials and materials covered by the attorney-client privilege, it has specifically refrained from commenting on whether that reasoning also extends to attorney work product. Judge Oetken, though, had little trouble applying the doctrines to attorney work product, holding: “If publicly adopting a document vitiates the purposes of the attorney-client privilege, it is hard to see why it ought not to do the same to the work product doctrine. Similarly, if justifying agency action on the basis of a document shielded by the attorney-client privilege is offensive to FOIA, it is hard to see why justifying the same action on the basis of a document shielded by the work-product doctrine is not offensive.”

**The decision, written by Judge Paul Oetken, also breathes life into the “express adoption” doctrine of FOIA, a potentially powerful but still evolving tool for attacking agency objections that a document can be shielded as “deliberative” under FOIA’s Exemption 5.**

(Continued on page 44)



*(Continued from page 43)*

Judge Oetken then turned to the question of whether the few public statements made by the Attorney General about Durham’s investigations constituted express adoption of the various memoranda that Durham produced. Judge Oetken was clear that it was the content – not the quantity – of Government statements that matters for express adoption analysis: “The touchstone of the express adoption inquiry is whether the agency uses the reason contained in a document, and the authority provided by the document, to ‘justify’ its actions to the public. This principle guides the analysis of whether references to a document were sufficiently ‘express’ and whether those references adopted that document’s ‘reasoning’ rather than merely its conclusions.”

With this standard in hand, Judge Oetken found that the Recommendation Memorandum and its two supplements had been expressly adopted. Notably, this finding was based on just two press releases containing relatively short statements from the Attorney General. The first statement, from 2011, “described Durham’s process, identified his sources, and concluded that Durham’s ‘thorough review ha[d] satisfied th[e] need’ for a DOJ

investigation of detainee treatment.” The court found critical the fact that the press release explicitly stated that the Attorney General had “accepted [Durham’s] recommendation to conduct a full criminal investigation” into the two detainee deaths.

The second statement, from 2012, was largely similar. These short mentions, however, were enough because the Attorney General had gone out of his way to invoke Durham’s legal analysis (however briefly) and framed Durham’s recommendation as the basis for the

decision to proceed with an investigation. The Attorney General could have said nothing, but when he decided to go public, “he adopted Durham’s reasoning as his own.”

Judge Oetken used similar reasoning to find that the two Declination Memoranda – which concluded that no charges should be brought related to the detainee deaths – were also expressly adopted. Again, this was based largely on a single statement from the Attorney General. In that statement, Holder said:

AUSA John Durham has now completed his investigations, and the Department has decided not to initiate criminal charges in these matters. In reaching this determination, Mr. Durham considered all potentially applicable substantive criminal statutes as well as the statutes of limitations and jurisdictional provisions that govern prosecution...I asked Mr. Durham to

**The Times lost on the second part of its case seeking access to the FBI summaries of the witness interviews.**

*(Continued on page 45)*



(Continued from page 44)

conduct his review based on existing information as well as new information and matters presented to me that I believed warranted a thorough examination of the detainee treatment issue. I am confident that Mr. Durham's thorough reviews and determination that the filing of criminal charges would not be appropriate have satisfied that need.

That statement was enough, the court said, at least when read in conjunction with DOJ's statement that it had declined prosecution because "[b]ased on the fully developed factual record concerning the two deaths. . . the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."

The Times lost on the second part of its case seeking access to the FBI summaries of the witness interviews. DOJ argued that the summaries were covered by the attorney work product privilege because they had been written at the direction of Durham and other prosecutors. The government's position was unusual and daunting. Typically, Exemption 5 (which incorporates the work product privilege) covers only opinions and not facts, but the Second Circuit has ruled that factual material can fall within the privilege. The government has rarely taken the position that 302s are attorney work product, and in the Durham case DOJ's attorneys stressed that they were not making a general assertion about 302s but only about the 302s in this investigation.

The court ruled that 302s were not always attorney work product. It found that the label applies only when documents reveal an attorney's strategic impressions and mental processes. But in looking at the 302s at issue here, the court found that these particular reports did reveal Durham's legal thinking because the selection of witnesses and the types of questions asked inherently reflected on his case strategy. The court rejected The Times's argument that reports that were essentially verbatim accounts of witness interviews fell outside the attorney work product privilege.

The case will now move forward to its second phase: whether the national security exemptions of FOIA apply to the five Durham memos. No briefing schedule has been set.

*The Times and Charlie Savage are represented by David McCraw and Jeremy Kutner of the Times legal department. The Justice Department is represented by AUSAs Jeannette Vargas and Tara LaMorte.*



# Utah Supreme Court Orders Disclosure of Criminal Investigation Documents

## *Citizen Activist Wins Public Records Fight*

By Jeff J. Hunt, David C. Reymann, and LaShel Shaw

In a significant decision analyzing the interplay between the Utah Constitution and the State's open records statute, the Utah Supreme Court recently held that the Utah Constitution did not bar a citizen activist from obtaining lawfully-subpoenaed bank records in the possession of the Attorney General's Office. [\*Schroeder v. Utah Att'y General's Office\*](#), 2015 UT 77. The Court also held that Attorney General was required to disclose attorney work product relating to a closed criminal investigation because the public interests in disclosure outweighed the interests in non-disclosure.

### Background

The relevant records request arose out of alleged misconduct on the part of former Ogden City Mayor Matthew Godfrey. During his time in office, Mayor Godfrey and his supporters formed Envision Ogden, a non-profit organization that held itself out as promoting local business and recreation. In 2007, Envision Ogden organized fundraising events and solicited more than \$80,000 in contributions, including contributions from local banks, hospitals, the Ogden-Weber Chamber of Commerce, and the Utah Governor's Office of Economic Development.

Unbeknownst to the contributors, more than \$25,000 of the money raised by Envision Ogden was secretly funneled into Mayor Godfrey's election campaign and the campaigns of two city council candidates. Another \$5,000 was given to a state legislative candidate and the Utah Republican Party. These expenditures were only discovered in 2009 when Dan Schroeder, a local blogger and university professor, stumbled across Envision Ogden's late-filed IRS Report of Contributions and Expenditures. Schroeder's discovery led to press coverage and an admission from both city council candidates that they had received political contributions from Envision Ogden.

The Utah State Bureau of Investigation interviewed several of Envision Ogden's major contributors and launched an investigation. Each of the individual contributors stated they would not have donated if they had been aware of the political nature of Envision Ogden, and most of them additionally stated that their contributions had been solicited by Mayor Godfrey.

**The Court's decision provides helpful guidance on the interplay between the state Constitution and Utah's open records law, particularly in the context of access to investigative records obtained through subpoena.**

(Continued on page 47)



*(Continued from page 46)*

The investigation was then taken over by the Utah Attorney General's Office, which subpoenaed Envision Ogden's bank records. Eventually, in March 2011, the investigation was closed without any criminal charges being filed.

The following day, Schroeder submitted a request under Utah's open records statute, the Utah Governmental Records Access and Management Act ("GRAMA"). Schroeder sought copies of "all records pertaining to the recently concluded investigation into Envision Ogden." Some records were released by the Attorney General's Office, but it claimed that the rest of the records were "protected" under GRAMA. Schroeder appealed that decision first to the Utah State Records Committee and then to the State District Court.

### **District Court Proceedings**

Three withheld records were at issue before the district court: 1) Envision Ogden's bank records, which the government had validly subpoenaed, 2) a summary of those bank records prepared by an investigator at the Attorney General's Office, and 3) a post-it note containing a to-do list made by that same investigator.

The district court determined that the bank records were constitutionally protected under the search and seizure provision of Article I, Section 14 of the Utah Constitution. The district court relied on *State v. Thompson*, 810 P.2d 415 (Utah 1991), which found a reasonable expectation of privacy in bank records. The court concluded that the government's search of Envision Ogden's bank records years earlier would become retroactively "unreasonable" if the Attorney General then disclosed those documents to the public. In essence that meant bank records were categorically exempt from Utah's open records law. The district court also upheld the Attorney General's decision to withhold the summary and Post-it note as attorney work product, a protected category under GRAMA.

Although GRAMA provides for the release of protected records where "the interest favoring access outweighs the interest favoring restriction of access," the district court determined that "the public's right to know," though "significant," was outweighed by the important public policy "that an attorney's mental impressions are to be protected" and by the constitutional "interest of individuals and organizations in the State of Utah to be free of unreasonable searches of their financial records."

### **Supreme Court Decision**

Schroeder appealed the district court's decision to the Utah Supreme Court, which reversed and ordered the disclosure of all three records.

*(Continued on page 48)*



(Continued from page 47)

With respect to the bank records, the Court explained that *Thompson* stood only for the proposition that bank records were private papers that could not be seized by the government through illegal subpoenas, but that it did not “accord bank records special status over other personal information” nor protect lawfully-subpoenaed bank records from subsequent GRAMA requests. 2015 UT 77, ¶ 22. The Court noted that GRAMA already protects many categories of bank records, including “records describing an individual’s finances,” and “nonindividual financial information [which, if disclosed, might] result in unfair competitive injury.” None of these protected categories, however, were applicable to the bank records of Envision Ogden, an entity which had been defunct for several years. *Id.* at ¶ 28.

With respect to the summary and Post-it note, the Court agreed that they contained the mental impressions of state prosecutors made solely in anticipation of criminal litigation and therefore were attorney work product. The Court found that the district court erred, however, in determining whether the records should be released under the balancing test because it “weighed general policy interests without focusing on their specific application to the documents at issue in this case,” an approach that would always stack the deck against disclosure. *Id.* at ¶ 55.

Looking instead at the particularized interests and policies pertinent to the records, the Court noted that the allegations of corruption by an elected political official were the sort that gave rise to a strong public interest in information. In contrast, the attorney work product was less important in the context of a case that had been closed for four years and in which no criminal charges had been brought. Finding that the balance weighed heavily in favor of disclosure, the Court ordered the Attorney General to release the summary and post-it note, as well as the subpoenaed bank records. The Court then remanded the case for a determination of whether Mr. Schroeder was entitled to attorneys’ fees as the prevailing party under GRAMA.

The Court’s decision provides helpful guidance on the interplay between the state Constitution and Utah’s open records law, particularly in the context of access to investigative records obtained through subpoena. The opinion also makes clear that government entities cannot rely on generalized policy concerns when determining whether records should be disclosed under GRAMA’s public interest balancing test. Instead, the balancing analysis “must be tethered to the specific interests of the parties and the particularized application of the relevant public policies at issue.” *Id.* at ¶ 51.

*Jeff J. Hunt, David C. Reymann, and LaShel Shaw of Parr Brown Gee & Loveless represented Mr. Schroeder pro bono in the appeal.*



# California Newspaper Reports on New Evidence of Priest Abuse and Diocese Inaction

## *Appeals Court Affirms Modification of Protective Order to Allow “Access” to Unfiled Discovery*

By Roger Myers and Leila Knox

A California newspaper’s two-year court battle with the Catholic church to obtain access to unfiled discovery after settlement of a sex abuse case by a former altar boy ended October 30 with publication of a Special Report outlining allegations of abuse by multiple potential victims and warnings the church ignored.

The report by the *Monterey County Weekly* became possible only after the California Court of Appeal’s Sixth Appellate District in San Jose affirmed on July 31 the authority of the Monterey Superior Court to grant the *Weekly*’s motion to modify a protective order that had prevented public disclosure of any discovery in the case. [\*John RJ Doe v. Roman Catholic Bishop of Monterey\*](#), No. H040662.

A stay on release of the documents pending appeal expired when the remittitur issued on September 30, and the *Weekly* received and began reviewing 1,350 pages of discovery the next day.

In opposing the *Weekly*’s motion, both the Diocese of Monterey and Father Edward Fitz-Henry argued that there was no precedent in California authorizing the trial court to modify a protective order on unfiled discovery after settlement and dismissal. And, they argued, there was no reason to do so in this case – despite the Diocese’s decision to pay Doe \$500,000 to settle his case and to pay Fitz-Henry an undisclosed amount to settle his cross-claims – because Doe’s allegations had not been proved (and were found not credible by a Diocese investigation), those of one other alleged victim had already been reported and, they claimed, there was no support for Doe’s allegations that the Diocese had “covered up” claims of abuse by multiple other potential victims.

After the discovery was released, however, it showed the Diocese’s investigator had testified in his deposition he believed Fitz-Henry had sexually abused Doe – “In terms of it being

### **The Case Of Father Edward Fitz-Henry And The Diocese Of Monterey.**

The *Monterey County Weekly* began covering alleged sexual abuse by a priest at the Diocese of Monterey back in 2011, after parishioners first learned their beloved priest at Old Mission San Juan Bautista had been suspended.

The civil litigation continued for years; a young man identified as John RJ Doe sued the diocese and Father Edward Fitz-Henry; the diocese agreed to pay Doe \$500,000 in a settlement.

Fitz-Henry then sued the diocese, claiming they’d failed to protect him; the [diocese paid him an undisclosed sum as part of a settlement](#).

**The *Monterey County Weekly*’s report. [Click to read.](#)**

(Continued on page 50)



(Continued from page 49)

unlawful to have sex with a minor” – and there may have been at least three, and possibly six, other “potential victims.”

Moreover, the discovery revealed that the former head of the Diocese’s schools had warned church officials to keep Fitz-Henry away from altar boys – only to be told by the then-Bishop to mind her own business – and that the Diocese had failed to keep a promise to the mother of another victim that Fitz-Henry would not be allowed to minister in a parish with a school where he could be around children.

The [Court of Appeal’s decision](#) in this case is noteworthy because no prior decision in California had recognized a newspaper’s “standing to request access to [unfiled] discovery materials.” Slip. Op. 11. Nor were there any published decisions in California that upheld the “continuing authority” of a trial court judge to modify a protective order prohibiting parties from providing to the media or publicly discussing any discovery once the risk of tainting the jury pool ceased to exist because the underlying cases were settled.

*Id.* at 13.

In allowing the *Weekly* “access to discovery,” the trial and appellate courts did not mandate that the parties provide copies of discovery to any media that asked. Instead, the courts lifted a restraint that had prohibited the attorneys from providing copies to the *Weekly* if the attorneys wanted to do so.

As in the federal court decisions on access to discovery, the *Weekly* in its motion and the superior and appellate courts in their rulings did not rely on any First Amendment rights per se. Rather, they relied on the rules governing discovery – in California, the Civil Discovery Act, and specifically provisions like Code of Civil Procedure § 2031.60, which under article I, § 3(b)(2) of the state constitution “must be construed ‘both broadly in furtherance of a right of public access and narrowly to the extent they limit such access right,’” *id.* (citation omitted) – and on the trial court’s “‘inherent power’ to vacate or modify [a] restriction ... [that] was in its nature injunctive.” *Id.* (citing, e.g., Civil Code §§ 533, 3424).

Although it addressed what the trial court had said was “in some respects ... a question of first impression,” the Court of Appeal declined to publish its decision. However, copies of both the superior court and appellate court decisions have been submitted to Media Law Reporter.

Media attorneys should also be aware of another ruling in this case. The Sixth District held the *Weekly* did not meet the statutory criteria to intervene because, it said, intervention immediately after settlement was untimely and the *Weekly* did not have “interests ... affected by

**The Court of Appeal’s decision in this case is noteworthy because no prior decision in California had recognized a newspaper’s “standing to request access to [unfiled] discovery materials.”**

(Continued on page 51)



(Continued from page 50)

the judgment” on the merits. *Id.* at 10-11 (applying Civ. Proc. Code § 387). The Court of Appeal nonetheless found the trial court’s decision to allow the *Weekly* to intervene was harmless error because the *Weekly* had standing to seek access to the discovery and Doe’s counsel wanted to provide copies to the *Weekly*. “Whether or not the procedural device of intervention was correct, the modification order itself can be reviewed for jurisdictional and substantive sufficiency,” the court held. *Id.* at 11.

Although the unpublished decision in *Doe* cannot be cited as precedent, it continues a trend of decisions cutting off the media’s long-standing practice in California state courts – as in the federal courts – of using intervention as the method to oppose or seek to lift sealing or gag orders. *See Overstock.com, Inc. v. Goldman Sachs Group, Inc.*, 231 Cal. App. 4<sup>th</sup> 471, 489 (2014) (media may not intervene to oppose motion to seal court records). *Doe* does not suggest what procedure the appellate court would consider proper, and the notion of allowing the media to participate as amicus curiae, which *Overstock* suggested, is of little value where none of the parties oppose sealing or a protective order (or, even if they do, are unwilling or unable to spend time and money on an opposition).


In cases involving court records, California Rule of Court 2.551(h) allows “any member of the public” to “move, apply, or petition” to unseal records previously sealed. In cases involving protective orders, *Doe* suggests that the media can file as amicus if one party opposes the motion and simply file a motion to lift or modify the protective order if it has already been entered. The Fourth Appellate District in San Diego has indicated the media may be able to proceed under Code of Civil Procedure § 1008, allowing reconsideration of an order, or, conceivably under § 473, allowing relief from an order. *Wilson v. Science Applications Int’l*, 52 Cal. App. 4<sup>th</sup> 1025, 103-33 & nn. 3-5 (1997).

Neither statute provides a perfect solution. A motion under § 1008 must be brought within 10 days of the movant being served with the order at issue, must be made to the same judge who issued the order and must be based on a showing of new, different or changed circumstances. *Id.* A motion under § 473 must be brought “within a reasonable time, and in no case exceeding six months,” by “a party or his or her legal representative” to seek relief from a judgment, dismissal or order “taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.”

*Roger Myers and Leila Knox of the San Francisco office of Bryan Cave LLP represented Milestone Communications dba Monterey County Weekly in this case.*

**Although the unpublished decision in *Doe* cannot be cited as precedent, it continues a trend of decisions cutting off the media’s long-standing practice in California state courts – as in the federal courts – of using intervention as the method to oppose or seek to lift sealing or gag orders.**





MLRC warmly thanks our London Conference sponsors – and all our moderators, panelists and delegates who made the conference a success.

**Bloomberg  
Hiscox  
Google  
AXIS Pro  
Chubb  
Covington & Burling  
Davis Wright Tremaine  
Dentons**

**Fox Rothschild Frankfurt  
Kurnit Klein & Selz  
Jackson Walker LLP  
Leopold Petrich & Smith  
Levine Sullivan Koch & Schulz  
Miller Korzenik Summers  
Times Newspapers**

**[Conference Bulletin: International Media Law Developments](#)**

Why Reading The First Amendment Isn't Easy; To Confront The Assassin's Veto, Or To Ratify It?; Hate Speech Under German Law; Canada: A Middle Ground On Hate Speech?; Speech Offences In England And Wales; Restriction Of Freedom Of Press Under Turkish Media Law; Developments In Ireland; Press Regulation In The United Kingdom: Where Things Stand At Present And The Clouds On The Horizon; Data Privacy In The United States