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#### Advertising & Commercial Speech: The Other Issues

This session will cover several topics beyond native advertising: the new Federal Communications Commission rule requiring that prior express written consent be given before telemarketing calls are made to consumers; the implications for advertisers and social media networks from online sports betting, social games and fantasy sports leagues, including media companies forfeiting ad revenue earned for publishing ads for allegedly illegal internet gambling businesses; what impact the Seventh Circuit's ruling in *Jordan v. Jewel* will have on whether there is any corporate commercial speech that does not consist of brand promotion and does not run into right of publicity problems when making corporate

tributes to celebrities; and what media lawyers need to consider when examining insurance coverage for advertising claims under media liability policies.

#### The FCC and the 21st Century Media Marketplace

Regulations by the Federal Communications Commission affect the ownership arrangements of media outlets and the lay of the land for media operations. Current issues include whether Internet Service Providers are entitled to First Amendment protections as speakers; the future, if any, of net neutrality regulation by the FCC; how the FCC will regulate arrangements among TV broadcast stations, without common owners, to share resources; and if the FCC has enough evidence that joint TV advertising sales agreements, when reaching 15 percent of a station's advertising time, incentivize ad brokers to influence station programming and operations or lead stations to coordinate, rather than compete, for advertising.

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### Entertainment Law: Ripped From The Headlines: Legal Risk Avoidance & Entertainment Works Derived From Real Events

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#### MLRC MediaLawLetter

### Supreme Court Rules Aereo Violates Public Performance Right

#### By Jim Rosenfeld, Lance Koonce and Eric Feder

In a 6-3 decision written by Justice Breyer, the Supreme Court ruled that Aereo's internet television service infringes broadcasters' exclusive rights to publicly perform their works. <u>American Broadcasting Cos., Inc. et al. v. Aereo Inc.</u>, No. 13-461 (U.S. June 25, 2014).

Despite the potentially broad ramifications of this closelywatched case, the Court was careful to limit its decision, relying primarily on what it saw as Congress' decades-old intent to require retransmissions of copyrighted television content to be subject to the Copyright Act. The narrowness of the decision likely comes as welcome news to cloud services providers and others concerned that the Court's decision could have devastating effects on emerging

industries involved in the delivery of online content. At the same time, the majority's reliance on the commercial characteristics and user experience of Aereo's service could subtly alter the way in which copyright cases involving new technologies are argued and decided in the future.

#### Background

Aereo is an internet-based service that

allows its subscribers to watch broadcast television programs over the Internet in exchange for a monthly fee. Aereo's subscribers can also record and store programs for delayed playback. Aereo does not obtain licenses from copyright holders to record or transmit their programs.

Aereo transmits broadcast programs by capturing the broadcast signal with a different aerial antenna temporarily assigned to each subscriber for that session. (Aereo's facility contains boards with thousands of tiny antennas—each roughly the size of a dime—so that each subscriber using the service at any one time has access to a single antenna.)

Television broadcasters (and other copyright owners of broadcast television programs) brought a copyright infringement lawsuit against Aereo, Inc. ("Aereo") in the District Court for the Southern District of New York. At issue in the case was whether Aereo's service infringed the copyright holders' exclusive rights to publicly perform their works. *See* 17 U.S.C. § 106(4).

The Copyright Act defines "perform" as "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101. Performing a work "publicly" means:

to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times. (emphasis added)

The broadcaster plaintiffs asserted that Aereo infringed their public performance and reproduction rights under the Copyright Act, and sought a preliminary injunction barring Aereo from transmitting television programs while they were being broadcast. The district court denied the preliminary injunction motion, and the Second Circuit affirmed.

The lower court decisions were based on the premise that because each subscriber has access to a single copy of a broadcast through the single antenna used to receive the broadcast, and no other subscribers can receive a transmission from that copy, the transmission did not constitute a "public" performance. In the wake of the litigation in the Second Circuit, Aereo began to expand its service to other regions of the country, and several other lawsuits involving Aereo or (Continued on page 7)

The Supreme Court reversed the Second Circuit and ruled that Aereo's system publicly performs broadcasters' copyrighted programs.

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similar services were initiated. In the ensuing months, a District Court in Massachusetts denied a preliminary injunction against Aereo in accordance with the Second Circuit's decision, while District Courts in Utah and the District of Columbia shut down Aereo in those regions, and a California District Court shut down a similar competing service.

#### The Majority Decision

The Supreme Court reversed the Second Circuit and ruled that Aereo's system publicly performs broadcasters' copyrighted programs. The Court's opinion, authored by Justice Breyer and joined by five other justices, was careful to address Aereo's technology narrowly – explicitly *not* ruling on the legality of cloud-based storage and other emerging technologies and suggesting that many such technologies were *not* publicly performing copyrighted works and therefore would not be rendered illegal by its

opinion.

The Court divided the public performance analysis into two prongs. First, it ruled that Aereo "performed" programs transmitted through its system. Acknowledging that the Copyright Act's definitions of "perform" and "transmit" were vague, it looked to the legislative history: Congress had amended the Act in 1976 to

overturn two prior Supreme Court rulings which had ruled community antenna television ("CATV") systems to be beyond the Act's scope because the systems did not perform the works they transmitted; under the Court's analysis, the CATV providers were more like viewers than broadcasters. *See Fortnightly Corp. v. United Artists Television, Inc.*, 392 U. S. 390 (1968); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974).

The 1976 Amendment rejected this distinction, defining "perform" as "show[ing a work's] images in any sequence or [making] the sounds accompanying it audible" and making other amendments which rendered the transitter of a program a "performer" of that work. The majority opinion found Aereo substantially similar to the CATV companies that Congress had amended the Act to reach; under the revised Act, Aereo was communicating the programs' images and sounds, and thus performing those works. Second, the Court concluded that Aereo's performance of televised works was "public". Whether the "performance" in question is the underlying broadcasts (as the broadcasters urged) or the act of transmitting the work (as Aereo argued) – an issue which the Court did not decide –Aereo's transmission of the performance was public. The Court rejected Aereo's attempt to get around this conclusion by transmitting each performance from a different antenna, characterizing these technical details as "behind-the-scenes" and irrelevant to a viewer.

It pointed to the text of the transmit clause, which states that a performance can be transmitted through a set of "multiple, discrete transmissions" to different viewers at different times. And, significantly, it suggested that transmitting performances to subscribers as "owners or possessors of the underlying works" would require a different analysis, leaving breathing room for cloud storage and various other on-line services.

The Court closed by acknowledging that Congress "did

not intend to discourage or to control the emergence or use of different kinds of technologies," assuring that the "limited" holding in this case would not have that effect and giving some clues as to potential exceptions. Other technologies may or may not constitute "performances" or be "public," the Court explained.

For instance, "[w]e have said that [the term 'the public'] does not extend to those

who act as owners or possessors of the relevant product. And we have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content." The Court further acknowledged that the fair use doctrine would also provide a defense to infringement for some technologies, as in the recent Google Books decision. The majority put off such questions until they concretely arise in later cases, and noted that interested entities "are of course free to seek action from Congress."

#### The Dissent

Justice Scalia, joined by Justices Thomas and Alito, sharply dissented. In the dissent's view, Aereo cannot be (Continued on page 8)

The dissent likens Aereo to a "a copy shop that provides its patrons with a library card."

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directly liable for publicly performing the broadcasters' works because Aereo passively allows its *subscribers* to select the broadcast content. (The dissent likens Aereo to a "a copy shop that provides its patrons with a library card.") Without any "volitional act" on the part of Aereo, it cannot be liable for direct infringement.

The dissent expressly leaves open the possibility that Aereo may be held secondarily liable (as either a vicarious or contributory infringer) for the direct infringements of its subscribers. In fact, Justice Scalia states that he "share[s] the Court's evident feeling that what Aereo is doing (or enabling to be done) to the Networks' copyrighted programming ought not to be allowed," but "[i]t is not the role of this Court to identify and plug loopholes."

The dissent criticizes the majority's decision as being based on the flimsy premise that Congress had previously amended the Copyright Act to cover cable systems and "Aereo looks a lot like a cable system," therefore it should be treated the same. Ultimately, the dissent warns that, in light

of the "imprecision of [the majority's] result -driven rule," the Court "cannot deliver on [the] promise" that its decision will not affect cloud-storage providers and cabletelevision systems.

#### Analysis

At oral argument in this case, the very first question asked by the justices was delivered by Justice Sotomayor: Why isn't Aereo a cable company?

Several months later, the majority has answered that question; Aereo's system, according to the Court, is sufficiently analogous to the cable services Congress intended to reach when it overturned *Fortnightly* and *Teleprompter*, and thus are subject to the proscriptions of the Copyright Act. Without question, the Court's decision is a major victory for television content providers, because it indicates that any subscription service that facilitates the rerouting of over-theair broadcasting to end users will likely be viewed as akin to a cable system and be held unlawful, unless the service acquires the necessary rights, such as through private or compulsory licensing.

The Court's heavy reliance on the legislative history of the 1976 amendments to the Copyright Act, and specifically Congress' broad purposes in enacting those amendments in response to *Fortnightly* and *Teleprompter*, is perhaps unsurprising, as it allowed the Court to attempt to limit its decision to the television industry. The majority takes great pains to confirm that its holding is a narrow one, and not intended to reach new technologies offered by companies that are not "equivalents" of cable companies. In particular, the Court is careful to distinguish services that deliver content to a user that the user already owns or possesses, such as cloud lockers. This should provide comfort to providers of cloud services and other remote storage solutions, including remote DVR applications such as the one approved by the Second Circuit in *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), the very case that propelled the Second Circuit to decide in Aereo's favor below.

Perhaps as a consequence of its reliance on legislative intent, the majority's analysis of how the actual functionality of the Aereo system fits within the framework of the Copyright Act is more perfunctory than might have been expected. In addressing one of the key differences urged by Aereo – that its system does not activate the stream until an

end user turns it on and causes a transmission of a performance – the Court says that "[t]his difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to the subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional

cable system into a 'copy shop that provides its patrons with a library card."

Similarly, in addressing whether performances using Aereo are public notwithstanding that each transmission is only to one subscriber, the Court asks why the "behind-thescenes" functionality matters, given that they "do not render Aereo's commercial objectives" different from the cable providers addressed by the changes to the Act in 1976, and that they do not alter the viewing experience for end users.

As noted, the dissent, authored by Justice Scalia, takes issue with what it terms an "improvised", "looks-like-cable-TV" standard, versus a more detailed comparison of the technical functionality of the service with the cable systems at issue in the *Fortnightly* and *Teleprompter* cases. There is often a tension in copyright law between a high-level, practical view and a granular, technical view. (For instance, in determining infringement courts may examine both a *(Continued on page 9)* 

The majority takes great

pains to confirm that its

holding is a narrow one.

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work's "total concept and feel" and also dissect the work into its component parts under the so-called "abstraction-filtration -comparison" test.)

This tension is especially acute in cases involving the intersection of copyright law and new technologies; however, courts have more often tended to examine "under the hood" functionality of such technology to understand how the parties involved may or may not be exploiting one of the exclusive copyright interests reserved to the copyright owner. In cases such as *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), for instance, which examined Google's image search service, courts eschewed examination of the end-user experience and focused on which computer servers were actually hosting and delivering the content.

By potentially elevating an analysis of high-level functionality and viewer experience under the performance right, the Court may have opened the door for arguments in future cases that are less dependent on the precise functionality of underlying technologies, and more on the intent of the parties or the overall practical effect of the technology. This may make it difficult for technology companies to predict whether their new technologies are infringing.

Jim Rosenfeld and Lance Koonce are partners, and Eric Feder an associate, at Davis Wright Tremaine LLP. Paul D. Clement of Bancroft PLLC argued the case at the Supreme Court for the broadcasters. David Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, argued the case for Aereo. A full list of counsel and amicus briefs is <u>available</u> <u>online here</u>.

#### **Recent MLRC Publications**

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Who qualifies as "the media," it seems, is the perennial million-dollar question in an age when the "pen," the camera, and the "press" are all combined in a single device that fits easily in your purse—if not your back pocket—and everyone is a potential publisher. This updated report offers a review of that question by examining legislative developments and court decisions in a variety of situations, ranging from libel and right of publicity issues, to state shield laws and reporter's privilege changes, to application of state and federal open records laws.

#### Non-Competes in the Broadcast Industry

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

### Keeping the Courthouse Door Open to First Amendment Challenges

Supreme Court Reverses the Sixth Circuit in SBA List v. Driehaus

#### By Tom Clyde

Almost lost in the considerable hubbub surrounding the *Aereo* case was the fact that the U.S. Supreme Court issued another important decision this month that protects the legal infrastructure around speech rights in this country. In <u>Susan</u> <u>B. Anthony List v. Driehaus</u>, (U.S. June 16, 2014), the Supreme Court issued a *per curiam* decision reversing the Sixth Circuit Court of Appeals, which had found a political advocacy organization lacked standing to challenge an Ohio law that prohibited "false statements" during the course of a campaign.

Even though the law had been used to stop the advocacy organization from posting a billboard against then Ohio Congressman Steve Driehaus, the Sixth Circuit affirmed the dismissal of the action on the grounds that the advocacy organization could not show an "imminent threat of *future* prosecution."

Unless reversed, the Sixth Circuit's decision threatened to overturn – at least for a large and politically important part of the United States – the longstanding recognition that laws violating free speech rights create a

sufficient "chill" on potential First Amendment speech to satisfy ripeness and standing challenges. In Ohio, the door to federal court would be closed until an actual prosecution was in the offing, even if many speakers would forego certain speech (including certain political advertising) out of fear the "false statements law" would be used against them.

Thankfully, the U.S. Supreme Court unanimously reversed the Sixth Circuit and reaffirmed the long line of case law recognizing that the barrier to challenging statutes that threaten First Amendment-protected speech is intentionally low so that political discourse is not chilled by overhanging uncertainty.

#### A Law Well Crafted for Mischief

Although the issue before the court was confined to standing, the underlying Ohio law presented a compelling example of how statutory schemes can infringe First Amendment rights. The Ohio statute prohibits certain "false statement[s] . . . during the course of any campaign for nomination or election to public office." It also prohibits any person from "mak[ing] a false statement concerning the voting record of a candidate or public official." Ohio Rev. Code Ann §3517.21(B). Any person may file a complaint

alleging a violation of the statute with the Ohio Elections Commission, which then makes a "probable cause" finding whether an alleged violation has occurred. Thus, in the nomenclature of Harry Potter, the Ohio Elections Commission serves as a "Ministry of Truth."

During the 2010 election cycle, Susan B. Anthony List ("SBA"), a pro-life advocacy organization, sought to display a billboard that would repeat a criticism it had already publicly proclaimed elsewhere. The billboard would say "Shame on Steve

Driehaus! Driehaus voted FOR taxpayer funded abortion." Congressman Driehaus vigorously disputed the SBA's logic, which was premised on the idea that a vote for Obamacare facilitated "taxpayer funded abortion" by expanding Medicaid programs and the availability of federal funds for abortion procedures.

Driehaus filed a complaint against the SBA with the Ohio Elections Commission alleging the SBA violated the law misrepresenting his voting record. After an expedited hearing, a panel voted 2-1 in Driehaus's favor, finding probable cause that a violation had been committed. Having made no headway on the planned billboard, the SBA filed *(Continued on page 11)* 

The SBA's cause drew a wide and varied set of amici concerned that an adverse decision would stifle their ability to challenge laws intended to chill their particular brand of free expression.

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suit in U.S. District Court challenging the constitutionality of the Ohio statute.

However, before the District Court could engage on the merits, Driehaus lost the election and withdrew his complaint before the Ohio Elections Commission. The SBA maintained its federal court action asserting that it intended to engage in "substantially similar" political activity in the future and faced the prospect of its speech rights "again being chilled and burdened."

The District Court dismissed the case (and a companion case) on the grounds that the action no longer presented a sufficiently concrete injury to meet standing or ripeness standards. Remarkably, the Sixth Circuit agreed, making the bizarre assertion that it was speculative to assert a person

would file a complaint with the Ohio Elections Commission in the future under the law notwithstanding the undisputed history of the case. The Sixth Circuit felt the past events were simply incapable of showing "an imminent threat of future prosecution," suggesting no anticipatory challenge would ever be ripe.

#### An Outcry from Amici

After the Supreme Court granted certiorari, the SBA's cause drew a wide and varied set of amici concerned that an adverse decision would stifle their ability to challenge laws intended to chill their particular brand of free expression.

Most notably, satirist P.J. O'Rourke filed an amicus brief in support of the SBA, noting that false political speech was an American tradition. O'Rourke gave a nod to the Supreme Court's recent decision in *United States v. Alvarez*, which protected certain false speech in striking down the Stolen Valor Act, thus leading O'Rourke to announce in his first footnote that "Amici and their counsel, family members, and pets have all won the Congressional Medal of Honor."

The Student Press Law Center filed an amicus brief asserting that generous standing and ripeness principles are vital to protecting student speech because students are especially susceptible to chilling effect of statutes and administrative rules as they are surrounded by authority figures that can impose discipline without the robust legal process available to ordinary citizens.

Various amici came from across the political and business spectrum to support SBA's position, including the Cato Institute, the ACLU, Citizens United, the Republican National Committee and the American Booksellers Association.

#### A Clear Win for Justiciability

In a unanimous opinion written by Justice Thomas, the Court firmly reversed the Sixth Circuit and remanded the case back to the District Court for decision. In particular, the Court emphasized that it had repeatedly allowed

> "preenforcement challenges" to laws restricting or criminalizing speech where the plaintiffs could allege "an actual and wellfounded fear that the law will be enforced against them."

> The Court found the SBA met that standard because its concerns were not "purely conjectural," but premised on its stated intent to "engage in substantially similar activity in the future," including in the form of additional challenges to candidates that endorsed Obamacare.

> Although the Opinion lacked the ringing language of the Court's other recent First Amendment decisions emphasizing the threat of a "chill" on speech, *Driehaus* falls

squarely into the line of precedent finding that First Amendment "preenforcement challenges" are justiciable even where the imminence of a prosecution is hard to define.

Tom Clyde is a partner with Kilpatrick Townsend & Stockton, LLP in Atlanta. Along with Frank D. LoMonte from the Student Press Law Center and Kilpatrick Townsend partners Adam H. Charnes and Richard D. Dietz, Tom represented the SPLC in filing its Amicus Brief. The SBA was represented by Michael A. Carvin, Jones Day, at the Supreme Court. Ohio State Solicitor Eric E. Murphy argued the case for the state defendants.

A full list of counsel and amicus briefs is <u>available</u> <u>online here</u>.

The Supreme Court unanimously reversed the Sixth Circuit and reaffirmed the long line of case law recognizing that the barrier to challenging statutes that threaten First Amendmentprotected speech is intentionally low.

#### MLRC MediaLawLetter

### Section 230 Protects Dirty.com Website Jury Verdict for ex-Cheerleader Vacated

#### By John C. Greiner

In what for legal circles is lightning fast time, the Sixth Circuit Court of Appeals vacated the jury verdict in Sarah Jones' case against thedirty.com. *Jones v. Dirty World Entertainment Recordings LLC*, No. 13-5946. The case was argued on May 1, and decided on June 16.

#### Background

Ms. Jones is a former Ben Gal cheerleader who sued thedirty for comments posted by third party commenters. The comments were vulgar, lewd and likely defamatory. But rather than determining the identity of the people who actually posted the comments, Ms. Jones

chose to sue thedirty.

Thedirty.com is a website that encourages readers to submit "dirt" on people. It's the site that broke the story on Anthony Weiner continuing to post sexually explicit messages while running for mayor <u>after</u> he'd been forced out of Congress for the same conduct.

Jones' decision not to pursue the

commenters made sense on some levels. First, it saved Ms. Jones the burden of figuring out who they were. Second, presumably, the website has a deeper pocket than the average poster. And third, thedirty.com and its owner/operator Nik Richie are not the most sympathetic defendants. Given Ms. Jones recovered a verdict that included a \$300,000 punitive damage award, her instincts were in some respects validated.

But the case all along had a nagging a problem – the law.

The federal Communications Decency Act expressly prohibits holding the website operator liable as the publisher of content supplied by third parties. Ms. Jones was able to convince the trial court judge that thedirty lost the CDA protection because it "encouraged" the submission of the offensive content and because it "ratified" the offensive content by adding its own comments after the postings.

The Court found that the website operator must make a "material contribution" to the

#### Sixth Circuit Decision

But much like an NFL official can reverse a ruling on the field, the Sixth Circuit threw out the verdict and ordered the trial court to award a judgment in favor of thedirty.

The Court found that the website operator must make a "material contribution" to the offensive content to be held liable for it. An example of a "material contribution" would be if the website required certain information to be included in the submitted material. An online housing site in California called Roommates.com for example, required users to list preferences for roommates, including whether they preferred a certain sexual orientation. In that case, because the site

required that information, it was not immune from a discrimination suit. By contrast, Craigslist, which allows users to state discriminatory preferences, but doesn't require it, retained its CDA immunity.

Here thedirty did not require users to provide any particular information. And so it didn't lose its CDA protection despite encouraging users to submit "dirt."

And thedirty didn't sacrifice its protection under the CDA by adding its own commentary. It's important to note that the commentary in itself wasn't actionable. But Ms. Jones argued that when read in context, the commentary "adopted" the offensive content in a way that made thedirty the "developer" of the third party material. But the Sixth Circuit found that an "adoption" theory did as much to undermine the CDA as did the "encouragement" theory. They are two sides of the same coin.

The holding in the Sarah Jones trial, if adopted, would have seriously undermined the broad immunity provided by the CDA. The Sixth Circuit decision not only prevented this result, it expressly noted that immunity determinations under the CDA should be determined at the early stage of litigation. And it indicated that an interlocutory appeal will be available to review the determination.

(Continued on page 13)

# contribution" to the offensive content.

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### **D.C. Circuit Issues Section 230 Decision**

All in all, June has been a good month for the CDA. Earlier this month, the D.C. Circuit affirmed the dismissal of a complaint against Facebook, finding that the CDA barred suit. <u>Klayman v. Zuckerberg and Facebook, Inc.</u>, No. 13-7017 (D.C. Cir. June 2014) (Tatel, Brown, Millett, JJ.).

Larry Klayman was upset by a page he discovered on Facebook called the "Third Palestinian Intifada," which called for an uprising to take place after the completion of Islamic prayers on May 15, 2011, and proclaimed that "Judgment Day will be brought upon us only once Muslims have killed all the Jews."

Although the complaint indicates that "after many days" Facebook took the page down, that did not suit Mr. Klayman, who sued Facebook and Mark Zuckerberg for his "reasonable apprehension of bodily harm."

The District Court granted the defendants' motion to dismiss, which Klayman appealed. Klayman did not seriously dispute that Facebook is an interactive computer service or that the offensive page was a third party posting. Klayman's primary contention was that Facebook and Zuckerberg did not qualify for CDA coverage because Facebook "can control the contents posted on [its] website." The court was unimpressed with this argument. As it noted, not only does the CDA not say anything of the sort, Section 230(c)(2) of the Act prohibits holding providers of interactive computer services liable for "any action voluntarily taken \* \* \* to restrict access to" content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A).

According to the court, "[i]t would make nonsense of the statute to say that interactive computer services must lack the capacity to police content when the Act expressly provides them with immunity for doing just that."

Two good results in one month, although the Klayman case is a better example of how courts should apply the CDA – swift dismissal on the law as early as possible. It's unfortunate that a jury had to waste its time on the Sarah Jones case.

John C. Greiner is a partner at Graydon Head & Richie in Cincinnati, OH. He filed a media amicus brief in support of the defendant in Jones v. Dirty World. Plaintiff was represented by Christopher Roach, Eric C. Deters & Partners, Independence, KY. Defendants were represented by David S. Gingras, Phoenix, AZ. In Klayman v. Zuckerberg, Larry Klayman represented himself. Defendants were represented by Craig S. Primis, Kirkland & Ellis, Washington, D.C.

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### New York Appellate Court Adopts "Endorsed or Intended" Threshold Test for Libel by Implication

#### By Laura R. Handman and Camille Calman

On May 29, 2014, a panel of the New York Supreme Court, Appellate Division, First Department resolved the "open question" posed two decades ago and issued the first decision by a New York appellate court to establish a standard for defamation by implication cases – a standard that has significant positive implications for media defendants. *Stepanov v. Dow Jones & Co., Inc.*, 2014 NY Slip Op 03940 (1st Dep't May 29, 2014).

In affirming the lower court's dismissal of a defamation lawsuit, the First Department held that, in order to state a claim for defamation by implication, a plaintiff must first

make a "rigorous showing" not only that the article in suit "as a whole can reasonably read to impart the defamatory inference," but also that the article "affirmatively suggest[s] that the author intended or endorsed that inference." This is a "threshold" question turning on "whether the plain language of the communication itself suggests that an inference was intended or endorsed," permitting an early resolution on a motion to dismiss of what has become a standard, but sometimes elusive, claim in the libel plaintiff's arsenal.

#### Background

On April 18, 2011, Barron's, America's premier financial weekly and a Dow Jones publication, published an article titled "Crime and Punishment in Putin's Russia," written by Bill Alpert. The article reported on a complaint sent to Swiss authorities (the "Hermitage Complaint") by British counsel for the defrauded hedge fund, Hermitage Capital Management Limited. The Hermitage Complaint alleged that Swiss bank accounts were used to launder the proceeds of the largest tax fraud in Russian history, which resulted in a fraudulently obtained tax refund of \$230 million, issued on Christmas Eve 2007. Bank records included in the Hermitage Complaint showed large money transfers flowing through shell corporations in late 2007 and early 2008 to accounts connected to Olga Stepanova, the Russian tax official whose Moscow tax bureau had approved the fraudulent refund, and her then-husband, Vladlen Stepanov. The Article said "the use of offshore shells to hide income and assets isn't, on its own, illegal," but queried whether Credit Suisse had complied with Swiss money-laundering reporting obligations regarding these transfers.

The Hermitage Complaint resulted from an investigation commissioned by William Browder, co-founder and chief executive of the hedge fund, Hermitage, the victim of the tax

> fraud. Hermitage's lawyer, Sergei Magnitsky, who was investigating the fraud, was arrested on charges of fraud and died at age 37 in prison, allegedly after being tortured by police, one of four deaths associated with this tax fraud. The tax fraud and its aftermath led directly to the United States Congress's passage of the Magnitsky Act, which sought to deny entry to the U.S. to Russian officials suspected of being responsible for Mr. Magnitsky's death. Adding insult to injury, Russia convicted Magnitsky post-mortem, and Browder in absentia, for purported tax evasion.

In the 3,047-word, forty-paragraph Article, only three paragraphs even mentioned plaintiffs Maxim A. Stepanov and the company he founded, Midland Consult (Cyprus) Ltd ("Midland Consult"). Nothing in the article stated or implied that they were complicit in, or even aware of, the alleged money laundering or the underlying alleged tax fraud. Rather, the article mentioned plaintiffs only in the truthful context that their business (which involves setting up and selling of shell corporations) had a connection to a New Zealand shell corporation, Bristoll Export, which had made one of the Swiss money transfers described in the Hermitage Complaint.

(Continued on page 15)

The First Department resolved the "open question" posed two decades ago and issued the first decision by a New York appellate court to establish a standard for defamation by implication cases.

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#### (Continued from page 14)

Several months after the article was published, plaintiffs wrote a letter demanding that Barron's remove the article from its website or delete any references to plaintiffs. Dow Jones declined to do so, but offered to correct a minor factual error in the Article. In March 2012, plaintiffs filed suit.

The complaint challenged four statements – two purportedly associating plaintiffs with the activities of another creator of shell companies, GT Group, which had raided by police and linked to illegal arms dealing and drug cartels ("GT Statements"); one about Midland Consult employees serving as directors of a shell corporation, Midland New Zealand, connected to Bristoll Export which had made suspicious transfers to the accounts identified in the

Hermitage Complaint ("Directors Statement"); and one identifying Maxim Stepanov as a former Russian diplomat ("Diplomat Statement").

Dow Jones moved to dismiss, arguing that no reasonable reader could find the article linked plaintiff with GT Group's activities simply because it mentioned that GT registered a shell company affiliated with plaintiffs; the Diplomat Statement was entirely true and incapable of defamatory meaning; the Directors Statement was substantially true, and the one mistake it contained (about which shell company was nested inside which other shell company) was trivial and had the same gist as the correct statement.

Dow Jones also argued that the statements were a fair report of the Hermitage Complaint and should be privileged under Section 74 of the New York Civil Rights Law. Plaintiffs, in contrast, argued that even if the article was factually correct, it created a false impression by placing plaintiffs in the context of an article about wrongdoing by others – particularly since two of the others shared plaintiff Stepanov's last name, and Dow Jones failed to mention that they were not related. According to plaintiffs, Dow Jones should also have given the timeline of <u>when</u> plaintiffs worked with GT Group (before the police raid); <u>when</u> Stepanov was a Russian diplomat (prior to the presidency of Vladimir Putin, who was named in the article's headline); and <u>when</u>

"We believe this rule strikes the appropriate balance between a plaintiff's right to recover in tort for statements that defame by implication and a defendant's First Amendment right protection for publishing substantially truthful statements."

plaintiffs' employees were affiliated with Bristoll Export (prior to the money transfer at issue in the article).

Justice Ellen M. Coin granted DJ's motion to dismiss on the grounds that the challenged statements were either not of and concerning, not defamatory, or not false. Adopting the standard suggested by defendant, Justice Coin found that nothing on the face of the article suggested that the author intended or endorsed the inferences of which plaintiff complained. Justice Coin also found section 74 did not apply because the Hermitage Complaint was made to a foreign entity.

Plaintiffs appealed Justice Coin's decision to the First Department. The parties' argument on appeal reflected their arguments below; plaintiffs argued that, read as a whole, the

> article defamed them by associating them with wrongdoing and failed to cite to facts that would have made clear to readers that plaintiffs did not belong in the article at all. Dow Jones argued that the implications that defendants purported to find in the article simply were not there and that nothing on the article's face suggested that those implications were intended or endorsed.

#### The First Department's Decision

The First Department began its decision by citing to *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 381 (1995), in which the Court of Appeals stated that the choice of which test to apply to claims of defamation

by implication must "await another day." That day, announced the First Department, "has finally come."

Associate Justice Paul Feinman, writing for a unanimous court, first found that there was no express defamation, because plaintiffs' claims were "based on substantially true statements that are not reasonably susceptible of defamatory connotations." In particular, the corruption in the article described Russian police and tax officials, not diplomats, so describing Stepanov as a former Russian diplomat was not defamatory even in the context of the article's headline.

The court then turned to defamation by implication, noting that the trial court had adopted the approach taken by (Continued on page 16)

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the U.S. District Court for the Southern District of New York in *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 463-67 (S.D.N.Y. 2012), as well as cases in the Fourth Circuit, the D.C. Circuit, and a New York Supreme Court case affirmed by the First Department. The court examined the test endorsed by plaintiffs, which did not require a showing that the defendant intended or endorsed a defamatory inference.

Plaintiffs had argued that they were not public figures and therefore should not be required to show what the author intended or endorsed. The court pointed out that plaintiffs were conflating actual malice – a subjective standard about what the author believed at the time of publication – with the "intended or endorsed" test, an "objective" standard based on "the plain language of the communication

itself."

New York courts had previously indicated that proof that the author intended or endorsed the implication was required on summary judgment at the fault stage, even for gross irresponsibility. *See, e.g., Chaiken v. W Publishing Corp.*, 907 F. Supp. 689 (S.D.N.Y. 1995), *aff'd*, 119 F.3d 1018 (2d Cir. 1997); *McCormack v. County of Westchester*, 731 N.Y.S. 2d 58 (2d Dept. 2001). The "threshold" "objective" test was in addition to and in advance of the fault requirement and can properly be raised on a motion to dismiss looking at the publication on its face.

The court adopted the objective

"endorsed or intended" standard, saying, "We believe this rule strikes the appropriate balance between a plaintiff's right to recover in tort for statements that defame by implication and a defendant's First Amendment right protection for publishing substantially truthful statements" (citing *Armstrong*, 85 N.Y.2d at 381).

The court agreed that the "minor omission of the timeline" as to when employees of Midland Consult served as directors did not lead to an implication that Midland had a direct connection to the suspicious wire transfer that had occurred earlier.

reveal that plaintiffs had no place in the article; the point of mentioning plaintiffs, the court noted, was because a number of risk factors identified by experts in the article as associated with suspicious transactions that could trigger the obligation to report to regulators by the bank, were present here, as set forth in the Hermitage Complaint.

Nor did the court believe that adding the timeline would

That Stepanov was a former Russian diplomat was associated with a risk factor – "politically connected individuals" – and that Midland Consult was located in Cyprus – a "high risk jurisdiction" – were both relevant. Finally, the court noted that there was no reasonable reading of the article that imparts the inference that plaintiff Stepanov was related to Olga Stepanova and her husband – particularly

> since the plaintiffs had acknowledged that the name Stepanov in Russia is as common as Smith in the United States.

#### **Current Status**

On June 17, 2014, the same plaintiffs lost their appeal in the Court of Special Appeals of Maryland which affirmed dismissal of a very similar libel claim against the Journalism Development Network, Inc., a non-profit dedicated to investigative journalist. (See accompanying article in this issue of the *MediaLawLetter*). The plaintiffs' time to appeal the New York decision has not yet run at the time of this writing, and so we do not know if plaintiffs

plan to seek leave to appeal from the Court of Appeals.

A decision from New York's highest court that the "intended or endorsed" test applies as a threshold matter on a motion to dismiss based on the language of the publication, would be an invaluable tool for the media defense bar.

Laura R. Handman and Camille Calman of Davis Wright Tremaine LLP, and Jason P. Conti, Senior Vice President and Deputy General Counsel, represent Dow Jones & Co. Maxim Stepanov and Midland Consult (Cyprus) Ltd. are represented by Steven Skulnik of Ganfer & Shore, LLP and Josh N. Bennett and Ilena Alvarez of The Law Firm of Josh N. Bennett, Esq., P.A.

"We believe this rule strikes the appropriate balance between a plaintiff's right to recover in tort for statements that defame by implication and a defendant's First Amendment right protection for publishing substantially truthful statements."

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### **Court Affirms Dismissal of Defamation Claims By Former Russian Official and His Company** *Plaintiff Sued Journalism Non-Profit*

#### By Mara J. Gassmann

A unanimous panel of the Court of Special Appeals of Maryland affirmed the dismissal of all claims against Journalism Development Network, Inc. ("JDN") brought by Midland Consult (Cyprus) Ltd. ("Midland Consult") and its founder Maxim Stepanov ("Stepanov"), a Russian citizen and former government official. *See <u>Stepanov v. Journalism Dev.</u>* <u>Network, Inc.</u>, No. 0878 September Term 2013 (Md. Ct. Spec. App. June 17, 2014).

Midland Consult and Stepanov each asserted a claim for defamation arising from a series of articles published by the Organized Crime and Reporting Project ("OCCRP"), a program of JDN, a Maryland not-for-profit. In affirming the circuit court's dismissal of the complaint, the Court held that the articles, which reported on a system of international money laundering used by organized crime, including how appellants factored into that system, were not capable of a defamatory meaning and that Stepanov had no personal cause of action arising from the articles.

#### **Background and Lower Court Proceedings**

Organized under the laws of Cyprus, Midland Consult is a registration agent in the business of incorporating and maintaining companies in various jurisdictions until such time as its clients purchase these companies off the "shelf." JDN administers OCCRP, an online investigative news reporting organization supported by a network of correspondents located throughout Eastern Europe and Central Asia whose mission is to produce news reports and assemble public records pertaining to organized crime and corruption.

Consistent with this mission, OCCRP published a series of articles on its website, www.reportingproject.net, that reported on the methods by which organized crime launders money throughout the world. These articles discussed what OCCRP described as the "criminal services industry" – the people and businesses whose lawful acts facilitate organized crime – and the ways in which organized crime relies on these industries, including the roles played in that system by banks, lawyers and company registration agents.

The four articles challenged in appellants' complaint described several money laundering schemes, including the off-shore companies used in those schemes, accurately reporting that Midland Consult had originally formed certain of the identified companies and referencing Stepanov as the owner of Midland Consult and affiliated entities.

Midland Consult and Stepanov filed suit, arguing that the articles accused them of criminal acts. The circuit court, however, granted JDN's motion to dismiss. It held that the articles, which contained indisputably accurate reporting, at most left open the question whether registration agents knowingly or unknowingly facilitated money laundering, and therefore were not reasonably capable of bearing the defamatory implication plaintiffs alleged. Nor did the articles support the necessary conclusion that JDN intended to convey any such implication. The circuit court concluded further that Stepanov had no independent cause of action because the challenged statements were not "of and concerning" him individually.

Midland Consult and Stepanov argued on appeal that the circuit court had erred because the articles, by reporting the appellants' associations with companies suspected of laundering money and by using words that appellants believed conveyed purposeful involvement in criminal activities, were defamatory of them.

JDN responded that the circuit court had correctly determined that the articles as a whole could not support the interpretation appellants ascribed to them, that nothing on the face of the articles suggested that JDN had intended or endorsed a defamatory interpretation, and that Stepanov could not state a claim, in any event. And although Midland Consult and Stepanov had asserted throughout the litigation that the articles were "false," JDN emphasized that at no point did the appellants dispute the accuracy of any single particular fact it had reported.

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#### **Court of Special Appeals Decision**

Following a close review of the four articles, the appellate court affirmed dismissal on the grounds that the articles were incapable of a defamatory meaning as to either appellant. Observing that the published facts were not in dispute and adopting the circuit court's "apt" analysis of the articles, the Court observed that JDN "'never reported that the [appellants] were *knowingly* involved in the crimes or that they *knowingly conspired* with the purchasers to commit the crimes." Op. at 9-10 (quoting 41 Media L. Rep. 2294 (Md. Cir. June 6, 2013)) (emphasis in original).

The Court rejected appellants' effort to take words and phrases out of the context of the articles, which had twice quoted a Midland Consult representative's denial that the company knowingly participated in criminal activity. When read as a whole, the Court concluded, the articles could not support the defamatory interpretation that appellants sought to impose on them.

With respect to Stepanov's claim, the Court noted as a matter of law that he had no separate cause of action as Midland Consult's owner, and it rejected his contention that references to "Stepanov's network" in the article defamed him. Although the word "network" carried multiple meanings at different points in the articles, and at one point was used to refer to the money-laundering network, the Court read the phrase "Stepanov's network" in context and found it imparted a clearly non-defamatory connotation: that Stepanov owned a network of registration companies.

The Court did not address the applicability of Maryland's fair report privilege to a private party's complaint to a foreign government prior to any government action, which the circuit court, in a brief discussion, had held was not an official proceeding covered by the privilege.

This Court is the second to affirm dismissal of a case filed in the United States by these appellants against journalists reporting on Midland Consult's connections to suspected money launderers. *See Stepanov v. Dow Jones & Co.*, No. 11593, 2014 WL 2208921 (N.Y. App. May 29, 2014).

JDN was represented by Jay Ward Brown, Michael D. Sullivan and Mara J. Gassmann of Levine Sullivan Koch & Schulz, LLP. Appellants were represented by Neal C. Baroody of Baroody & O'Toole and Ilena Alvarez of I.A. Law, P.A.



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### **New Jersey Federal Court Dismisses Defamation Case Over Movie** Film Not "Of and Concerning" Plaintiffs

The New Jersey District Court recently dismissed a defamation claim by members of the Ramapough Native American group against the producers of the movie "Out of the Furnace." DeGroat v. Cooper, No. 2:13-07779 (D.N.J. May 14, 2014) (Walls, J.). The court held that allegedly

defamatory statements in the movie were not "of and concerning" the A related negligent plaintiffs. infliction of emotional distress claim was also dismissed on the same grounds.

#### Background

The movie "Out of the Furnace" was released in December 2013. The movie features a violent gang leader named Harlan DeGroat who leads his group, known as the Jackson Whites, in the Ramapo Mountain region in New Jersey. DeGroat and his community are depicted, according to plaintiffs, as "lawless, drug addicted, impoverished, and violent," and are at several points in the film referred to as being "inbred."

Plaintiffs are members of the Ramapough Lunape Nation, a Native American ethnic group. They stated that many Ramapough live in the area in which the movie takes place, that the Ramapough have been referred to with the derogatory label "Jackson

Whites," and that they have been regarded as "inbred."

Additionally, Plaintiffs noted that ATVs, which are used as transportation by the fictional gang, are a common form of transportation among the Ramapough people, and that the surnames DeGroat and Van Dunk, both used in the film for characters in the gang, are common surnames of the

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Plaintiffs argued that the 'group libel doctrine' would allow their claim to stand if "it might be reasonable to conclude that a statement made concerning the group concerns each member of that group as an individual."

as the Ramapoughs." Sharing a surname and ethnicity with the character in the movie does not suffice to show that the alleged defamatory statements are "of and concerning" the plaintiffs, Judge Walls ruled.

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Ramapoughs. All of this, plaintiffs claimed, adds up to create a "ready association" between the plaintiffs and the movie. Because they are "easily recognizable" as the characters in the movie, and the characters are portrayed as violent criminals, the plaintiffs claimed the movie put them in a false

light and defamed them.

Defendants moved to dismiss the complaint for failure to state a claim.

#### **Defamation and False Light Claim**

The court first noted that the laws of New York, New Jersey, Tennessee, and California might all apply to the case; however, each state has the same law with regard to the dispositive "of and concerning" doctrine and therefore it was unnecessary to decide which state law governed.

All four states require that the alleged defamatory statements be "of and concerning" the specific plaintiffs. "It is plain that the 'of and concerning' requirement is not met in this case," Judge Walls wrote. "Plaintiffs plead only that some of them share the same surname, but not first name, as two of the characters in the movie. They also contend that they are Ramapoughs, as are the characters in the movie, and that many of them live in the same region



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Plaintiffs argued that the 'group libel doctrine' would allow their claim to stand if "it might be reasonable to conclude that a statement made concerning the group concerns each member of that group as an individual." But Judge Walls rejected that reasoning, noting that the plaintiffs had already conceded that they are not actually portrayed in the movie.

"Plaintiffs' admission that they, in fact, are not portrayed, with the logical corollary that the statements do not concern them, makes the exception to the group libel theory inapplicable as a matter of law," Judge Walls wrote. "This is because they have conceded that what the exception is meant to establish is in fact not the case."

#### **Negligent Infliction of Emotional Distress**

Because the defamation claim was dismissed, and because the emotional distress claim was based on the same conduct as the defamation claim, it failed as a matter of law. This result was also consistent with the law in New York, New Jersey, and California, Judge Walls wrote. Though Tennessee has yet to decide on the rule, the Constitution requires it, and the court found in the alternative that the defamation claims could not survive as a matter of federal constitutional law, thus leading to the dismissal of the complaint in its entirety, with prejudice.

Plaintiffs were represented by Lydia B. Cotz of Ramsey, NJ. Defendants were represented by Mark D. Marino of Kirkpatrick & Lockhart Preston Gates Ellis, Newark, NJ.

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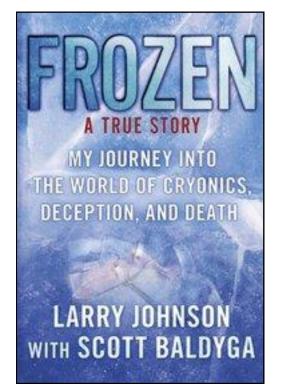
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### Book Publisher Wins Summary Judgment in Libel Suit by Cryonics Company No Evidence of Actual Malice

An expose about a cryonics company and its unorthodox practice of freezing decapitated human heads for future reanimation was published without actual malice. <u>*Alcor Life Extension Foundation v. Johnson,*</u> No. 113938/2009 (N.Y. Sup. May 1, 2014).

The court held that the publisher had no reason to believe that the allegations in the book were false or that



The court held that the publisher had no reason believe that the allegations in the book were false or that the authors were unreliable. the authors were unreliable. Moreover, the book was fact checked, legally vetted, and edited by a publishing professional. Plaintiff also sued the publisher for "aiding and abetting" an alleged breach of fiduciary duty by a co-author. But this claim could not survive when the underlying defamation claim failed.

At issue was the book "Frozen: A True Story, My Journey Into the World of Cryonics, Deception and Death" published by Vanguard Press in 2009. The book was written by Larry Johnson, a former employee of the Alcor Life Extension Foundation, with Scott Baldyga. The book was based on Johnson's eight months working at the company and was billed as a view into the "nightmare world of scandalous controversy, gruesome practices, and deadly secrets." Among other things, the book reported that Alcor employees used the head of baseball legend Ted Williams for batting practice.

Alcor sued Vanguard and the authors alleging that over 30 statements in the book were false and defamatory. The claims against Johnson were settled.

On the motion for summary judgment by the publisher and co-author Scott Baldyga, the court held that Alcor was a public figure for purposes of the lawsuit. The court noted that

Alcor has been the subject of media attention for more than 20 years for its controversial work in cryogenics. And Alcor failed to provide evidence of actual malice. Notably, allegations that Johnson stole company documents and breached his fiduciary duty to Alcor did not make him unreliable. The court noted that whistleblowers "are often guilty of theft of employer information (or other serious infractions," but the information that becomes public "does not thereby become unreliable."

Vanguard Press was represented by Miller Korzenik & Sommers LLP, New York.

### **Colorado Jury Defamation Verdict Reversed** *Obscure Literary Reference Not Defamatory*

In an interesting non-media defamation case, a Colorado appellate court held that a reference to a 19<sup>th</sup> Century poetic drama was not a statement of fact that could be defamatory per se. <u>Zeuger v. Goss</u>, No. 12CA2000 (Colo. App. May 8, 2014). In addition, the court held that a general jury verdict based on several statements had to be reversed because "a verdict possibly based on a statement that is not defamatory per se cannot stand."

The case grew out of a dispute between the plaintiff art dealer and defendant, the representative of an artist's estate. The defendant accused plaintiff of selling unauthorized reproductions and, among other things, wrote online that "The company is comparable to the 'Man in Black' for Mozart."

The "Man in Black" referred to a character who kills Mozart in Alexander Pushkin's 1830 play "Mozart and Salieri." Plaintiff alleged the reference implied he killed Earl Biss, the artist whose work was the subject of dispute between the parties. The trial court ruled that the reference was defamatory per se. On appeal, plaintiff argued that the audience of sophisticated art connoisseurs understood the reference and its defamatory nature.

The Colorado appellate court disagreed. First, even if the audience understood the literary reference "to say that plaintiffs are 'comparable' to a literary character cannot reasonably be understood as an assertion that they were responsible for killing Biss."

Since it was impossible to know from the record if the jury verdict was based on this statement, the case had to be reversed and remanded for a new trial. "The better practice," the court noted, "would have been to include a special verdict form requiring the jury to indicate which of the statements it relied upon in reaching its verdict."

Plaintiff was represented by Glenn W. Merrick, G.W. Merrick & Associates, LLC, Greenwood Village, CO. Defendant was represented by John H. Case, Aspen, CO.

### **MLRC UPCOMING EVENTS**

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

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

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

MLRC/Southwestern Entertainment and Media Law Conference January 15, 2015 | Los Angeles, CA

### NY Decision Protects Author's Speculation on Paternity as Opinion Based on Disclosed Facts

#### By Robert Balin and Samuel Bayard

A recent decision by the New York County Supreme Court reaffirms the longstanding principle under New York law and the First Amendment that an author's speculation about a factual matter constitutes protected opinion when the grounds for that opinion are set forth.

In a case with colorful and unusual facts, Justice Shlomo Hagler issued a thoughtful decision that safeguards the rights of authors, publishers, and other content creators to speculate on the fundamental mysteries of life. If you've perhaps suspected that the answer to the question "Who's your daddy?" isn't always so black and white, here's your citation to back it up: <u>Oleniak v. Slaton</u>, No. 153239/2013 (Sup. Ct. N. Y. Cty. May 23, 2014).

#### Background

Pam Slaton is an "investigative genealogist" who helps adoptees search for their biological parents. An adoptee herself, Ms. Slaton runs her own investigative agency and was featured in the TV show "Searching For..." on Oprah Winfrey's OWN Network. Slaton and her co-author Samantha Marshall also wrote *Reunited: An Investigative Genealogist Unlocks Some of Life's Great Mysteries*, which was published by St. Martin's Press in 2012.

In part, the book recounts several of Ms. Slaton's cases, in which she has helped adoptees, including Run DMC's Darryl McDaniels, find their birth parents. But *Reunited* is also an autobiography, tracing Slaton's personal search for her own birth parents. As recounted in the book, when Ms. Slaton finally locates her birth mother (identified as "Priscilla"), Priscilla wants nothing to do with Ms. Slaton and makes the horrifying claim that Ms. Slaton is the product of incest.

Much of the personal narrative in the book revolves around Ms. Slaton's attempt to disprove this hurtful allegation, though Ms. Slaton informs readers that she cannot conclusively rule out this possible explanation of who her father may be. But Ms. Slaton nonetheless keeps searching,

The Oleniak decision strongly reaffirms that speculation about murky events will receive full protection as opinion so long as the basis for that speculation is set forth.

and the book follows along as she tracks down a Bronx man identified as "Vinnie," who is "presumed to be [her] father" in adoption agency records.

Chapter Eight of *Reunited* chronicles Ms. Slaton's relationship with Vinnie (known to his friends as "Big Vinnie") and her developing personal views on whether or not he is her biological father. Slaton has sporadic contact with Vinnie for a decade, alternately charmed by his personality and repelled by his "creepy and cavalier" comments.

Plagued by "nagging doubt" as to whether Vinnie is her father, Ms. Slaton eventually arranges DNA testing in an effort to "know once and for all if Vinnie was [her] biological father." The book describes how, after the DNA tests prove

> "inconclusive," Slaton has an epiphany. Feeling herself growing closer to Vinnie emotionally in the wake of her adopted mother's death, Slaton concludes that she does not "need the scientific evidence" to achieve closure and "feels," with "every pore of [her] being," that Vinnie "must be" her biological father. The chapter ends with Slaton full of warmth and affection for Vinnie, the man she believes to be her father.

> And then "Vinnie" sued. In April 2013, plaintiff Vincent Oleniak instituted a libel action against Slaton, her co-author Marshall

and the publisher of *Reunited* in New York State Supreme Court, New York County. In his complaint, Oleniak alleges that *Reunited* falsely accuses him of being Slaton's father and of acknowledging his paternity.

Oleniak admits in the complaint that he indeed had an unmarried sexual relationship with Slaton's biological mother and had a child (Vinnie Jr.) from an out-of-wedlock relationship with another woman, but asserts that he is not Slaton's father and has consistently told her so since they first met. The complaint also alleges that the book falsely accuses Oleniak of "sexual promiscuity and misconduct" by labelling him a "Lothario" and "player" who "kept an old shoe box... full of pictures...of various women."

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The defendants filed a pre-answer motion to dismiss the complaint, arguing, among other things, that (1) the statements in *Reunited* expressing Slaton's belief that Vinnie is her biological father are non-actionable opinion based on disclosed facts; and (2) that referring to Vinnie as a "Lothario" and "player" was not defamatory and was likewise opinion.

(As an alternative ground for dismissal of the paternity statements, defendants also argued that, given changes in

social mores, it should no longer be deemed defamatory under New York law to state that a man has fathered a child as part of a monogamous, nonmarital relationship. Cf. Freedlander v. Edens Broad., 734 F. Supp. 221, 227 (E.D. Va. 1990) ("cohabitation, in the context of today's social mores, cannot be said to be behavior involving moral depravity or deviation"). Because Justice Hagler dismissed the complaint on opinion grounds, he did not reach this issue of first impression, which will have to await another day for resolution.)

#### The Court's Ruling

Justice Hagler granted defendants' motion to dismiss in its entirety, holding that Ms. Slaton's statements about Vinnie's paternity were non-actionable opinion. The court started from the bedrock principle that, under New York

law, courts must examine statements in their overall context and may not "sift[] through a communication for the purpose of isolating and identifying assertions of fact." Applying this principle, Justice Hagler concluded that a reasonable reader would understand that Slaton does not know for sure who her father is, and that the book expresses her speculation on her own parentage based on emotional factors disclosed to the reader.

Looking at the overall context of the statements, the court found that "the autobiographical nature of the book" weighed in favor of a finding of opinion. In support, the court cited language from *Goetz v. Kunstler*, 164 Misc. 2d 557 (Sup. Ct.,

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Pam Slaton is an "investigative genealogist" who helps adoptees search for their biological parents.

N.Y. Cty. 1995), suggesting that autobiographies are written from "a subjective . . . point of view and do not purport to be anything else." The court further observed that, throughout the book, Slaton repeatedly informs readers that she is relying on her "gut," "instincts," and "intuition" in forming opinions and pursuing her cases.

Turning to the specific content regarding Vinnie, Justice Hagler noted that the central mystery of the book – whether Slaton is the product of incest or Vinnie's daughter – is never resolved. "Given that Slaton left open the possibility that

> Slaton's grandfather was her father, it is quite clear that the authors in the Book could not have stated that plaintiff was Slaton's father as an assertion of fact."

> In this regard, the court likened the case to Levin v. McPhee, 119 F.3d 189 (2d Cir. 1997), where the Second Circuit held that conflicting and contradictory accounts of "what either did or might have happened" in a fatal Moscow apartment fire constituted "opinion based on speculation without any implication of fact." In holding Ms. Slaton's speculation about her paternity to be non-actionable opinion, the court also found important that Slaton expressly disclaimed reliance on DNA evidence: "[I]t is clear from the Book that the DNA tests did not confirm plaintiff's paternity, and that Slaton was not relying on conclusive, scientific evidence. To the contrary, anv suggestion of paternity is based upon [Slaton's] opinion and her feelings, and

not on assertions of fact."

The court also rejected Oleniak's argument that the book was actionable because it falsely accused him of making specific statements acknowledging his paternity. For example, the book states that Vinnie, in his initial meeting with Slaton, "acknowledged [Slaton] as his biological daughter." The book also states that, when Slaton first got Vinnie on the phone, he said "I know who you are. You are my daughter. You were born on my birthday." While the complaint claimed these statements were false, Justice Hagler

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explained that these allegedly false statements did not undermine the defendants' opinion defense for two reasons.

First, Justice Hager noted that, later in the book chapter, the authors "recorded that plaintiff effectively disavowed his prior paternity acknowledgement." In other words, the court recognized that statements must be placed in context temporally as a story develops—with a statement's meaning necessarily affected by its broader context. This reasoning could be particularly helpful to publishers and other content creators who trace the history of investigations, where different information comes to light at different times along the way.

Second, Justice Hagler found that Slaton made sufficiently clear to readers that these purported acknowledgments of paternity by Vinnie were not the basis for her opinion. Instead, the book disclosed a number of subjective and emotional factors that formed the basis of Slaton's view that Vinnie is her birth father: (1) Vinnie and Slaton "share the same warped sense of humor"; (2) they "have the same no-BS style" and "don't pull any punches"; (3) Vinnie has "grown on [her]" through his nurturing behavior; (4) Vinnie was there when she was born; (5) Vinnie's wavy hair resembles her son's; and (6) Vinnie "is all about feeding the ones he loves."

The court thus concluded that Ms. Slaton's hypothesis about Vinnie's paternity "is accompanied by a recitation of the facts on which it was based,' including Slaton's disavowal of scientific DNA evidence, and, therefore, her hypothesis 'is readily understood by the audience as [nonactionable] conjecture." Justice Hagler accordingly found that the paternity statements constituted pure opinion.

Last, the court also dismissed Oleniak's claim that the book falsely accuses him of being promiscuous. Justice Hagler emphasized that, other than statements identifying Oleniak's two extramarital relationships (which Oleniak does *not* deny), the book contains no "specific references to promiscuity or sexual misconduct" by Vinnie. In this regard, the court ruled that "vague and/or ambiguous" statements about generalized "unchaste behavior" are not defamatory under New York law. The court accordingly held that the statements in the book that Vinnie was a "Lothario" who "never married," had "an old shoe box…full of pictures…of various women," and "was such a player" were not sufficiently specific to be defamatory and, in any event, constituted "subjective and speculative opinions."

The *Oleniak* decision strongly reaffirms that speculation about murky events—even events as inherently factual (and potentially verifiable) as one's parentage—will receive full protection as opinion so long as the basis for that speculation is set forth. And for authors, publishers and creators of autobiographies and docudramas that is welcome news indeed. Oleniak has filed a notice of appeal, so New York's Appellate Division, First Department will have a chance to weigh in on the topic soon.

Robert Balin and Samuel Bayard of Davis Wright Tremaine LLP, New York, represented defendants Pamela Slaton, Samantha Marshall, Holtzbrinck Publishers, LLC, Macmillan Publishers, Inc., and St. Martin's Press, LLC. Plaintiff Vincent Oleniak was represented by Anthony Elia of Miller Mayer, LLP, Ithaca, NY.



### **Texas Broadcaster Wins Anti-SLAPP Motion** Statute Applies in Federal Court

#### **By Catherine Robb**

In a recent case in the Southern District of Texas, a federal court in Texas for the first time explicitly found that the Texas Anti-SLAPP statute applies in federal court. *Williams v. Cordillera Communications, Inc., et al, No. 2:13-CV-124 (June 11, 2014).* 

#### Background

A Corpus Christi television station KRIS ran a series of stories about a (now) former high school teacher and coach, Christopher Williams, who had been accused over the years of offenses of a "sexual nature" and of inappropriate behavior with female students. The plaintiff teacher initially sued KRIS in state court for defamation based on a series of 2013

broadcasts that discussed charges brought against the plaintiff for telephone harassment and allegations of illegal exposure.

As the case progressed and additional information about the plaintiff teacher came to light, KRIS then broadcast a number of follow–up stories, including allegations that the plaintiff had been accused of inappropriate contact with two different female students at two different schools at which he taught.

KRIS' 2014 broadcasts focused on this troubling matter of public concern – that, despite years of allegations (and, in some instances charges) of inappropriate conduct and after leaving a number of teaching positions due to the allegations, – the plaintiff continued to get hired at other Texas schools or districts. After KRIS ran the 2014 stories, the plaintiff amended his complaint to include additional allegations of defamation based on the 2104 broadcasts.

Because an anti-SLAPP motion had not previously been filed (by KRIS' prior counsel) with regard to the 2013 claims, KRIS filed a motion for summary judgment on the initial claims (for the 2013 broadcasts) and an anti-SLAPP motion on the amended claims (for the 2014 broadcasts). The plaintiff also filed a motion for partial summary judgment. KRIS moved for summary judgment on the grounds that the statements were true or substantially true, were privileged pursuant to the fair report/comment privilege, and that plaintiff was a public figure and could not demonstrate actual malice.

KRIS' anti-SLAPP motion, concerning the 2014 broadcasts, also argued for substantial truth, privilege, and lack of actual malice, and that plaintiff could not establish a prima facie case. In response, the plaintiff argued that the anti-SLAPP statute did not apply in federal court, that the anti -SLAPP statute was not timely because it was filed over a year after the initial complaint was filed (although within the 60 day deadline from the amended complaint), and that the court could not consider the majority of KRIS' evidence because it was not in the form of pleadings or affidavits.

Plaintiff also argued that he had met his burden under the statute.

**District Court Decision** 

After an oral hearing on all motions, the court granted KRIS' motion for partial summary judgment and denied plaintiff's motion for partial summary judgment. On that same day, the court also entered an order granting KRIS' Anti-SLAPP motion and

requesting that the parties set a hearing on the recovery of costs, fees, and expenses for the Anti-SLAPP Motion.

In granting KRIS' partial summary judgment motion, the court found that the complained of statements – that plaintiff "pled to a lesser charge" and "had one conviction" for an incident "of a sexual nature" (telephone harassment) – were substantially true and no more harmful than the truth, despite the fact that plaintiff had technically not "pled" to the charge, but had entered a deferred prosecution agreement that included a confession of guilt. (Plaintiff had also orally confessed to the crime to the police on tape.)

The court also found that the plaintiff has been connected to alleged indecent exposure cases in 2008 (as alleged in KRIS' broadcast) and that the fact that the plaintiff had had (Continued on page 27)

A federal court in Texas for the first time explicitly found that the Texas Anti-SLAPP statute applies in federal court.

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the official records of the indecent exposure charge expunged (assuming he had done so, as there was no evidence to support the assertion) did not render false the evidence of the underlying charges that were reported by KRIS. Finally, relying on the evidence before the court, including the broadcasts themselves and affidavit testimony of KRIS employees, the court also found that the statements were privileged as a fair report/fair comment made in good faith.

#### **Anti-SLAPP** Analysis

In finding that the Texas Anti-SLAPP statute applies in federal courts sitting in diversity jurisdiction, the court analyzed the statute under the *Erie* Doctrine and found that, while there are procedural aspects to it, such as its time constraints and a stay of discovery, the statute's procedures are "designed to prevent substantive consequences--the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit under state law regarding defamation."

The court also looked to the statute in denying plaintiff's objection to the timeliness of the motion, noting that a "legal action" is clearly defined in the statute as, "a lawsuit, cause of action, petition, complaint cross-claim, or counter-claim or any other judicial pleading or filing that requests legal or equitable relief" (citing TCPA § 27.001(6)) and finding that the statute "contemplates additional pleadings and additional causes of action that may arise during the progress of the

case" – such as an amended complaint that adds new causes of action.

In response to plaintiff's argument that the court could not consider the majority of KRIS' evidence because it was in forms other than pleadings and affidavits, the court found that plaintiff's argument "was not supported by authority and is contrary to the full import of §27.006," which allows for targeted discovery relevant to the motion and which would produce "other types of evidence such as deposition testimony, admissions, and documents produced through requests of production an or subpoenas duces tecum."

The court also found that the anti-SLAPP statute applied to the case because KRIS' reporting on the school districts' continued hiring of the plaintiff amid allegations of wrongdoing was about "health and safety, community wellbeing, and... the government" and constituted reporting on a matter of public concern, regardless of whether the plaintiff was a public figure.

Finally, again looking at the broadcasts and the evidence of substantial truth presented to the court, the court found that plaintiff did not satisfy "his TCPA burden of showing clear and specific evidence that the reports were materially false and defamatory" and dismissed with prejudice all of plaintiff's remaining claims.

Laura Prather, Catherine Robb, Tom Williams, and Alicia Calzada of Haynes & Boone LLP, Austin, TX, represented KRIS. Plaintiff was represented by Jon D Brooks, Brooks LLP, Corpus Christi, TX.

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### **Oklahoma Enacts New Anti-Slapp Statute** *Revised Law Modeled After Texas's Broad Statute*

#### By S. Douglas Dodd

On April 22, 2014, Oklahoma Governor Mary Fallin signed the state's <u>new anti-SLAPP legislation</u> into law. The law, called the Oklahoma Citizens Participation Act, is modeled after and virtually duplicates the Texas Citizens Participation Act, which was enacted in 2011.

For several years the Oklahoma Press Association (OPA) has quietly urged adoption of an anti-SLAPP statute without any positive results. In 2014, the bill was introduced by three members of the Oklahoma House and one Oklahoma State Senator. While it was not introduced as a pro-press or pro-media bill, it was followed closely and quietly by the OPA. There was no aggressive or even visible lobbying. No citizens groups testified. There was no pro-bill newspaper editorial campaign. The movement of the bill through the 2014 legislature was very quiet. The sponsoring legislator explained the purpose of the bill to his colleagues. The OPA talked to a couple of friendly legislators on each committee and provided information concerning which they could ask friendly questions. The OPA Executive Vice President was available in case any prickly questions came up, but they never did. The bill was considered by many to be a tort reform bill since it discourages the filing of frivolous lawsuits.

Oklahoma's <u>Citizens Participation Act</u> seems to have all the right stuff for an anti-SLAPP law. It provides that "if a legal action is based on, relates to or is in response to a party's exercise of the right of free speech, right to petition or right of association, that party may file a motion to dismiss the legal action." The law requires that a motion to dismiss under the Act shall be filed within sixty (60) days after service of the legal action. The law suspends all discovery until the court has ruled on the motion to dismiss. It also requires a hearing on the motion to dismiss within sixty (60) days after service of the motion, but allows the hearing to be deferred for up to an additional thirty (30) days based on docket conditions of the court, a showing of good cause, or by agreement of the parties.

While it was not introduced as a propress or pro-media bill, it was followed closely and quietly by the OPA. There was no aggressive or even visible lobbying.

Under the new law, the court, on its own motion and on a showing of good

cause, may allow specified and limited discovery relevant to the motion to dismiss. The timing of the motion to dismiss hearing may be extended by the court to permit the limited discovery. Even with limited discovery, the motion to dismiss hearing must occur within one hundred twenty (120) days after service of the motion to dismiss.

Oklahoma's anti-SLAPP law requires that "a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to or is in response to the party's exercise of 1) The right of free speech; 2) The right to petition; or 3) The right of association." The only exclusion from this directed dismissal is "if the party filing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." The new law also provides a direct appeal of any failure of a trial court to rule on a motion to dismiss within the time provided in the law.

Finally, the law orders that the successful moving party be awarded its "Court costs, reasonable attorney fees and other expenses incurred in defending against the legal action as justice and equity may require." A trial court shall also (*Continued on page 29*)

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award "Sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in the Oklahoma Citizens Participation Act." The party which brings the suit and defeats a motion to dismiss can recover costs and fees under limited circumstances. "If the court finds that a motion to dismiss filed under the Oklahoma Citizens Participation Act is frivolous or solely intended to delay, the court may award court costs and reasonable attorney fees to the responding party."

The Citizens Participation Act does not apply to 1) an enforcement action that is brought in the name of this state or a political subdivision of this state by the Attorney General or a district attorney; 2) a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct the action is based upon arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer; 3) a legal action seeking recovery for bodily injury, wrongful death or survival or to statements made regarding that legal action; or 4) a legal action brought under the Oklahoma Insurance Code or arising out of an insurance contract.

The Oklahoma Citizens Participation Act takes effect on November 1, 2014.



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#### MLRC MediaLawLetter

### **Universities Do Not Violate Copyright By Scanning Their Library's Books**

#### By Judith A. Endejan

The Second Circuit this month blessed the wholesale electronic copying of entire books in university collections – but only for three limited uses. <u>Authors Guild, Inc. et al. v.</u> <u>HathiTrust, et al.</u>, (June 10, 2014) (Walker, Cabranes, Parker, JJ.). The Court held that the HathiTrust Digital Library's ("HDL") use of copyrighted material is protected from a claim of copyright infringement under the doctrine of fair use.

#### Background

HDL is an organization founded by leading universities (i.e., University of Michigan) that creates a repository for the

digital copies of all books in the collections of the member universities. HDL permits three uses of the copyrighted works in the HDL repository. The first use is a computerized search capability that allows the general public to search for particular terms across all digital copies in the repository. This search produces a list of results showing where the term appears in books in the collection. The searcher is not able to view any page or other portion of the book.

The second use allows member libraries

to provide patrons with certified print disabilities access to the full text of copyrighted works. Certified patrons with a print disability (i.e., blindness) can obtain access to the works in HDL's repository using adaptive technologies.

The third use is archival. HDL preserves the copyrighted books in digital form and will permit members to create a replacement copy if the member's original copy is lost, destroyed or stolen and a replacement copy is unobtainable at a "fair price" elsewhere.

#### Second Circuit Decision

As a threshold matter the Court found that three of the

This case suggests that courts are inclined to apply "fair use" protection liberally for socially beneficial purposes even if entire books are copied without the authors' permission.

plaintiff author associations from the United States lacked standing to bring suit on behalf of their members under 17 U.S.C. § 501(b). The remaining authors associations, based in other countries, did have standing to sue on behalf of their members.

The Court then examined the history and purpose of American copyright law and the doctrine of "fair use" codified as amended at 17 U.S.C. § 107. That statute lays out four nonexclusive factors to assess whether a particular use is fair. The Court then methodically applied those factors to two of the uses of the HDL electronically scanned books. Regarding the first use, the Court found that the creation of a full text searchable database "is a quintessentially

transformative use" because it adds a great deal more to the copyrighted works at issue.

The Court found the second fair use factor – the nature of the copyrighted work - to not be dispositive.

The Court focused on the third and fourth factors, which examine whether the copying used more of the copyrighted work than necessary and whether the plaintiffs suffered market harm because the secondary use serves as a substitute for the original work. Because HDL needed to scan the entire body of works in order to have a full text search

function, the Court found that this copying was not excessive.

Regarding the fourth factor the Court found that the plaintiffs would not suffer any specific market harm, rejecting speculative arguments that the authors might be irreparably damaged in the event of a security breach that would allow unauthorized access to the books stored at the HDL repository. The Court found that no actual market harm could occur because the full text search function does not serve as a substitute for the books that are being searched.

In applying the four factor analysis to the second use – providing access to the print disabled – the Court said that expanded access to the "print disabled" is not transformative (Continued on page 31)

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but more in the nature of a derivative work, but this did not rule out fair use protection. The Court cited passages from the legislative history of the Copyright Act of 1976, demonstrating that the fair use doctrine was, if anything, intended to facilitate access for disabled persons such as the blind. The Court found that, like the first use, HDL needed copies of the entire work in order to create capabilities for the blind and disabled and that market harm was unlikely to occur because so few publishers sell books manufactured in specialized formats for the blind.

The Court did not examine the third use – preservationunder fair use criteria, finding that the plaintiffs could not claim copyright infringement for others' copyrighted works. (A finding at odds with the Court's conclusion that the foreign authors could argue infringement for the first and second uses.) The Court remanded the case to the district court to determine whether the plaintiffs have standing to challenge the "preservation use" of the HDL repository.

The Court refused to address infringement claims over the University of Michigan's abandoned "orphan works project," ("OWP") designed to make such works available digitally. An orphan work is an out-of-work print work that is still protected by copyright but whose copyright holder cannot be readily identified or located. This project was conceived by the University of Michigan but was suspended indefinitely as a result of this lawsuit, before the project was brought on line. The Second Circuit found that infringement claims raised in connection with the OWP were not ripe for adjudication.

Overall, this case suggests that courts are inclined to apply "fair use" protection liberally for socially beneficial purposes even if <u>entire</u> books are copied without the authors' permission. The <u>use</u> to which this copying is put ( i.e., for educational/ socially beneficial purposes) controls. As more and more creative <u>uses of</u> works occur in our digital world the limits of fair use will be tested.

Judith A. Endejan is a partner at Garvey Schubert Barer in Seattle, WA. The Authors Guild was represented by Edward Rosenthal, Frankfurt Kurnit Klein & Selz, P.C., New York. Defendants were represented by Joseph Petersen, Kilpatrick Townsend & Stockton LLP, New York.



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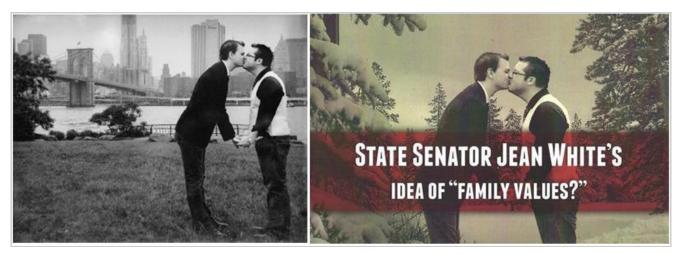
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### **Court Holds That First Amendment Protects Use of Couple's Engagement Photo in Mailers**

But Plaintiffs Stated Copyright Infringement Claim



Original engagement photo left; photo as used in political mailer at right.

The Colorado federal district court recently held that the First Amendment bars a misappropriation of name or likeness claim for the use of a gay couple's engagement photo in political mailers criticizing candidates for their pro-gay rights positions. *Hill, et al v. Public Advocate of the United States*, No. 12-cv-02550 (D. Colo. March 31, 2014) (Daniel, J.). But the use of the photo was not a fair use as a matter of law for purposes of a copyright infringement claim.

#### Background

Plaintiffs Brian Edwards and Thomas Privitere are a married couple living in New Jersey. Photographer Kristina Hill took engagement photos of the couple in May 2010. One depicts the couple holding hands and kissing in a park next to the East River in New York City with the Brooklyn Bridge in the background. They posted the photo on their blog, with the photographer's permission.

In Spring of 2012, anti-gay rights groups in Colorado used an altered version of the photograph in political mailers. One mailer sent to about 3,000 Colorado residents used plaintiffs' photograph with a background of pine trees with the caption, "State Senator Jean White's Idea Of Family Values?" The other, sent to approximately 4,000 Colorado residents, used the photograph with a background of clouds and the caption, "Jeffrey Hare's Vision For Weld County?"

Both listed the Public Advocate of the United States ("Public Advocate") as the sender. Public Advocate is conservative "family values" advocacy group based in Virginia.

Edwards, Privitere, and the photographer Kristina Hill sued Public Advocate and a five other related organizations and individuals for misappropriation of name and likeness and copyright infringement. (The photographer alleged that she owned the copyright in the photograph). Public Advocate and the other defendants filed motions to dismiss the copyright infringement claim on the basis of fair use, and the misappropriation claim under the First Amendment.

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#### **First Amendment Analysis**

The court dismissed the misappropriation claim, finding the mailers to be protected speech under the First Amendment. Following the Colorado Supreme Court's ruling in *Joe Dickerson & Assocs., LLC v. Dittmar* 34 P.3d 995 (Colo. 2001), the court applied a two-part test, first asking if the use of the image was primarily commercial in nature, and then determining whether the use reasonably related to a newsworthy matter or issue of legitimate public concern.

On the question of commerciality, the court noted that "[n]either of the mailers proposes a commercial transaction," but rather are "simply statements of disapproval of certain political candidates. Therefore, the mailers were used for a primarily noncommercial purpose and protected by the First Amendment.

The mailers also reasonably related to a matter of public concern. "[T]he mailers," Judge Daniel wrote, "were sent for the sole purpose of negatively impacting pro same-sex union candidates' chances of being re-elected/elected." Public Advocate clearly knew that the issue is one of public concern, the Judge reasoned, because it was featured prominently on the mailers, picked from among any number of issues that could have also featured on the mailers.

The court rejected the plaintiffs' argument that Edwards and Privitere were not reasonably related to the public issue over candidates for office in Colorado. Judge Daniel, calling the plaintiffs' approach "splitting hairs," emphasized that the test asks whether the defendant's use is reasonably related to the public concern. The defendants used the image in mailers to express disapproval of the candidates support for same-sex marriage which, Judge Daniel wrote, is a matter of public concern.

#### Fair Use Analysis

Plaintiffs' copyright claim, however, survived the motion to dismiss. Applying the four statutory factors for fair use, Judge Daniel found that defendant's use of the image was not fair use.

Public Advocate claimed the purpose and character of its use was educational and transformative, but the court rejected both claims. The use was not educational in the traditional vein of educational work, the court held. And the use was not transformative because defendants used the relevant portion of the image as it was, merely swapping out the background and adding a caption for the purposes of the mailers, Judge Daniel wrote. As such, this factor did not favor fair use.

Judge Daniel found that the photo is "more creative than informational or functional" and noted that the photographer took care that the photo would reflect the appropriate tone, and thus this factor did not favor fair use.

In terms of the amount and substantiality of the portion used, Public Advocate pointed out that it only used approximately 20% of the original image. However the court noted that the analysis is not only quantitative, but qualitative, and that "the Defendants used the focal point, the most important portion of the photo," meaning this factor did not favor fair use. For the final factor, effect on potential market for the work, Judge Daniel wrote that a decision would be improper without any evidence, and left the factor aside.

Plaintiffs were represented by Anjali Jayanand Nair, David C. Dinielli, and Samuel Eugene Wolfe of the Southern Poverty Law Center, Montgomery, AL; Christopher L. Larson and Kathryn Ann Feiereisel of Faegre Baker Daniels LLP-Denver, Denver, CO; Daniel David Williams of Faegre Baker Daniels LLP-Boulder, Boulder, CO; and Daralyn Jeannine Durie and Joseph Charles Gratz of Durie Tangri, LLP, San Francisco, CA. Defendant Public Advocate of the United States were represented by Barry Kevin Arrington of Arrington Law Firm, Centennial, CO, and Christopher Michael Collins of Vanderpool Frostick & Nishanian, P.C., Manassas, VA. Defendants National Association for Gun Rights, Rocky Mountain Gun Owners, Lucius B. O'Dell, and Dudley Brown were represented by Laurin Howard Mills (Lead Attorney) and David Alan Warrington of LeClairRyan, PC-Alexandria, VA, and Terrance L. Ryan of The Terry Ryan Law Firm, LLC, Fort Collins, CO. Defendant Andrew Brown was represented by Laurin Howard Mills (Lead Attorney) and David Alan Warrington of LeClairRyan, PC, Alexandria, VA.

### **European Court of Justice Confirms That Internet Browsing Is Not a Copyright Violation** *Latest Decision in UK Meltwater Dispute*

#### **By Timothy Pinto**

The Court of Justice of the European Union ('CJEU') has held that internet browsing falls within the temporary copies exception under Article 5 of EU Directive 2001/29. The onscreen and cached copies made by a user viewing websites are temporary, transient or incidental and constitute an integral and essential part of a technological process. Public *Relations Consultants Association v Newspaper Licensing Agency*, Case C-360/13 (June 5, 2014)

#### Background

The case forms part of the English *NLA v Meltwater* dispute. Meltwater provides a media monitoring service to PR agents. Meltwater had agreed to take a licence from the Newspaper Licensing Authority ('NLA') for its use of newspaper articles. However, the question for the English court was whether Meltwater's customers, represented by the Public Relations Consultants Agency ('PRCA'), required a licence for *receiving* 

Meltwater's media monitoring product, known as 'Meltwater News.'

This included headlines of and extracts from articles of interest to PR companies and their clients. The courts held that most if not all of copies of Meltwater News would constitute a substantial part and the expression of the author's own intellectual creation from the earlier copyright works.

The English High Court and Court of Appeal also held that when Meltwater News is received by email, Meltwater's customers usually required a licence. This was because an email is a permanent copy. However, when Meltwater's customers receive Meltwater News via Meltwater's website, the question was whether those customers needed a licence to view the content of the website. The Court of Appeal had held that a licence was required as the temporary copies exception did not apply to the online version of Meltwater websites, on the basis, for example, that the user's acts of reproduction were "occasioned by the voluntary human process of accessing that webpage".

News on Meltwater's website or articles on publishers' own

The PRCA appealed this point to the UK Supreme Court which disagreed with the lower courts and opined that the act of browsing fell within the EU temporary copies exception. Part of the Supreme Court's reasoning was that, since reading or viewing a physical embodiment of content, such as a newspaper or book (whether or not a pirate copy) is not an infringement of copyright, nor should viewing or reading a digital version of the same thing.

The case forms part of the English NLA v Meltwater dispute. Meltwater provides a media monitoring service to PR agents. Rather than giving a final judgment, the Supreme Court referred the question to the CJEU of whether internet browsing requires a licence from the copyright owner. This was because the question has relevance not only to the Meltwater dispute, but also to the millions of people in the EU browsing other parts of the Internet.

The temporary copies exception is part of EU law under Directive 2001/29 on the

harmonisation of certain aspects of copyright in the Information Society. The CJEU is the highest court in the EU and interprets EU law.

#### Facts

When Meltwater's customers access Meltwater News on Meltwater's website without downloading or printing the webpage, a copy of the webpage is made (a) on the screen and (b) in the cache, of the user's computer.

The on-screen copy remains on the screen until the user moves away from the site in question.

The cached copies are normally deleted by being automatically replaced by other content after a time, (Continued on page 35)

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depending on the size of the cache and frequency of internet use by the user. The cache is a universal feature of current internet browsing technology. Whilst it is technically possible for there not to be a cache, the internet would not be able to cope with the current volumes of data and function properly or efficiently without the cache being part of the browsing process.

#### Law

The temporary copies exception, which only applies to the reproduction right, is contained in Article 5(1) of the Directive which states:

Temporary acts of reproduction referred to in Article

2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

> (a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to

be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

Article 5(5) of the Directive, which implements the Berne Convention three step test, states:

The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subjectmatter and do not unreasonably prejudice the legitimate interests of the rightholder.

Meltwater's customers (i.e. PR agencies) do not need to take a licence from the NLA to view Meltwater News on Meltwater's website nor to view online newspaper articles linked from it.

#### Issue

The UK Supreme Court asked the CJEU if viewing a webpage satisfies the temporary copies exception under Article 5(1) of Directive 2001/29. It asked the CJEU to assume that:

- the creation of the on-screen and cached copies were indispensable to the technical processes involved in efficient internet browsing;
- these copies are retained for no longer than the ordinary processes associated with internet use;

the sole purpose of the copies is to enable a transmission in a network or a lawful use; and

the copies have no independent economic significance.

The specific questions the CJEU was asked to answer were whether the acts of reproduction made on-screen and in the cache were:

#### Temporary;

An integral and essential part of a technological process; and Transient or incidental.

#### Decision

The CJEU noted that whilst the exceptions under Article 5 must be interpreted strictly, they must also ensure the development of new technologies and safeguard a fair balance between the rights and interests of rights holders and users.

#### **Temporary?**

The CJEU noted that the on-screen copies were deleted when a user moves away from the webpage and the cached copies are normally automatically overwritten. Therefore, these copies were temporary.

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#### **Integral and Essential Part of a Technological Process?**

As for whether the acts of reproduction were an integral and essential part of a technological process, two criteria must be met. First, the acts of reproduction must be carried out entirely in the context of a technological process. Second, the completion of those acts must be necessary in the sense that the technological process could not function correctly or efficiently without them. The Court noted that these criteria do not preclude the technological process from being activated or completed by human intervention. The cached copies greatly facilitate browsing on the internet, which could not take place as efficiently or properly without it. In summary, the on-screen and cached copies were an integral and essential part of the technological process in issue.

#### **Transient or Incidental?**

A transient act of reproduction is one whose duration is limited to what is necessary for the technological process to work properly. An act of reproduction is incidental if it neither exists independently of, nor has a purpose independent of, the technological process of which it forms part.

The on-screen copies remain until the user moves away from the webpage

concerned and thus remain in existence to the extent necessary for the proper functioning of the act of viewing. Therefore they are transient.

As regards the cached copies, these may not be transient since they usually remain in existence for longer than the viewing of the website by the user. However, the technological process determines the purpose of the cached copies, which do not exist, nor have a purpose, which is independent of the technological process. The cached copies are thus incidental.

Therefore, the on-screen and cached copies satisfy the conditions for the temporary copies exception in Article 5(1) of Directive 2001/29.

The wider implication of the decision is that ordinary web browsing of publicly available websites by the general public is not an infringement of copyright.

#### Article 5(5)

In order to fall within the temporary copies exemption, Article 5(5) must also be satisfied. Since the on-screen and cached copies are created only for the purpose of viewing websites, they constitute a special case. The legitimate interests of the copyright owners are properly safeguarded as the websites have been made available to users with the copyright owners' consent. The viewing of websites by means of the technological process represents a normal exploitation of the works which have been made available to users. Therefore, the conditions of Article 5(5) are also satisfied.

#### Comment

For the Meltwater dispute in England, this ruling should

mean that Meltwater's customers (i.e. PR agencies) do not need to take a licence from the NLA to view Meltwater News on Meltwater's website nor to view online newspaper articles linked from it. The position is likely different if a user receives an email or downloads or prints a copy of Meltwater News because the temporary copies exception probably does not apply to such copies. This means that PR agencies which want to receive Meltwater News by email or to print or save Meltwater News or newspaper articles may need to take a licence.

For the avoidance of doubt, the CJEU's decision does not affect any paywalls which may protect any content on websites.

The wider implication of the decision is that ordinary web browsing of publicly available websites by the general public is not an infringement of copyright. It also has similar implications for viewers watching ordinary TV where a temporary copy of a copyright work is made on the screen and in the memory of the TV or decoder box. Therefore, just watching TV would not require a copyright licence (as was held by the CJEU in the *Murphy* case).

*Timothy Pinto is senior counsel at Taylor Wessing LLP in London.* 

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# **Damage Award in Australian Restaurant Review Libel Case on Appeal**

# Long-running Coco Roco Restaurant Review Case Continues

### **By Leanne Norman**

Who would ever have thought that a defamation action over a restaurant review could give rise to such a plethora of hearings, appeals, rehearings, fresh appeals, and still be unresolved nearly 11 years after publication? See, e.g., Gacic v John Fairfax Publications Pty Ltd (No 2) [2014] NSWSC 738 (6 June 2014).

### Background

To go back to the beginning, on 30 September 2003, The Sydney Morning Herald. the major metropolitan daily newspaper Sydney, Australia, in published a review, written by then-resident food critic. Matthew Evans, about the newly opened Coco Roco. Coco Roco was promoted as two restaurants in one: Coco the more expensive was restaurant upstairs, and its sister restaurant Roco, the more casual option on the lower level. Whilst the review referred to Coco Roco (consistent with how the businesses had been



review implied that, at Coco Roco, they served unpalatable food, charged excessive prices, and provided some bad service, and that they were incompetent restaurateurs for employing a chef who made poor quality food.

The claim was defended primarily on the basis that, if any such implications arose, they were true and/or reflected the honest opinion of the reviewer, based on what he experienced on dining there.

Under the procedure applicable in New South Wales at

time, defamation that proceedings were determined in two separate stages: a jury would be empanelled to consider whether the plaintiffs had persuaded them that the review conveyed the pleaded meanings and, if so, whether they were defamatory. If none of the meanings passed both tests, that would be the end of the case, but to the extent that any meanings survived, a later hearing would be convened, before a judge alone, for defences and, if applicable, damages to be determined.

### **Libel Trials**

promoted), it made it plain that Mr Evans had only eaten at Coco.

While the reviewer gave praise to some aspects of his dining experience at Coco, overall he was extremely critical of the food and service on the two occasions on which he had eaten there.

The restaurant's owners, sisters Aleksandra and Ljiljana Gacic, and Ljiljana's partner, Branislav Ciric, sued the newspaper and Mr Evans for defamation, claiming that the

The case came before a jury for the first stage hearing in June 2005. The jury rejected that imputations of excessive pricing and incompetence arose from the review; and while it found that meanings of unpalatable food and bad service were conveyed, it found such meanings were not defamatory.

The plaintiffs had failed to make out their case; the defendants had won.

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The plaintiffs appealed the jury's decision. The appeal court reversed the jury's decision that the two meanings found were not defamatory, saying that such matters went to the heart of the plaintiff's business as restaurateurs, and it was not open to the jury to find that those meanings were not injurious. Rather than sending those issues back for retrial, however, the Court substituted its own rulings for those given by the jury. In respect of the incompetence meaning, though, the appeal court found that the jury had been misdirected as to one aspect of the law, and remitted it back to a fresh jury for reconsideration.

The defendants applied for leave to appeal to the High Court of Australia, on various issues, including whether the appeal court was entitled to substitute its own rulings for the jury's decision, rather then remit those issues for rehearing. Leave to appeal was granted, but the appeal was ultimately unsuccessful.

The second jury trial, as to whether the incompetence meaning was conveyed and defamatory, took place in September 2007. The new jury found that it was both, meaning that the incompetence meaning, as well as the unpalatable food and bad service meanings imposed by the appeal court, were now to be the subject of the defences and damages hearing before a judge.

That hearing took place before Justice Harrison in November 2009. In a judgment delivered on 18 December 2009, his Honour found the defendants had proved true that the plaintiffs had provided some bad service at Coco, and that the third plaintiff, Mr Ciric, was an incompetent restaurateur for employing a chef who made poor quality food (this was not established in respect of the other two plaintiffs, as they were not chefs themselves and could not be expected to have the necessary expertise that a demonstration of their incompetence assumed). However his Honour upheld the comment defence in relation to all meanings in relation to all plaintiffs, clearly accepting Mr Evans as a witness of truth in his description of the food he ate and the service he received.

Importantly, Justice Harrison found that "Coco Roco" was in fact one restaurant, not two, based on the promotional material issued by the plaintiffs, and the close connection between the two establishments, both physically and otherwise. He thus rejected the plaintiffs' argument that the defamation could not be defended because the defamatory meanings implicated Roco, as well as Coco, in circumstances where Mr Evans had never eaten at Roco, and could not have

held any opinion as to its quality, nor proven the meanings true so far as Roco was concerned.

The defendants had won again.

Notwithstanding that he found a complete defence to the publication, Justice Harrison nevertheless went on to assess the damages to which he considered the plaintiffs to be entitled, if he was wrong about the applicability of the defences. He assessed those damages at \$80,000 for each plaintiff.

But the matter did not rest there. The plaintiffs appealed - again.

The principal issue on appeal was whether, in referring to "Coco Roco", the defamatory meanings were to be understood as referring to one restaurant or two and, if the latter, whether the defences of truth and comment, based on Mr Evans' evidence as to his experiences of dining only at Coco, could be available to defend defamatory meanings relating to Coco *and* Roco.

The appeal court upheld the plaintiffs' argument that the imputations referred to two separate restaurants, and thus ruled that the defences of comment and truth must fail, given that the defendants were not in a position to prove the meanings true, or hold any opinion, in respect of Roco. Further, because the appeal court found that, in assessing damages, Justice Harrison did not appear to factor in the claim for aggravated damages, it remitted the matter back to the original court for further consideration. However the appeal court did not disturb any of Justice Harrison's findings with respect to Mr Evans' experiences at Coco.

The defendants then sought leave to appeal this decision – again, arguing that the appeal court's ruling was wrong, and that the defamatory imputations should not be understood as referring to Roco as well as Coco, particularly in circumstances where the review made clear that the reviewer only dined at Coco. However leave to appeal was declined, meaning that the next step was the damages rehearing.

The first issue to be tackled in this respect was whether the damages reassessment should be heard by Justice Harrison - who had the benefit of having heard all the evidence at trial - or by a new judge to consider the matter afresh. The plaintiffs objected to Justice Harrison on the ground that he could be seen to have prejudged the issue of quantum of damages, having expressed a view on it in his initial judgment. His Honour acceded to their application and recused himself.

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The damages rehearing took place before Justice Hall commencing in December 2012. The defendants argued that the findings of fact made by Justice Harrison concerning the food and service at Coco ought to be taken into account on the assessment, in mitigation of damage. In his judgment delivered on 19 December 2013, Justice Hall rejected this argument, saying that Justice Harrison made no findings of fact (and that Mr Evans statements were simply statements of opinion), and that if there were such findings they were irrelevant in any event as they were made well after the publication. He awarded the plaintiffs \$160,000 each. In a later decision, he added pre-judgment interest, at 3% from the date of publication to the date of his judgment, amounting to \$47,842.19 for each plaintiff.

The plaintiffs have now appealed, yet again. They say that the damages award was insufficient and, in particular, that exemplary damages should have been awarded by reason of the review remaining on the internet.

The defendants have cross-appealed, alleging that, in assessing damages, Justice Hall erred in not taking account of Justice Harrison's findings at the previous hearing.

The appeal is due to be heard on 29 & 30 September 2014, the latter being the  $11^{\text{th}}$  anniversary of the publication of the review. One would hope that we are nearing the end of the saga, but given the history of the matter, there is no guarantee that the matter will end there.

Leanne Norman, a partner at Banki Haddock Fiora in Sydney, Australia, represents The Sydney Morning Herald, in this case. Plaintiffs are represented by McKenzie Leamey Solicitors & Barristers.

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# **Court Rejects Parties' Request to Close Voir Dire In the Aurora Theater Shooting Case**

### By Steven D. Zansberg

On June 11, 2014, the Colorado State District Court judge presiding over *People v. Holmes*, the man charged with murdering twelve and wounding seventy others in the July 20, 2012 assault in a movie theater in Aurora, Colorado, ruled that the entirety of the *voir dire* process will be conducted in open court. In his <u>29-page ruling</u>, Judge Carlos A. Samour, Jr., rejected Holmes' request to close the entirety of the *voir dire*, and the prosecution's request to close the portions of the *voir dire* when the judge instructed prospective jurors and the individual questioning of jurors on four identified topics.

A coalition of media entities, comprised of ABC, the AP, CNN, CBS, *The Denver Post*, Dow Jones & Co., FOX News Network, Gannett, four Denver-based television stations, *The Los Angeles Times*, National Public Radio, NBCUniversal,

*New York Times*, E.W. Scripps, Tribune, and *The Washington Post*, filed an opposition to the parties' request to close the *voir dire*. Judge Samour embraced the arguments put forth by the media petitioners and succinctly stated his conclusion on the third page of his ruling:

Rather than hinder the effectiveness of jury selection, openness and the

watchful eye of the media will increase scrutiny and enhance the reliability and fairness of the process. In the Court's view, sunshine, not darkness, is the appropriate disinfectant here.

### Long, Complicated Voir Dire Process Ahead

The trial in the case is set to begin in October 2014. It has previously been reported that the Court expects the *voir dire* will span several months. 6,000 summonses will be issued. The Court will hold approximately twenty-two introductory sessions before 150 prospective jurors in the courtroom, during which the Court will make welcoming remarks, introduce the parties and the attorneys, generally discuss the case and the charges, provide instructions about the presumption of innocence and other important legal concepts, give admonitions regarding prospective jurors' behavior, and explain the logistics of jury selection. Following a presentation by the jury commissioner on videotape, the jurors will then complete the questionnaires which will disqualify some prospective jurors.

Those not disqualified will then be subject to individual *voir dire* on four topics: the death penalty, the defense of insanity, exposure to pre-trial publicity, and hardship. Through this process, the Court hopes to find 100 to 120 individuals who are available to sit on the jury and to be fair and impartial. That group will then be subjected to group *voir dire* from which the parties and the Court will select 24 jurors (twelve jurors and twelve alternates). Neither the blank jury questionnaire nor the completed questionnaires will be released to the public, and the Court will refer to both

prospective and actual seated jurors only by number and will conceal their identity from the public (but not from the parties).

### Court Firmly Embraces Press-Enterprise and Progeny

Judge Samour devotes 8<sup>1</sup>/<sub>2</sub> pages of his ruling to the governing "legal principles" in which he set forth, in considerable detail, the

Supreme Court and lower court precedents establishing a qualified constitutional right of public access to jury selection in criminal trials, beginning with *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

After setting forth the applicable standard that parties seeking to close *voir dire* must meet – first, that there is a substantial probability the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights – Judge Samour explains "the rationale behind such a stringent standard," as the Supreme Court has recognized: "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives (Continued on page 41)

A coalition of media entities filed an opposition to the parties' request to close the voir dire.

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assurance that established procedures are being followed and that deviations will become known," quoting *Press-Enterprise*, 448 U.S. at 508 (emphasis in original). Not only does openness play a positive functional role in enhancing fairness and the appearance of fairness, but the salutary effect of press coverage is also recognized by Judge Samour, quoting Justice Brennan's concurrence in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 586-87 (1976):

[I]t has been correctly perceived that a responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Judge Samour then explains how the Second Circuit's ruling in *ABC Inc. v. Stewart*, 360 F.3d 90 (2d Cir. 2004), reversing a trial judge's order closing *voir dire* in the criminal case against Martha Stewart, fully supports the application of the stringent test for closure in high-profile cases that have, for good reason, attracted significant press coverage and public attention.

### All Three Phases of *Voir Dire* Open to the Public

Judge Samour then applies the above principles to the parties' requests to close the three portions of the *voir dire*, in turn. Judge Samour begins by swiftly sweeping aside the parties' idle speculation that closed-circuit television coverage of the Judge's admonitions to potential jurors prior to their completing jury questionnaires would somehow chill or intimidate the jurors. He characterizes the parties' asserted fears as mere "hypothes[es]" and "conjectural claims" that "are insufficient to establish an overriding interest that overcomes the presumption of openness firmly rooted in American jurisprudence."

Judge Samour then summarily denies Holmes' request to close the third phase of jury selection, the group *voir dire*,

based upon similar speculation and conjecture, relegating that discussion to a two-sentence footnote.

### Parties' Concerns on Individual Voir Dire Are Rejected

Both Holmes and the prosecution asked the Court to close the individual *voir dire*, to be conducted outside the presence of other potential jurors, on four "sensitive" topics.

### No Showing that Open Questioning will Chill Juror Candor

As above, Judge Samour rejects as "conclusory and speculative" the parties' contention that awareness of press coverage of individual *voir dire* will cause jurors to be less than candid: "If the parties' doomsday prediction – that openness will overwhelm and intimidate prospective jurors so as to inhibit their candor – were sufficient, trial courts would be required to close jury selection in every high-profile case. That is not the law."

Relying on *ABC*, *Inc. v. Stewart*, *Nebraska Press Ass'n*, and the Nevada Supreme Court's ruling in *Stephens Media LLC v. Eighth Judicial District*, 221 P.3d 1240 (Nev. 2009) (involving the media's successful effort to access completed jury questionnaires in the criminal case against O.J. Simpson for breaking and entering into a Las Vegas hotel room), Judge Samour denigrates the parties' asserted fears of jury chill as unsupported speculation, legally

insufficient to overcome the presumption of public access: "The required 'substantial probability' that the defendant's fair trial rights will be violated" cannot be satisfied by a party's assertion that there is a *chance* that publicity will cause prospective jurors to be dishonest."

In every high-profile criminal case, there is a risk that jurors will prejudge the defendant but will be unwilling to admit their prejudgment. However, we agree with other jurisdictions in concluding that the mere risk of juror untruthfulness is not sufficient to support the closure of a criminal proceeding.

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"The watchful eye of the media will increase scrutiny and enhance the reliability and fairness of the process."

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Moreover, Judge Samour states, "to the extent that a party has genuine concerns about a prospective juror's candidness, the proper remedy is to remove the juror for cause during the *voir dire* process," citing *Stephens Media LLC*, 221 P.3d at 1251 n.3. Judge Samour notes that the fact that the jury questionnaires will be sealed and that the jurors will not be identified to the public "should substantially reduce, if not altogether eliminate, any reluctance on the part of prospective jurors to answer questions candidly during individual *voir dire*."

The Court also rejects Holmes' claim that purported prior acts of media misconduct in the Aurora theater shooting case support his claim that jurors will feel intimidated through press access to the individual *voir dire*. Judge Samour finds that there has been no documented evidence of any media

misconduct. The fact that the case had attracted "unparalleled intensity of . . . media coverage" is of no moment "because there is nothing improper about providing extensive coverage of a criminal case."

Notably, Judge Samour also absolves FOX News.com reporter Jana Winter of any wrongdoing by publishing information she had received from two confidential law enforcement officers who spoke to her in violation of the Court's gag order. Ms. Winter was not subject to the order herself,

and the fact that she asserted New York's shield law, successfully, in opposition to Holmes' efforts to compel her to disclose her sources, "is hardly surprising and does not constitute misconduct."

Judge Samour also rejects Holmes' argument that questioning individual jurors on issues of mental illness and the death penalty will cause them to hide their prejudices and preconceived notions on those topics. Lastly, Judge Samour rejects as an unreasonable and constitutionally impermissible alternative means the release of a redacted transcript, relying on *Stewart* for the proposition that "one cannot transcribe an anguished look or a nervous tic," and "the ability to see and to hear a proceeding as [it] unfolds is a vital component of the First Amendment right of access – not . . . an incremental benefit."

In sum, the Court rejects the parties' arguments in favor of closing the individual *voir dire* because of concerns over juror candor in the questioning: "Where, as here, *voir dire*  does not include particularly sensitive or controversial topics, knowledge that the public and the media are in attendance probably discourages fabrication and ensures honesty on the part of prospective jurors."

### No Showing that Later-Questioned Jurors Will Be Tainted by Publicity of Earlier Questioning

The Court also rejects the parties' argument that allowing the public and press to attend individual *voir dire* questioning will taint later-questioned jurors by alerting them to the types of questions they will be asked and the types of responses that may trigger for-cause elimination of earlier potential jurors. The judge first acknowledged the multiple precedents recognizing that to the surprise of judges and attorneys involved in high-profile cases, members of the public rarely

> pay as much attention to press coverage of those proceedings as those parties would predict.

> In addition, Judge Samour will instruct all prospective jurors to immediately stop reading, viewing, or listening to any media reports concerning the case, and that they must notify the Court through a standardized form if, despite those efforts, they inadvertently read, view, or listen to any information about the case. Rejecting the parties' claims that such admonitions are

ineffectual, Judge Samour states, "if prospective jurors cannot be trusted to abide by the Court's publicity admonition, the Court is at a loss as to why it should expect that they will follow other equally important instructions. . . . Colorado law is to the contrary: courts presume that jurors follow the instructions that they receive." Judge Samour notes that the length of the individual *voir dire*, between two and four months or "perhaps longer," itself counsels against closure.

Lastly, the Court rejects the parties' analogizing the jurors' learning of individual *voir dire* questions in advance to allowing students to have prior knowledge of a school exam. *"[V]oir dire* is much more personal and does not involve questions that call for a 'correct' or an 'incorrect' answer. Instead, *voir dire* questions seek to elicit honest answers about personal opinions, philosophies, thoughts, ideas, and experiences that may bear upon a prospective

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The Court rejects the parties' arguments in favor of closing the individual voir dire because of concerns over juror candor in the questioning.

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juror's ability to be a fair and impartial juror in a particular case."

In the final section of the opinion, Judge Samour rules that the victims, who have certain rights of being informed under the Colorado Constitution and statute, cannot be excluded from the *voir dire* portion of the trial. Judge Samour concludes his opinion as eloquently as he began it:

Under the circumstances present here, the public and the media have a right to know what takes place during jury selection. Contrary to the parties' speculation, openness and public pressure will ensure that suspicions of potential juror misconduct are publicized and will discourage those inclined to abuse the system. Hence, the presence of the public and the watchful eye of the media will enhance the fairness and effectiveness of the jury selection process.

Steven D. Zansberg is a partner at Levine Sullivan Koch & Schulz, LLP in Denver, CO and represented the media coalition in this case.



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# Georgia Court Holds Execution-Participant Confidentiality Statute Is Constitutional

Cites "Longstanding Tradition" of Hiding Identity of Executioners

The Georgia Department of Corrections does not need to reveal the source of the drugs used in executions by the state, the Georgia Supreme Court ruled. <u>Owens, et al. v. Hill</u>, S14A0092 (Ga. May 19, 2014) (Hines, J.) (Benham, J., in dissent). The court found that while the claims were properly brought in the Superior Court, Hill failed to show likelihood of success on the merits by the legal standard applied under the Eighth Amendment, which involves a showing of a "substantial risk of serious harm" that is "sure or very likely to cause serious illness and needless suffering." The court ruled that there are significant public policy reasons for allowing the drugmaker to remain anonymous which

overwhelm any claim that the information falls under the limited forms of government proceedings required to be disclosed under the First Amendment.

### Background

Warren Hill was convicted of murdering a fellow inmate by beating him to death with a sink leg embedded with nails. The jury

sentenced him to death. The sentencing court issued the execution order on July 3, 2013, setting Hill's execution for the one-week period of July 13-20, 2013. That execution order was filed after the July 1, 2013 effective date of a new law designating as confidential "identifying information" concerning the persons and entities that participate in executions, including those who participate in the procurement of execution drugs." OCGS § 42-5-36(d)(2).

Hill filed suit naming the Commissioner of Corrections and others as defendants, seeking an interlocutory injunction, a permanent injunction, a declaratory judgment, a writ of mandamus, and "[s]ealed discovery of the identity of the compounding pharmacy and the supply chain and manufacturer(s) of any and all ingredients used to produce the lethal drug compound to be injected into [defendant]." Hill alleged that the execution-participant confidentiality statute was unconstitutional under Georgia and federal law in that it wrongly denied him information revealing the identities of all those involved in his execution.

The Superior Court of Fulton County granted an interlocutory injunction prohibiting Hill's execution with a drug from a confidential source in order to consider the constitutionality of the statute. The Supreme Court granted the State's application for discretionary appeal.

#### Analysis

First, the Court held that the issue was not moot, despite the specific batch of drugs that was set to be used for the execution and was thus the basis for the lawsuit having expired. If the case were dismissed as moot, the court reasoned, the process would presumably repeat itself and the case would simply return, again moot, to the Supreme

Court with a different batch of drugs, making this case an example of the narrow exception to mootness: a matter capable of repetition yet evading review.

Then, the court found that "Hill properly brought his claims regarding the procurement of the drug to be used in his execution and a possible injunction prohibiting the use of that *particular* drug against the state officers involved in those matters rather than making some sort of motion in the sentencing court maintaining jurisdiction over his sentence of death," because the issue was not whether Hill would be executed, but how.

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The court ruled that there are significant public policy reasons for allowing the drugmaker to remain anonymous.

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Similarly, the court found that a habeas petition would also have been inappropriate as the challenge was against the manner of the execution, and did not allege constitutional defects in his conviction or sentence.

Third, the Court found that the constitutional question could be avoided in a case where, through the employment of a robust discovery mechanism that would allow access to the drug for testing, the plaintiff could make out a strong Eighth Amendment claim. However, this was not such a case, as Hill's Eighth Amendment claim was weak, even if the discovery were likely to provide additional proof.

The Court further found that the Superior Court erred in granting an interlocutory injunction barring the State's use of the execution drug. Judge Hines noted that Hill's claim of an unconstitutional risk that his execution will amount to cruel and unusual punishment was raised in a hypothetical fashion. Such a claim requires that Hill show that "the conditions

presenting the risk must be 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" Judge Hines found Hill's evidence, which consisted largely of expert testimony that some drugs from compounding pharmacies like the ones supplying the drugs for this case could be

potentially fatal, to be unconvincing in the context of an execution case. "[E]ven fully crediting Hill's factual claims regarding compounding pharmacies, this case presents merely the fact that there is some risk that a lack of sterility could lead to symptoms that are irrelevant to a person being executed," Judge Hines wrote. "Hill's factual assertions fall far short of satisfying the legal standard applied under the Eighth Amendment, which involves a showing of a 'substantial risk of serious harm' that is 'sure or very likely to cause serious illness and needless suffering," Hines continued, adding that there was little chance of success on the merits.

Based on similar reasoning, Judge Hines found that Hill failed to make any claims that could merit relief.

Finally, Hill argued that the First Amendment required disclosure. The Court applied the familiar experience and logic test: (1) whether access has been granted historically;

and (2) whether public access would play a positive role in the functioning of the process. "Even adopting the extravagant view that the acquisition of execution drugs is a government process subject to this test, we still conclude that Hill's claims fail to satisfy either of these elements," Judge Hines wrote. The Court found that there is a "longstanding tradition of concealing the identities of those who carry out those executions."

Additionally, Judge Hines noted several policy reasons for offering such privacy, "including avoiding the risk of harassment or some other form of retaliation from persons related to the prisoners or from others in the community who might disapprove of the execution as well as simply offering those willing to participate whatever comfort or peace of mind that anonymity might offer," and reasoned that this extends beyond the actual executioner to those involved in the process.

Further, Judge Hines wrote, without this privacy "there is

In dissent, Judge Benham invoked the recent botched execution in Oklahoma. a significant risk that persons and entities necessary to the execution would become unwilling to participate." These policy concerns overwhelmed Hill's argument that releasing the identity of the pharmacy would help further the public discourse on the death penalty and help shed light on whether Georgia's method of execution is humane.

#### Dissent

In dissent, Judge Benham wrote that Hill's due process rights were being violated, and invoked the recent botched execution in Oklahoma as an example of the potential effects of keeping secret the information Hill sought. "The fact that some drug providers may be subject to harassment and/or public ridicule and the fact that authorities may find it more difficult to obtain drugs for use in executions are insufficient reasons to forgo constitutional processes in favor of secrecy, especially when the state is carrying out the ultimate punishment," Benham wrote.

Benham reasoned that it is a violation of due process to reject Hill's claim as speculative "while simultaneously denying him the means by which he has any hope of proving that claim."

### MLRC MediaLawLetter

# *Gericke v. Weare:* Advancing a Clearly Established Right or Does It?

### By Mickey H. Osterreicher

In the slow but steady progression of cases clearly establishing the right to photograph and record in public, the case against Carla Gericke represents another small step in the right direction. Soon after the U.S. Court of Appeals for the First Circuit issued its decision in *Gericke v. Weare* (May 24, 2014) the defendants settled the case for \$57,500 with no admission of "liability, wrongdoing or culpability."

Writing for the three judge panel, Circuit Judge Kermit Lipez (who also penned the decision in <u>Glik v Cunniffe</u>, 655 F.3d 78 (1st Cir. 2011)), affirmed the district court's denial of the police officers assertion of qualified immunity on Gericke's First Amendment retaliatory prosecution claim,

stating, "[b]ased on Gericke's version of the facts, we conclude that she was exercising a clearly established First Amendment right when she attempted to film the traffic stop in the absence of a police order to stop filming or leave the area." *Gericke* at 3.

### Background

In 2010 Ms. Gericke was driving her car following behind another vehicle. Both cars contained two people who all knew each other and were headed to the same location. During the trip police pulled over both cars, with Town of Weare Police Department Sergeant Joseph Kelley parking his cruiser

between the two vehicles. The sergeant first approached Gericke's car, informed her it was the other driver he was detaining and told her to move her car. She told Kelley that she was going to move her car into an adjacent parking lot to wait for the other driver and Kelley eventually agreed to that.

Sergeant Kelley then went to the other vehicle and upon some initial questioning of that driver learned he had a gun at which point Kelley instructed him to get out of the car. During this time Gericke had moved her car and was standing outside it along a fence and grassy area that separated the parking lot from the road about thirty feet from Kelley. She then announced that she was going to record the scene with her video camera and attempted to do that but could not get her camera to record. At that point Kelley ordered her back to her car and she immediately complied but continued to point her camera at the scene, knowing it was not actually recording.

She eventually put the camera down. Shortly thereafter other officers arrived and one of them asked where her camera was but she refused to tell him or provide her license and registration. Police then arrested her, seized her camera and took her to the station where she was charged with disobeying a police officer; obstructing a government official; and unlawful interception of oral communications, all in violation of various sections of New Hampshire law

including its wiretapping statute.

Both the town and county prosecutors refused to move forward with the charges which were then dismissed. Gericke commenced a lawsuit in May 2011 against the police officers, the Weare Police Department, and the Town of Weare under 42 U.S.C. § 1983 along with violations of state law. Among other things, her amended complaint alleged that police violated her First Amendment rights by charging her with a wiretapping violation "in retaliation for her videotaping of the traffic stop." A year later the defendants filed motions for summary judgment, asserting that they were entitled to qualified immunity on plaintiff's First

Amendment claim "because there was no clearly established right to film the traffic stop."

### **First Circuit Decision**

In its decision the First Circuit took note of the district court's ruling that police lacked probable cause to charge Gericke with illegal wiretapping because the New Hampshire statute provides that, for a crime to occur, the officers must have had a reasonable expectation of privacy that their public conversations during the traffic stop were not subject to *(Continued on page 47)* 

Based on Gericke's version of the facts, we conclude that she was exercising a clearly established First Amendment right when she attempted to film the traffic stop in the absence of a police order to stop filming or leave the area."

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interception and that they had no justification in such an expectation.

In denying the qualified immunity motion, the district court relied heavily on the First Circuit's "broad holding in *Glik* that 'a reasonable officer should have known that a blanket prohibition on the recording of all traffic stops, no matter the circumstances, was not constitutionally permissible." *Id.* at 8, citing *Gericke*, 2012 WL 4893218, at \*7 n.4.

The trial court also reasoned that *Glik* "recognized that it is clearly established in this circuit that police officers cannot, consistently with the Constitution, prosecute citizens for violating wiretapping laws when they *peacefully* record a police officer performing his or her official duties in a public area." *Id.* citing *Gericke* at \*6 (emphasis added).

Holding that there was a genuine issue of fact as to whether or not Gericke had recorded "peacefully" or "disruptively" (for which there was no clearly established First Amendment right) the court had no choice but to deny the summary judgment motion related to the wiretapping charge.

The facts are extremely important in the First Circuit decision because, based upon her version of the facts (as presented above), the court concluded "that she was exercising a clearly established First Amendment right when she attempted to film the traffic stop *in the absence of a police order to stop filming or leave the area.*" *Id.* at 3 (emphasis added).

In *Glik* the court noted that "a traffic stop is worlds apart from an arrest on the Boston Common" as well as acknowledging the Supreme Court's finding in Fourth Amendment cases that traffic stops may be "especially fraught with danger to police officers, justifying more invasive police action than would be permitted in other settings.

Stated throughout these cases is the premise that "the exercise of the right to film may be subject to reasonable time, place, and manner restrictions. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (reasonable orders to maintain safety and control, which have incidental effects on an individual's exercise of the First Amendment right to record, may be permissible).

For the First Circuit in *Gericke* the threshold question was "whether the occasion of a traffic stop places Gericke's attempted filming outside the constitutionally protected right to film police that we discussed in *Glik*." Their resounding answer: "It does not."

That finding is grounded in the proposition that "a police order that is specifically directed at the First Amendment right to film police performing their duties in public *may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties.*" Gericke at 15 (emphasis added).

In *Glik* the court made it clear that "[t]he same restraint demanded of police officers in the face of 'provocative and challenging' speech, must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces." *Gericke* at 16,

> quoting *Glik* at 84 (citations omitted) (quoting *City of Houston v. Hill*, 482 U.S. 451, 461 (1987)).

In order to avoid a chilling effect on the exercise of a First Amendment right to film police performing their official duties in a public place (including traffic stops), "the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the [restriction]." *Id.* 

Accordingly, "such a restriction could take the form of a reasonable, contemporaneous order from a police

officer, or a preexisting statute, ordinance, regulation, or other published restriction with a legitimate governmental purpose." *Id.* at 17.

But in this case, according to the facts as presented, no such restriction was imposed as Gericke complied with every order Kelley gave and thus "her right to film remained unfettered, and a jury could supportably find that the officers violated her First Amendment right by filing the wiretapping charge without probable cause in retaliation for her attempted filming." *Id.* 

Because of the specific facts in this case that there was no order given to stop filming or leave the area (*absence of a reasonable restriction*), the court's analysis of whether or not Gericke's right to film the traffic stop was clearly established (*Continued on page 48*)

The decision still provides leeway for police to order someone to stop recording or disperse that "would incidentally impact an individual's exercise of the First Amendment right to film.

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reverted to the default articulated in *Glik* that her First Amendment right to record was "self-evident" and that "a reasonable police officer necessarily would have understood that Gericke was exercising a clearly established First Amendment right." Id. at 18-19

While *Gericke* represents another positive step in upholding that right, the decision still provides leeway for police to order someone to stop recording or disperse that "would *incidentally impact* an individual's exercise of the First Amendment right to film. Such an order, even when directed at a person who is filming, may be appropriate for legitimate safety reasons." *Id.* at 15 (emphasis added).

The First Circuit has also yet to address whether that clearly established right extends to the driver or passenger of a stopped vehicle rather than an outside observer. Should any of those situations arise expect another case.

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