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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

More information at medialaw.org

Vetting Materials Cross-Borders: Publication & Advertising Issues

Navigating the choppy currents of UK and European libel and privacy law, including the impact of the new Defamation Act, the new "right to be forgotten," the perils of publishing photographs, libeling the dead, Twitter libel, liability for user-generated content. Use of mobile apps, geotargeted ads and new technologies may give rise to exposure in unexpected jurisdictions. International publication regulations for advertising and content - banned words, weather forecasts and more.

Vetting Material Cross Borders: International Copyright

This session will explore the common themes and problems with efforts around the world to modernize copyright for the digital age. Making available/distributing copies to the public: challenges posed by streaming content, linking, and framing. Format shifting and fair dealing. Combating privacy: copyright injunctions and blocking orders.

Vetting Material Cross Borders: Information Gathering

A discussion of the practical and legal concerns when deploying journalists into hostile environments - from physical security and risk of kidnapping to protection of sources and editorial materials in countries opposed to press freedom and personal liberty. How news organizations operating overseas contend with the vagaries of U.S. law and figure out if their activities may run afoul of the Foreign Corrupt Practices Act or other statutes.

Advertising & Commercial Speech: Native Advertising

Many issues are being raised by native advertising as online publishers widely adopt it. Is content generated or sponsored by advertisers commercial speech subject to advertising regulations? What will regulators require of disclosures made to audiences about native advertising? Do sponsors have to vet all claims and clear all third-party rights implicated in native-advertising content? This panel will cover recent regulatory actions and the application of legal precedent to native advertising.

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.

Newsgathering

A discussion of cutting-edge legal issues in newsgathering: the legal problems from relying on social media in newsgathering and practical tips on how to verify and vet information; the current state of the First Amendment right to be free from punishment for recording a police officer's public performance of his or her duties; the erection of paywalls that impede the public's online access to public records; and the Federal Aviation Administration's regulation of drones for use in newsgathering.

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

What to do to avoid the legal risks stemming from entertainment works based on real events, including the affirmative defenses to raise, deciding if the acquisition of "exclusive" life story rights is really necessary, the non-legal reasons to acquire life story rights, and the steps to take to legally vet screenplays for TV programs and motion pictures against potential legal claims.

Trial Tales

A panel of lawyers dissect media cases tried over the past two years – with lessons from the frontlines and analysis of trends and common factors – as reported in the Conference's biennial survey of trials involving publication and newsgathering torts against media defendants.

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European Court of Justice Recognizes “Right to Be Forgotten”

Decision That Search Engine Must Delink Causes Huge Controversy

By Gavin Millar QC

The Court of Justice of the European Union (“CJEU”) in Luxembourg decided that a Spaniard could force Google to remove two old newspaper articles from its search index against his name. [Google v Spain](#) (May 3, 2014).

Everyone knows that plaintiff asserted before the Court a *right to be forgotten* recognised in the privacy law of some European states. But how did these issues end up being considered by this Court? What exactly did the CJEU say and what are the implications?

Background

The EU promulgates *directives* to member states. They must then amend their law to ensure that the directive’s principles apply in their country. Sometimes disputes arise in domestic courts about how a directive (and the local law implementing it) should be interpreted. These can be turned into questions and referred to the CJEU for an interpretive ruling on the directive.

Google v Spain was such a ruling about a 1995 [Directive \(95/46\)](#) on the protection of individuals with regard to the processing of data.

Directive 95/46 protects the privacy of *natural persons* in relation to the *processing* of *personal data*. Any legal entity, public or private, that processes by retrieving or disclosing (Article 2(d)) such personal data is known as a *data controller*.

The definition of *personal data* is very wide indeed and goes well beyond what might normally be understood as private information. It covers *any information relating to an identified or identifiable natural person...; an identifiable person is one who can be identified directly or indirectly from the data*.

The controller must process the data *fairly and lawfully*. And under Article 6(c)-(e) the data being processed must be:

adequate, relevant and not excessive in relation to the purposes of the processing;

where necessary, kept up to date;

and *kept...for no longer than is necessary* for the purposes of the data processing.

Under Article 7(f) one of the criteria considered in deciding whether processing is legitimate under Article 6 can be that it is:

...necessary for the legitimate interests pursued by the controller or by the third parties to who the data are disclosed, except where such interests are overridden by the interests of fundamental rights and freedoms of the data subject which require protection...

The latter include the data subject’s privacy interests.

The domestic law implementing 95/46 must enable the data subject to enforce compliance by controllers.

Plaintiff Costeja Gonzalez was arguing in Spain about two pages, published in a Catalan newspaper in 1998, reporting his bankruptcy and legal proceedings to recover his debts. He is now a solvent businessman and wanted to prevent Google including when his name is searched.

The information in the articles was neither private nor was it false. It had been lawfully in the public domain since 1998.

But it was *personal data* for the purposes of Directive 95/46 because it identified him.

The Spanish court asked the CJEU to give rulings, essentially, on three questions:

There is no appeal from this decision. The war has started and local battles over the application of this ruling will be fought in member states.

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Was Google *processing* the personal data as a *data controller* within the meaning of 95/46 when it located and indexed the articles - so that it could in principle be required by the Spanish authorities to remove them if they were being processed incompatibly with 95/46?

Was Google within the territorial reach of the directive?

Did Mr Gonzalez's desire to see the articles removed prevail over the *economic interest* of Google in processing the information and the *interest of the general public* in having access to the information through a search?

The CJEU answered the first in the affirmative. Google argued that it was not *data processing* because it retrieved and indexed all relevant data on the internet when it searched, without selecting *personal* as opposed to other data. It was not a *controller* in relation to the indexed data because it has no knowledge or control over what comes up on its searches. The CJEU rejected these arguments. If it had accepted them it would have severely restricted the scope of 95/46. It held that Google's activity fell squarely within the broad wording of Directive Art 2(b) defining data processing.

It gave a "yes" answer to the second as well. It did not matter that Google Search is based in the US. Google Spain has separate legal personality, with a seat in Madrid and sells advertising space on the website in Spain. This was enough to mean that the processing was *in the context of the activities of an establishment of the controller on the territory of the member state* within Art 4 of the Directive.

It is the ruling on the third question that has ignited the greatest controversy. The short answer was again "yes." The devil is in the detail.

The CJEU considered that the indexing of articles in 2014 was *inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine*. It was therefore incompatible with Articles 6(c)-(e).

Such processing was not saved by Article 7(f), as necessary for the legitimate interests of the controller or third parties, since any authorisation provided by this had to

continue for the *entire period during which it is carried out...* Article 7(f) was no longer made out in 2014.

Moreover a data subject in Mr Gonzalez's position could establish a presumptive right to removal of the old data even if continued indexing would cause him him/her no *prejudice*.

In this way the Central European "right to be forgotten" was smuggled into the Directive.

A search engine faced with a Gonzalez type request could, said the CJEU, conclude that the presumptive right was defeated. The processing might remain compatible with Article 6(e)-(f) and Art 7(f) might apply, in certain circumstances. It gave as an example where:

...for particular reasons, such as the role played by the subject in public life, the interference with fundamental rights is justified by the preponderant interest of the general public in having...access to the information in question.

But this is cold comfort to search engines faced with such requests, which must either block or assume the burden of justifying the indexing in public interest terms. If they do the latter the data subject can challenge their decision before data protection authorities and courts in the member state concerned.

The CJEU's conclusion is plainly wrong, as being incompatible with the free flow of information and ideas on the internet. A number of the steps in the reasoning are self-evidently flawed. In particular Mr Gonzalez was not protecting a privacy interest. He was protecting himself from continuing embarrassment. And the public interest in knowing about his past, especially when doing business with him, is obvious.

But there is no appeal from this decision. The war has started and local battles over the application of this ruling will be fought in member states. The politics of the judgment should not be underestimated. Central Europe holds dear the right to be forgotten.

There were Central European judges on the panel and the feeling generally in Europe, post-Snowden, is against the big American ISPs and their huge profits. Luxembourg did not see much in the way of a legitimate interest on Google's side of the balance.

Don't expect the battles to be won in many member states.

Gavin Millar QC is a barrister at Doughty Street Chambers in London.

First Amendment Protects Search Engine Results

By Carey R. Ramos and Jacob J. Waldman

In a scholarly and closely reasoned opinion issued in *Zhang v. Baidu.com Inc.*, 2014 WL 1282730 (S.D.N.Y. Mar. 28, 2014), Judge Jesse M. Furman of the SDNY forcefully declared that the First Amendment shields an Internet search engine from an action challenging its “editorial judgments about which political ideas to promote.”

The decision dismissed an action seeking to sanction Baidu—the most popular search engine in China—for allegedly depriving plaintiffs of their First Amendment rights by not returning links to their “pro-democracy” works in its search results. The Court found that plaintiffs’ attempt to enlist the courts to sanction Baidu ran afoul of the First Amendment’s protection against compelled speech. In reaching this conclusion, Judge Furman was called upon to address what he characterized as a “question of first impression” in the Second Circuit—“whether search-engine results constitute speech protected by the First Amendment”—which he answered in the affirmative, “at least in the circumstances presented here.” *Id.* at *1–2.

Background

Plaintiffs were eight Chinese individuals, living in the United States, who allegedly created written, audio, and/or video works advocating the democracy movement in the People’s Republic of China. Plaintiffs claimed that, although their works were available on “any of the well known search engines,” Baidu censors its results to exclude content that “deals with the Democracy movement in China,” in compliance with applicable laws of the PRC. Plaintiffs asserted violations of 42 U.S.C. §§ 1981, 1983, and 1985 on the grounds that Baidu’s alleged policies infringed the free speech clause of the First Amendment. They also asserted causes of action under New York State and local laws for discrimination against plaintiffs on Baidu’s search engine, which they characterized as a “place of public accommodation,” on the basis of plaintiffs’ purported “creed”—their “political belief in democracy and the

democratic process for the citizens of China.” Plaintiffs sought \$16 million (\$2 million per plaintiff) in unspecified damages.

The Decision

Judge Furman framed the issue presented as “whether the First Amendment protects as speech the results produced by an Internet search engine,” and concluded that “at least in the circumstances presented here, it does” since “allowing Plaintiffs to sue Baidu for what are in essence editorial judgments about which political ideas to promote would run afoul of the First Amendment.” *Id.* at *1.

In reaching this conclusion, the court turned to the Supreme Court’s decisions in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), which struck down a Florida statute requiring newspapers to permit political candidates a “right of reply” to editorials, and *Pacific Gas & Electric Co. v. Public Utility Commission of California*, 475 U.S. 1 (1986), which invalidated a rule requiring a utility company to include a consumer group’s critical newsletter in its bill mailings. *Id.* at *3.

“Taken together,” Judge Furman declared, these and other cases establish the principles that the Government “may not tell a private speaker what to include or not to include in speech about matters of public concern,” that this rule applies not just to the press but to corporations and ordinary individuals, and that it applies irrespective of whether the speaker “articulates, or even has, a coherent or precise message” or “generated the underlying content in the first place” and regardless of the Government’s justification for seeking to include or exclude certain speech. *Id.* at *4. The Court then explained that, “[i]n light of those principles, there is a strong argument to be made that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation,” *id.* at *4, particularly because in performing its data retrieval, “search

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engines inevitably make editorial judgments” about the content and presentation of their results. *Id.*

The Court further held that sanctioning Baidu for allegedly “design[ing] its search-engine algorithms to favor certain expression on core political subjects over other expression on those same political subjects” would “violate the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message,” and that punishing Baidu for editorial judgments “would contravene the principle upon which ‘our political system and cultural life rest’: ‘that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.’” *Id.* at *7.

Whether Baidu chooses “to disfavor speech concerning democracy”—as plaintiffs allege—was immaterial, the court reasoned, since “the First Amendment protects Baidu’s right to advocate for systems of government other than democracy (in China or elsewhere) just as surely as it protects Plaintiffs’ rights to advocate for democracy.” *Id.* at *9. Indeed, the court recognized that its dismissal of the case “is itself ‘a reaffirmation of the principles of freedom and inclusiveness that [democracy] best reflects, and of the conviction that our toleration of criticism . . . is a sign and source of our strength.’” *Id.*

The court found plaintiffs’ arguments to the contrary “wholly unpersuasive.” *Id.* at *7. Plaintiffs asserted that Baidu was merely discriminating and not actually speaking, but the Court noted that plaintiffs’ “own theory of the case” was that Baidu’s “editorial discretion” favored one form of speech over another. *Id.* at *8.

Plaintiffs argued that their private suit did not involve Government regulation of speech, but the Court found that “plaintiffs’ attempt to ‘enlist the government—through the exercise of this Court’s powers—to impose ‘a penalty on the basis of the content’ of Baidu’s speech,” would “inescapably dampen[] the vigor and limit[] the variety of public debate.” *Id.* at *8 (quoting *Tornillo*, 418 U.S. at 256).

Finally, plaintiffs claimed Baidu’s speech was commercial, and therefore entitled to less protection, but the Court found Baidu’s search results “relate to matters of public concern and do not themselves propose transactions,” and

Baidu’s “profit motive” did not “deprive it of the right to free speech any more than the profit motives of newspapers in *Tornillo* and [*N.Y. Times v. Sullivan*, 376 U.S. 254 (1964)] did.”

Other Authority

Zhang v. Baidu adds to a small but growing body of judicial authority concerning the application of free speech principles to search engines. In one of two other cases cited by Judge Furman, the District of Delaware rejected in three paragraphs the search-engine defendants’ unanswered argument that a *pro se* plaintiff’s demand for prominent placement of his advertisements in their search results was barred by the First Amendment. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007).

Similarly, in *Search King, Inc. v. Google Tech., Inc.*, 2003 WL 21464568 (W.D. Okla. May 27, 2003), the court found that Google’s search-result ranking expressed “opinions of the significance of particular web sites as they correspond to a search query,” that such rankings could not be deemed “false,” and therefore Google’s selection enjoyed Constitutional protection. *Id.* at *4. In a third decision, not addressed by the court, the Northern District of California in

Kinderstart.com LLC v. Google, Inc., 2007 WL 831806 (N.D. Cal. 2007), dismissed plaintiff’s free speech claims for failure to demonstrate that Google’s actions were state action. *Id.* at *13. Notably, the court rejected plaintiff’s argument that the “emanation of third-party speech from a search engine somehow transforms that privately-owned entity into a public forum.” *Id.* In other words, a search engine is a private space—not a town square.

Despite the dearth of case law on the subject, Judge Furman noted that the application of the First Amendment to search-engine results “has been the subject of vigorous academic debate.”

The Court cited several articles, including Stuart A. Benjamin’s *Algorithms and Speech*, 161 U. Pa. L. Rev. 1445 (2013), which maintains that “[s]o long as humans are making substantive editorial decisions, inserting computers into the process does not eliminate the communication via that editing” (*id.* at 1494), and Michael J. Ballanco’s article

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The First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation.

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for the George Mason University Civil Rights Law Journal, *Searching for the First Amendment: An Inquisitive Free Speech Approach to Search Engine Rankings*, 24 GMUCRLJ 89 (2013), which argues essentially that search engine results are entitled to similar degrees of First Amendment protection as other speech (“When a search engine is providing a mere opinion, its result should be treated as a fully protected free speech opinion” but, when search results are more like commercial speech, they should be treated accordingly, *id.* at 111).

Judge Furman’s decision heeds these scholarly arguments by confirming that search engine results are entitled to protection coextensive with the expression of opinions and editorial decisions, and, critically, need not express anything beyond what the operators of the search engines wish to express.

Baidu was represented in this matter by Carey R. Ramos, a partner at Quinn Emanuel Urquhart & Sullivan, LLP, and Jacob J. Waldman, an associate at the same firm. Plaintiffs were represented by Stephen N. Preziosi, P.C.



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and the National Association of Broadcasters (NAB)*

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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 after 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.

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.

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

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. *Klayman v. Zuckerberg and Facebook, Inc.*, 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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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. *American Broadcasting Cos., Inc. et al. v. Aereo Inc.*, No. 13-461 (U.S. June 25, 2014).

Despite the potentially broad ramifications of this closely-watched 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 Supreme Court reversed the Second Circuit and ruled that Aereo's system publicly performs broadcasters' copyrighted programs.

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

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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 transmitter 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

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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 cable-television 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-the-air 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-the-scenes" 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

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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 [available online here](#).

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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.

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

By Judith A. Endejan

The Second Circuit has blessed the wholesale electronic copying of entire books in university collections – but only for three limited uses. [*Authors Guild, Inc. et al. v. HathiTrust, et al.*](#), (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

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

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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.

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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 – preservation-under 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 entire books are copied without the authors’ permission. The use to which this copying is put (i.e., for educational/ socially beneficial purposes) controls. As more and more creative uses of 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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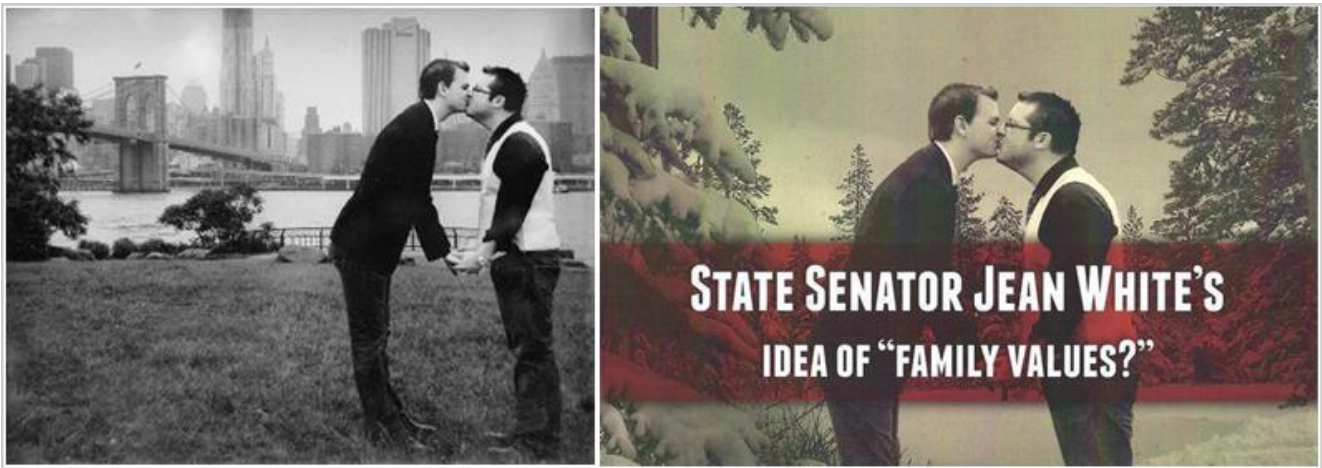
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Court Holds That First Amendment Protects Use of Couple's Engagement Photo in Mailers

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 on-screen 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

News on Meltwater's website or articles on publishers' own websites, on the basis, for example, that the user's acts of reproduction were "*occasioned by the voluntary human process of accessing that webpage*".

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.

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,

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The case forms part of the English *NLA v Meltwater* dispute. Meltwater provides a media monitoring service to PR agents.

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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 subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

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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Article 5(5)

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.

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.

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 in Sydney, Australia, 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 was the more expensive 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 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

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 that time, defamation 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.



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Libel Trials

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 than 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 11th 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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Dutch Broadcaster Wins Libel Case Brought by Ryanair

Questions About Flight Safety Not Defamatory

By Tessel Peijnenburg and Jens van den Brink

In April, a court in Amsterdam dismissed a libel suit brought by Irish budget airline Ryanair against Dutch broadcaster KRO over news reports that raised air safety issues about the carrier. [Ryanair Ltd., v. Katholieke Radio Omroep](#), (April 16, 2014).

At issue were reports on KRO's Brandpunt Reporter of [28 December 2012](#) and [3 January 2013](#) that discussed Ryanair's corporate culture and the influence this may have on flight safety. The broadcasts included interviews with a number of Ryanair pilots who appeared anonymously. Among other things, they addressed an incident that occurred on July 26, 2012 above Valencia, Spain in which three Ryanair pilots had "fuel maydays."

Ryanair sued alleging the broadcasts falsely accused it of jeopardizing flight safety by its fuel policy and also making pilots fly when sick.

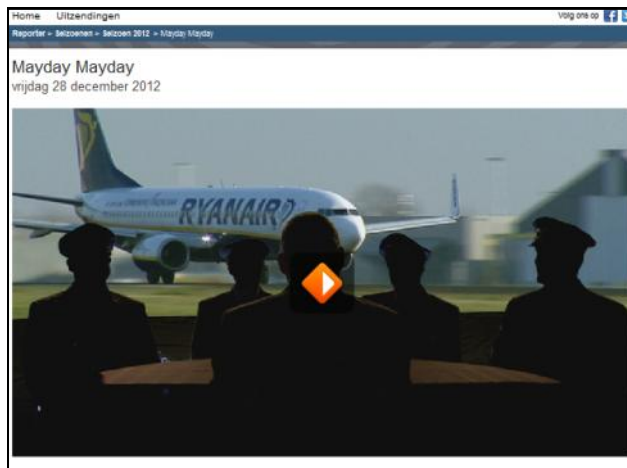
Court Ruling

The Court [ruled](#) that KRO had made a detailed investigation of the allegations and the broadcasts were supported by the facts disclosed or were fair comments about the issues. Therefore, KRO was justified to raise accusations about flight safety in its broadcasts.

The following considerations of the Court are particularly interesting.

4.4. *With the parties the Court establishes that on 26 July 2012 there was a hectic situation. A large number of airplanes tried to avoid storm cells above Madrid and some of them were*

subsequently above Valencia where there was only one landing strip and the airport had to deal with twelve diversions in twenty minutes time. The Court adjudicates the situation of the three Ryanair planes on 26 July 2012 as being potentially dangerous. It can also be established that it does not happen often that a plane must make a mayday call and that it is exceptional when three planes of one and the same airline have to make such a call on the same day.



A court in Amsterdam dismissed a libel suit brought by Irish budget airline Ryanair against Dutch broadcaster KRO over news reports that raised air safety issues about the carrier.

4.5 *KRO made a detailed investigation into the course of affairs and the circumstances that played a role in this context. KRO talked with various sources from the aviation sector and had a large amount of documentation available. On the basis of all available information, KRO came to the conclusion that there was a serious abuse: on the one hand, the corporate culture within Ryanair and, on the other hand, the associated safety risks.*

According to the Court, the nature of this abuse was such that KRO, being a news medium, must be able to comment on it and warn people about it. In principle, it is up to KRO to decide what is broadcast or not from the available material.

4.7 *The accusations made in the broadcast are supported to a large extent by statements of anonymous persons who say that they are pilots of Ryanair. In the light of the accusations made by them and in view of their dependent*

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relationship with Ryanair, the Court deems the choice of KRO to make them unrecognisable understandable. The identity of these persons was verified by a notary in such a way – by means of their identification-company passes – that KRO could assume they were pilots of Ryanair. In the Court's opinion, their statements are moreover sufficiently supported by the many documents and other sources which KRO disposed of.

4.11. The Court furthermore considers it important that also the (subjective) experience of pilots of Ryanair may influence flight safety, even if this could not be explained on the basis of the rules on fuel policy as included in the Operations Manual and the employment conditions of Ryanair. Apparently, various pilots experience the policy of Ryanair as a pressure which hinders them in their job, for instance when making a decision. It must be observed here that in all cases the decision to fly remains the responsibility of the pilot.

4.13. The Court therefore comes to the conclusion that the – serious – accusations made in the broadcasts were sufficiently supported by the available facts. The statements of the anonymous persons, of whom the KRO could assume that they worked as pilots at Ryanair, made in the broadcast are supported by (amongst other things) the above-mentioned exhibits, the correctness of which was not denied by Ryanair. The prior announcements on the website are only a summary of what is to be discussed in Broadcast I and II. It has not become evident that

the texts on the website, apart from the broadcasts, are unlawful towards Ryanair.

In the broadcast, accusations were made by the various interviewees. This was followed by KRO voice-overs summarizing or commenting on these statements. The Court said KRO did not make these statements as its own. The Court said in this respect:

4.6 This case concerns serious accusations against Ryanair. The accusations are embedded in interviews with sources from both within and outside Ryanair. The criticism on the policy of Ryanair made by the interviewees is of an equal nature and purport. It cannot be said that KRO has made these accusations its own, but it does attach conclusions thereto which are reported by a voice-over.”

Various media have reported that Ryanair will appeal against the judgment.

Incidentally, Ryanair's request for a provisional hearing of witnesses [was rejected](#) as unnecessary. The arguments of KRO were sufficiently supported by the facts. The Court argued that facts and circumstances that may be established afterwards cannot alter the lawfulness of the prior broadcasts.

At an earlier stage, Ryanair unsuccessfully sought to obtain the unedited videos of the interviews made by KRO. Ryanair argued that KRO used the statements out of its context. The Court rejected the request based on KRO's right not to disclose its journalistic information.

Tessel Peijnenburg and Jens van den Brink are lawyers with Kennedy Van der Laan in Amsterdam. They represented KRO in this case.

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MLRC memo representing some of the key points from the Final Rule publication.

2014 Report on Trials and Damages

MLRC's 2014 Report on Trials and Damages updates our study to include 12 new cases from 2012 and 2013. Our trial database now includes trial and appellate results in 632 cases from 1980-2013.

News Media Coalition Weighs in to Support Drone Photographer in NTSB Litigation

By Charles D. Tobin and Christine N. Walz

A coalition of news organizations, arguing that the use of unmanned aerial systems ("UAS" or "drones") for newsgathering should not constitute a "business purpose" under federal regulation, is supporting a drone photographer's administrative appeal of a \$10,000 fine.

This is the first organized effort by a group of news media to engage with the federal government in the growing debate over regulating civilian UAS use in the United States.

The coalition has appeared as [news media amici](#) before the full National Transportation Safety Board in support of Raphael Pirker, who was fined \$10,000 for flying a camera-equipped model aircraft around the University of Virginia. He successfully challenged the fine before an administrative law judge from the NTSB. The judge ruled that the Federal Aviation Administration's stringent regulation of commercial drones was unenforceable because the agency had failed to adopt it through appropriate procedures. The FAA has now appealed that ruling to the full NTSB.

While unmanned aircraft have traditionally been used for military and civil applications, recent technological advances have made journalists eager to deploy for news use the same inexpensive model aircraft popular with hobbyists. The FAA, however, has taken the position that the use of UAS for newsgathering would constitute an impermissible "business purpose" under the same FAA policy document that Pirker has challenged.

The administrative law judge ruled that the policy document was unenforceable because it was not enacted under the strictures of the Administrative Procedures Act. In its appeal, the FAA in the appeal argues that the general body of regulations that apply to commercial airplanes, the Federal Aviation Regulations, furnish broad authority to ban UAS use. Pirker counters that the FAA's broad interpretation absurdly would permit it to regulate frisbees, golf balls,

boomerangs, bullets, and children's toys. According to Pirker, the FAA's failure to issue regulations through proper notice and comment procedures precludes any penalty for UAS use.

A coalition of eighteen media companies and nonprofit journalists' associations have filed an *amicus* brief in support of Piker. The news media organizations have criticized the FAA's heavy-handed approach and complete ban on UAS, especially as it would apply to journalism. Newsgathering, the coalition argues, does not fall within "business purposes" in the sense of a commercial sale of goods or services. The news media's brief directed the NTSB to a number of federal policies that have carved out protections for the news media, including: exceptions to temporary flight restrictions over disaster sites; postal rates; campaign expenditure rules; broadcast license requirements; and subpoenas to journalists. The brief asks the NTSB, in adjudicating Pirker's appeal, to likewise recognize the public's and the news media's First Amendment interests in news gathering and dissemination.

The news media's brief also highlights the many ways that drones will aid news coverage, pointing the NTSB to coverage of recent news events, including fires and protests that incorporated video footage provided by drone hobbyists. The brief also cites a survey conducted by the National Press Photographers Association, under the leadership of its General Counsel Mickey Osterreicher, in which journalists anticipate using drones to obtain footage despite obstructions, safety concerns, police restrictions, or hazardous environments and expect that drones will improve their ability to report on fires, accidents, weather conditions, natural disasters, and construction sites. The NPPA's paper *Charting the Course for the Use of Small Unmanned Aerial Systems in Newsgathering*, includes the full survey results and is [available here](#).

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Responding to calls for additional privacy regulations relating to the use of drones, the news media *amici* argue that privacy concerns relating to this technology do not require a new set of federal laws. Instead, state laws, including invasion of privacy laws, as well as trespass laws, nuisance laws, state electronic eavesdropping or wiretapping laws, and anti-stalking laws, can address those concerns, as they have addressed other developing technologies.

Finally, the news media *amici* argue that, where First Amendment rights are implicated, it is critical that Congress and regulatory agencies provide clear, constitutional standards that avoid improperly limiting the rights to free speech and a free press. The FAA's *ad hoc* restrictions on the use of unmanned aerial systems do not currently provide clear standards. As a result, media organizations are at risk of facing enforcement actions like that brought against Pirker. This risk flatly contravenes the First Amendment.

Through their brief, the *amici* have encouraged the FAA to undertake a proper notice-and-comment rulemaking to establish a workable, constitutional regulatory framework for the safe and lawful use of UAS by the news media.

In addition to the news media's brief, the NTSB has also received *amicus* briefs from the National Agricultural Aviation Association (supporting the FAA's position), and from a coalition of drone users who have received cease-and-desist letters from the FAA and a technology consulting company that provides services for non-military, commercial uses of drones (supporting Pirker).

The litigation before the NTSB is just one forum in which the public policy debate over UAS regulation is playing out.

Congress in 2012 ordered the FAA to issue a comprehensive plan for integrating UAS into the air traffic system by 2015. As part of that goal, the law requires the FAA to issue a rule specifically addressing the use of small UAS. In late 2013, the FAA issued a "roadmap" laying out its plan for the safe integration of UAS, which begins with the establishment of six experimental test sites located around the country to experiment with the use of UAVs in areas with diverse climate, geography and ground infrastructure. Two of the test sites are currently operational. All of the test sites are expected to begin operation before the end of the summer.

The following news media organizations participated in the *amici* brief: Advance Publications, Inc., A. H. Belo Corporation, the Associated Press, Cox Media Group, LLC, Gannett Co., Inc., Getty Images, Gray Television, Inc., Hearst Corporation, The McClatchy Company, the National Press Photographers Association, the National Press Club, The New York Times Company, Reporters Committee for Freedom of the Press, the Radio-Television Digital News Association, Scripps Media, Inc., Sinclair Broadcast Group, Inc., Tribune Company, WP Company LLC/*The Washington Post*).

Charles D. Tobin and Christine N. Walz are attorneys in the Washington, D.C. office of Holland & Knight LLP. They, along with Gary Halbert from the Washington, D.C. office of Holland & Knight LLP, represent the coalition of news media amici in Huerta v. Pirker (NTSB Docket CP-217). On appeal, the FAA is represented by Susan Caron, Office of the Chief Counsel, Federal Aviation Administration. Photographer Raphael Pirker is represented by Brendan M. Shuman with the New York office of Kramer, Levin, Naftalis, & Frankel, LLP.

2014 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

Sidebar: Publishing Drone Video That Falls from the Skies

By Charles D. Tobin and Christine N. Walz

It's clear that the FAA currently considers it unlawful for a newsroom to strap a camera onto a drone, take images, and publish them. Whether the ban will survive the current litigation, or be replaced by a properly promulgated set of regulations, remains to be seen. Also uncertain is whether the FAA's dubious approach of sweeping newsgathering under the definition of proscribed "business purposes" will survive.

Until then, some newsrooms have wondered what to do when hobbyists take these aerial images on their own, then deliver them to their favorite newspaper, television station, network, or web host. Will the FAA come after journalists who publish these source materials without participating in the aerial photography themselves?

Recently, the FAA has made concerning statements suggesting that merely publishing drone footage could result in FAA enforcement action. Specifically, after a drone operated by hobbyists in Ohio captured video footage of a fire, a FAA spokesperson recommended that a news publication "err on the side of caution" because it "would require more legal review to determine if it was a fineable offense to publish the video on [a news] site." See Tristan Navera, *Why You Won't See Drone Footage From Downtown Fire on Our Site*, Dayton Biz Blog (April 4, 2014).

Despite this chilling warning from the FAA, U.S. Supreme Court precedent holds that the government may not punish publication of lawfully obtained information that is truthful and a matter of public significance, absent an interest of the highest order and a narrow tailored remedy. For this reason, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Court held that the First Amendment protected a broadcaster's publication of an illegally taped telephone conversation that he lawfully obtained from someone else, and that recorded a matter of legitimate public concern.

Since *Bartnicki*, courts consistently have held that government officials lack any authority to threaten citizens who have done nothing more than publish information of legitimate public concern. For example, in *Jean v. Massachusetts State Police*, 492 F.3d 24 (1st Cir. 2007), the First Circuit upheld an injunction prohibiting police from threatening to prosecute a woman who posted illegally-recorded video of a warrantless police search of someone else's home. Regardless of the homeowner's violation of state eavesdropping laws in creating the video, the First Amendment permitted her to publish. The appeals court noted specifically that even if the woman knew the homeowner broke the law, *Bartnicki* protected her since she had no hand in the recording.

Bartnicki and its progeny suggest that, while the FAA may not like seeing drone photography on the internet, journalists are fully protected where a photographer provides the footage and the newsroom did not participate in or request the recording. Of course, given the FAA's recent statements, newsrooms will individually have to weigh the risk and expense of defending against a potential enforcement action before publishing drone photography.

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MLRC Partners with Berkeley for Legal Frontiers in Digital Media Conference

On May 15-16, 2014, MLRC held its Seventh Annual Legal Frontiers in Digital Media Conference in Silicon Valley. This year MLRC partnered with the Berkeley Center for Law & Technology and convened at the Computer History Museum in Mountain View. We gratefully acknowledge our Conference co-chairs Rosemarie Ring, Munger Tolles & Olson; and Regina Thomas, AOL Inc.; and Chairs Emeritus Mark Kahn, Evernote; Timothy Alger, Perkins Coie; and Kurt Wimmer, Covington & Burling; and Conference supporters: Axis Pro, Backpage.com, Covington & Burling, Davis Wright Tremaine, Dentons, The Guardian, Jackson Walker, K&L Gates, Kelley Drye, Lathrop & Gage, Microsoft, Munger Tolles & Olson, Perkins Coie, SheppardMullin, WilmerHale, and reception sponsor Google.

The opening session of the conference addressed new business models in the age of digital video convergence. Brian Andersen, LUMA Partners, discussed among other things, the trend towards a data driven approach to programming. Andersen's presentation was followed up by a panel discussion, moderated by Jordan Gimbel, Yahoo, with Bob Heldt, Netflix; Karen Kramer, Zing Legal; Tara Maitra, TiVo; and Shashi Seth, Tribune Digital Ventures.

Next up was a panel titled, "Scraping Content: the CFAA, DMCA, and Terms of Use," moderated by Benjamin Glatstein, Microsoft with Jonathan Blavin, Munger, Tolles & Olson; Neel Chatterjee, Orrick, Herrington & Sutcliffe; Hanni Fakhoury, Electronic Frontier Foundation; and Aaron Schur, Yelp. Panelists addressed the civil and criminal reach of the Computer Fraud and Abuse Act and similar provisions (including terms of use) – often used in conjunction with technical blocking measures – to protect content from scrapers.

Last on Thursday was a panel addressing legal challenges faced by digital companies when served with process in national security investigations. The session, dubbed "Digital Media in the Age of NSA Surveillance," was moderated by Peter Canfield, Jones Day. Canfield walked the panel through a series of hypothetical scenarios involving a government official – expertly portrayed by Stewart Baker, Steptoe & Johnson – approaching a fictional startup media company, "My World," for which Nate Jones, Microsoft, assumed the role of in-house counsel. Marc Zwillinger, ZwillGen, served as outside counsel to My World, and Susan Freiwald, University of San Francisco School of Law, a "friend" of the of the fictional entity's in-house counsel, advised My World on civil liberties and privacy concerns.

Day two of the conference began with a session called, "Is Mobile Different?" To help answer that question, Dan Waggoner, Davis Wright Tremaine, led a series of presentations given by three experts on the subject: Sue Glueck, Microsoft; Mark Kahn, Evernote; Gerard Waldron, Covington & Burling. Among the reasons the technology is different: shorter interaction time, smaller screen size, location-based services, and the dominance of Apps. As discussed by the panel, these differences create a number of legal challenges, particularly in the areas of privacy and security.

The next session "Online Advertising Mashup" was moderated by Meredith Halama, Perkins Coie, with panelists Ken Dreifach, ZwillGen; Joanne McNabb, Office of the California Attorney General; Laura Pirri, Twitter; and David Wainberg, AppNexus. The session centered around privacy policy transparency and current standards and practices with respect to personally identifiable information and Do Not Track protocols.

The final session – Digital Media Venture Capital 2014 – discussed digital media trends from the perspective of venture capital professionals. The session was moderated by Stephanie Zeppa, Sheppard Mullin, with panelists Stephen Bernardez, ONSET Ventures; Saad Khan, CMEA Capital; Ray Rothrock, Venrock; and Robert Siegel, XSeed Capital. Among the major challenges for digital media startups are identifying great content, understanding the mindset of a new generation of so-called "digital natives" and grappling with global rights issues.