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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through November 28, 2018

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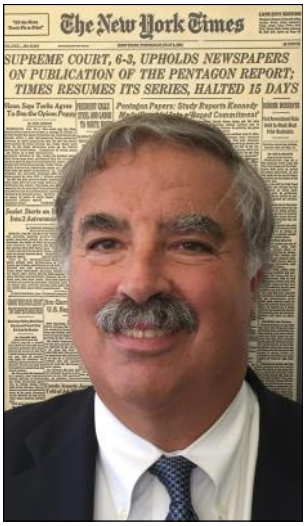
MLRC Annual Dinner on '68 and Forum on #MeToo Reporting Rousing Successes

Also: In-House Group to Meet Regarding Trump, Press Access, and Legal Threats

MLRC Annual Dinner week (formerly known as PLI week) has come and gone. It was, at once, busy, productive, interesting and entertaining. As so often seems to happen, it was almost contemporaneous with major legal events: the Kavanaugh hearing took place the very day of our Virginia Media Law Conference, and unbeknownst to us just as we sat down to eat at our Annual Dinner in New York, CNN's Jim Acosta's White House press credential was being revoked after a spat at a press conference that afternoon.

But the events in New York contained quite enough to keep us duly occupied.



George Freeman

First up, Wednesday afternoon, was the Annual Meeting of the MLRC Board, whose minutes appear elsewhere in the issue. The headline was the passing of the gavel, as Chair of the Board, from Lynn Oberlander to Randy Shapiro, Global Media Counsel of Bloomberg. I very much look forward to working with Randy, but at the same time I regret seeing Lynn go (although she is staying on the Board for another term). Over the past four years, pretty much coinciding with my tenure, Lynn has been at the same time supportive and instructive, and always a pleasure to collaborate with. I am sure Randy similarly will be a boon to the Board and a creative leader for the MLRC.

(Continued on page 4)

At the well attended annual open Board meeting held November 7 in New York, Randy Shapiro was chosen as new MLRC Board Chair.

(Continued from page 3)

The well attended Board meeting also featured the second of two amendments to our By-Laws this year. The one passed at the meeting was relatively ministerial, an amendment to the DCS By-Laws, now ratified by the MLRC Board, of a section conforming the length of terms of DCS Executive Committee members to current practice. Never having been changed since the early 1990's, the old version called for ExCom members to serve for 10 years, double the practice over recent decades and arguably unconstitutional as "cruel and unusual punishment."

The other amendment, enacted earlier this year, is more significant. Recent events and some changes in the media law landscape had raised questions about the efficacy and breadth of our By-Laws as to the stipulation preventing MLRC members from representing plaintiffs in libel and privacy cases against the media. So some changes were made, unanimously approved by both the MLRC Board and the DCS Executive Committee.

First, in addition to defamation, privacy and related lawsuits which firms are prohibited from bringing against the media, we added "newsgathering" lawsuits as well. More important, the prohibition had for years only included "actions" or "cases." That has now been expanded to include "lawsuits" and the taking of "steps in contemplation of such litigation against the media." So a DCS firm may not write a demand letter threatening a libel suit, etc. with an aim of getting a monetary settlement. There is a carve-out if the letter makes clear that it is not geared to a potential lawsuit, but is just seeking a retraction.

From the Board meeting, we moved to the Forum, which focused on #MeToo reporting and the breaking of the Harvey Weinstein story. We had a truly all-star cast, headlined by Ronan Farrow and Jodi Kantor, whose New Yorker and New York Times articles, respectively, combined to break the Weinstein story and send shock waves throughout the Hollywood community. Complementing them were Rebecca Corbett, the Times Assistant Managing Editor who painstakingly oversaw the Weinstein story, and Fabio Bertoni and David McCraw, the lawyers for each publication.

By unanimous acclamation, this was simply the best Forum we have ever put on. The room, unfortunately a little smaller than usual, was packed, with a crowd that spilled out the back

(Continued on page 5)

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Marvin Kalb, left, CBS' Chief Diplomatic Correspondent in '68, later host of NBC's Meet the Press; and Max Frankel, in '68 Washington Bureau Chief of The New York Times, later its Executive Editor

(Continued from page 4)

doorway. But more important, the audience was rapt as they listened to the authors describe how they found their sources (interestingly, they each had separate sources); how they got them to tell their sometimes horrific stories; and, critically, how they convinced the sources to go on the record. They also discussed their strategies in getting sources to agree to bypass NDAs which they might have signed. It was a fascinating, detailed discussion, with the remarkable panel unusually open in discussing what clearly was and still is a very sensitive topic.

Also of great interest to this audience were the comments by Rebecca as the editor on the Times' stories and the two lawyers as to their roles in facilitating and vetting the articles. Fabio received many kudos from Ronan, and David did a great job with the two-headed job I asked him to fulfill, of being both moderator and panelist. Interestingly, everyone on the panel said the process and the reporting techniques employed were no different than on other investigative stories, but that their resonance certainly was greater – largely because the victim/witnesses were, in large part, famous actresses whom the public knew and believed. A full description of the session, written by my colleague Michael Norwick appears elsewhere in this issue.

After a 90 minutes break for a reception well stocked with food and drink, it was on to our Annual Dinner. Some 550 members and friends packed the Grand Ballroom of the Grand Hyatt for dinner and for a program focusing on the tumultuous year of 1968. The questions posed to the panel ranged from were the divisions in American society 50 years ago greater

(Continued on page 6)

Lynn Sherr, left, a reporter for AP in ’68, and then for 30 years a National Correspondent for ABC News and at its news magazine show 20/20; and moderator Jeff Greenfield, a speechwriter for Robert Kennedy until his assassination in June ’68 and later a political correspondent and analyst for CBS, CNN and ABC.

(Continued from page 5)

than the schism we face today? (answer: yes); have we made significant progress in race relations and women’s rights in the intervening years? (yes); and would ’68 have played out differently in today’s media environment with cable, the Internet, etc? (the panel punted on that one).

It was a very erudite and eloquent panel – and they gave sophisticated and nuanced answers to most of the questions posed. They included Max Frankel, in ’68 Washington Bureau Chief of The New York Times, later its Executive Editor; Marvin Kalb, CBS’ Chief Diplomatic Correspondent in ’68, later host of NBC’s Meet the Press; Lynn Sherr, a reporter for AP in ’68, and then for 30 years a National Correspondent for ABC News and at its news magazine show 20/20; and moderator Jeff Greenfield, a speechwriter for Robert Kennedy until his assassination in June ’68 and later a political correspondent and analyst for CBS, CNN and ABC.

The program began with a 13 minute video montage taking the audience through the events of ’68: the Tet Offensive, a turning point in the Vietnam War, in January; Walter Cronkite’s report saying that the War couldn’t be won in February, Gene McCarthy’s challenge to LBJ, his near-victory in New Hampshire and LBJ’s famous speech saying he wouldn’t run for re-election, all in March; Martin Luther King’s assassination in April; RFK’s assassination and his funeral and the train procession from NY to DC in June; the fighting between police and students in Chicago, outside the Democratic Convention, and the nominations of Humphrey and Nixon in August, and so on. Also included in the video were Muhammad Ali, Joe Namath, Mick Jagger, draft card burning, bra burning and women’s lib marches, the black power sign at the medal podium of the Mexico City Olympics, as well as sex, drugs and rock n’ roll. It

(Continued on page 7)

(Continued from page 6)

was quite a dramatic and vibrant intro to the program, and, he says modestly, the most creative thing I've ever produced.

I would be remiss if I didn't retell one vignette. I had sent Jeff Greenfield an outline of what I suggested we cover and asked that we discuss it on the phone. When we talked, I told him that the program would begin with this video montage. Without missing a beat, he said, "And it begins with Buffalo Springfield." Somewhat dumbfounded, as no one outside my office had seen the video at that point, I gulped, "Yes, it does." He said, "Don't worry, every show about '68 starts with their "For What It's Worth." All I could respond with was, "Yes, and to continue the cliché, we then move into Mrs. Robinson and the Stones' Street Fighting Man, as Mayor Daley's cops attack the kids in Chicago."

I will not attempt to distill all the expert analysis given in those 75 minutes in one paragraph. Because of the extraordinary nature of the discussion – and its timeliness today – in a departure from our normal practice, we will put a video of the dinner program on our website. So those of you who missed the dinner and some who would like to see it again can watch it at your leisure. We'll let you know when it's posted.

But I should point out some highlights: Max Frankel seizing on George Wallace in '68 as a forerunner to Trump, and, similarly, Jeff Greenfield emphasizing that Wallace and Nixon between them got 57% of the vote in the national election, a near-landslide, showing, he said, that a majority of Americans recoiled at our now romantic view of the Revolution as depicted in the introductory video, and noting that this large segment still forms the base of Trump's not insubstantial support. Marvin Kalb opining that, in the end, everything in '68 was dominated by the Vietnam War: it was on TV every night, a massive contrast to the happy family shows of the time. And, further, that the Presidents and their Secretaries of State and Defense never adequately articulated why the War was right or justified why it was in our geopolitical interest.

Lynn Sherr saying that what was critical was the destruction and lack of trust we had in our institutions, a trend largely fostered by the youth of the time. In discussing the change in the 50 years, Lynn told some personal stories, about how she and other women would-be journalists were uniformly turned down for jobs, with management saying "we don't hire girls" looking for jobs as reporters, and then, when she finally attained a job at AP, being put on a team

(Continued on page 8)

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whose job was to explain to the American people what the new mores of the young people, such as long hair, really meant. And, finally, Max saying that there wasn't really a parallel between the two years, but that, instead, the "roots" of what we're going through now can be found in '68, because while there might not be direct comparisons, history forms a continuity which needs to be respected.

The program received rave reviews, with a consensus saying it was the best dinner program we have presented. Some folks questioned whether it was relevant enough for young people, but I sought out some millennials, and they uniformly reported enjoying it. After all, it was a crucial year in our history – and the video was aimed to introduce it to those who were uninformed as to its events. Unfortunately, Lydia Polgreen, editor of HuffPost who was not yet alive in '68 and therefore had a perspective we thought would appeal to the young lawyers in the audience, and who was going to grapple with the question of whether the events of the year might have played out differently in today's media environment, was not able to participate because of the day's news events – Attorney General Sessions had just been ousted, leaving us, she said, on the verge of a constitutional crisis. (In that vein, though we had a superior group of panelists, at one time both Gloria Steinem and Lesley Stahl had committed to participate, but both had later conflicts leading them to withdraw and Jann Wenner had health issues and couldn't take part.)

* * *

Finally, I should report on some Trumpian developments. First, as I mentioned above, during our Annual Dinner, Jim Acosta's White House press credential was rescinded. By early the next week, CNN had filed suit; shortly thereafter the Trump-appointed federal judge entered a TRO in Acosta's favor and soon after that the White House backed down and gave Acosta his card back.

As it has turned out, save for the recent Acosta imbroglio, Trump's attacks on the press have not really been in the legal sphere. They have been in the p.r. realm.

Fortunately for the lawyers involved, the MLRC had drafted a model brief early in Trump's presidency on exactly this issue: the revoking of White House access in retaliation for a reporter's or media entity's coverage. The brief came out of a meeting we convened on Dec. 1, 2016, just three weeks after the election, of in-house media counsel to strategize about expected Trump attacks on press freedoms. Of all the possible offensives we thought Trump might take and all the possible litigations the media might bring to assert their First Amendment rights, this was the area we then felt would be the most fruitful to litigate. Indeed, the sense of the meeting was to be very cautious about bringing broader claims where there were less favorable precedents.

As it has turned out, save for this recent imbroglio, Trump's attacks on the press have not really been in the legal sphere. They have been in the p.r. realm –"enemy of the people," "Fake news" and all the rest. But this onslaught, combined with the legal threats, has made it appropriate to have another similar meeting. As I recently wrote the attendees of the '16

(Continued on page 9)

(Continued from page 8)

meeting, "The never-ending barrage of White House attacks…continues unabated and largely without effective response, leading to the media's credibility being at an all-time low. The moves against Julian Assange suggest more threats against both leakers and publications which run leaked information. Three First Amendment litigations against the White House are under way, whose cost/benefit analyses might be instructive. And journalism on the President has become even more difficult and problematic, as the media is being criticized for becoming too opinionated, biased and even a cause for the nation's polarization – yet how else to cover a President who has made more than 6,420 false or misleading claims in less than two years (WaPo)?"

So we will hold a meeting redux, similar to the 12/1/16 confab, at the offices of the MLRC on the morning of Dec. 13. Because of space limitations and because the meeting is likely to focus on institutional issues and newsroom strategies as much as legal ones, like the '16 meeting, we are restricting the meeting to in-house counsel. If there are any groundbreaking developments, I'll share them with all.

The opinions expressed in this column are those of the author and not the MLRC. We welcome responses at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

O.J. and Harvey: A Buffalo Connection

Osterreicher's photograph for the *Buffalo Courier-Express* of Harvey Weinstein, left, and O.J. Simpson in 1977.

Photo by Mickey Osterreicher

By Mickey H. Osterreicher

For those of us in Western New York in the news business, there was always a Buffalo connection to most major news stories. In 1981 after the aborted U.S. hostage rescue attempt in Iran, Buffalo freelance writer Cynthia Dwyer endured nine months in an Iranian jail after being found guilty of espionage. When Terry Anderson, the AP Beirut bureau chief was taken hostage in Lebanon in 1985, it didn't take long to learn that he had lived in Batavia (between Rochester and Buffalo) and that his sister Peggy Say still lived there. That led to six years of news coverage as she sought Terry's released. And in 1995 when the bombing of the federal building in Oklahoma City killed 168 – the prime suspect was Timothy McVeigh – from a

(Continued on page 11)

(Continued from page 10)

town just outside Buffalo. And for those who don't know or remember, the Late Tim Russert and CNN's Wolf Blitzer grew up in Buffalo.

But those connections paled in comparison to former Buffalo Bills star O.J. Simpson's 1994 arrest for the murder of his ex-wife and her friend along with the subsequent "trial of the century" the following year. Which leads us to the backstage photo that I found in my files from forty years ago of the then still-adored Bills running back posing with the yet to be infamous Harvey Weinstein.


The New York Times

Review: 'O.J.: Made in America,' an Unflinching Take on His Rise and Fall

O. J. Simpson waving at fans in Buffalo. M. Osterreicher/ESPN Films

Several of my images have been used in stories about Harvey but one that I am most proud is of O.J. Simpson arriving at Rich Stadium in a limo on the day he was inducted into the Buffalo Bills Wall of fame. That photo, along with others was used in and to promote the ESPN Documentary "O.J.: Made in America."

Photo by Mickey Osterreicher

I came to Buffalo from the Bronx in 1969 to attend SUNY at Buffalo. Shortly after I began taking photos for the school paper, *The Spectrum*. I also met Harvey who was from Queens and selling advertising for the other paper, *Ethos.* Harvey moved on from ad sales to concert promotion, forming *Harvey and Corky Productions* with Corky Burger, a Buffalo native.

I shot many concerts for them including the Rolling Stones, Grateful Dead, Bette Midler, Chuck Berry and Frank Sinatra, to name a few. I also photographed many of those celebrities backstage with Harvey and Corky. When the story about Harvey broke, my wife Cathaleen Curtiss, who is the Director of Photography at the Buffalo News asked to see what images I had of Harvey from over 40 years ago to go with an article they were doing. I found the black & white negatives, which she took to the paper for scanning. Later that day she called me to ask if I had ever photographed O.J. Simpson and Harvey Weinstein together? I didn't recall. She then texted me the image to check if that was indeed them together backstage and the rest is Buffalo no-degrees-of-separation history.

Mickey H. Osterreicher is General Counsel of the National Press Photographers Association.

Tennessee Supreme Court Has Two Chances to Reshape Fair Report Privilege in the Volunteer State

Fair Report Privilege in Flux

By Paul R. McAdoo

For more than sixty-years the Tennessee Supreme Court has been silent regarding the fair report privilege, allowing the state's Court of the Appeals to develop the contours of this vital affirmative defense. This year, the Tennessee Supreme Court took up the issue in *Funk v. Scripps Media, Inc.* and is poised to issue its first opinion since 1956. There is also a pending application for review by the court in another fair report privilege case, *Burke v. Sparta Newspapers*. These two cases are an important opportunity for the court to clarify the contours of the privilege in Tennessee for reporters and the courts.

In the nineteenth century, the court repeatedly discussed defamation privileges, including the fair report privilege, and found that express or common law malice defeated the privilege. The Court of Appeals has inconsistently applied this precedent. Some opinions cite to these older cases and continue to include express malice as a means for defeating the privilege, while other opinions note that "at one time the fair report privilege required an absence of malice," but "subsequent Tennessee cases do not require it." The issue in *Funk* is what direction should Tennessee take on this issue.

For more than sixty-years the Tennessee Supreme Court has been silent regarding the fair report privilege.

Funk, Nashville's district attorney, who is suing Scripps' local station for defamation, asserts that the nineteenth century precedent is binding and should be reaffirmed by the Tennessee Supreme Court because of the long-held precedent and, among other things, the express malice component "places an important check on an increasingly freewheeling press in the age of the twenty-four-hour news cycle." Scripps focused on the Court of Appeals cases that found express malice is no longer a component of the privilege and argued that, nationally, the modern trend, as reflected in other state supreme court decisions, is consistent with the Court of Appeals decisions finding that the express malice component of the privilege should be excised from it.

A group of fourteen national media organizations filed an amicus brief in support of Scripps arguing three things: (1) under U.S. Supreme Court cases like *Garrison v. Louisiana*, it is unconstitutional to include express malice as an element of a defamation claim or as a means for defeating a defense; (2) under *Cox Broadcasting v. Cohn* and its progeny, it is unconstitutional to impose liability for truthful speech based on lawfully acquired information about a matter of public concern and express malice plays no role in that analysis, and (3) based on Tennessee precedent, the requirement is illogical and against the public policy in favor of free speech. The Court held oral argument in the case in early October 2018 but has yet to issue its opinion in the case.

(Continued on page 13)

(Continued from page 12)

The *Burke* case involves a different aspect of Tennessee's fair report privilege. In overturning the grant of summary judgment in the trial court, the Court of Appeals held that the privilege did not apply to a one-one-one, official, on-the-record interview with a sheriff's public information officer for two reasons. First, the Court held that the agency rationale justifying the privilege was not applicable to interviews that are not open to the public. As a result, the privilege did not apply. Second, the Court of Appeals took issue with the attribution to the source for the story. The defendant newspaper used the deputy's name and his role in the case, lead investigator, to identify the source, but did not include that he was also the public information officer. The court held that this failure would also defeat the privilege. This was the first time a Tennessee appellate court had held that there was an attribution requirement.

Sparta Newspapers filed an application for review with the Tennessee Supreme Court arguing that the ruling "improperly narrow[s] Tennessee's longstanding fair report privilege and that [the ruling is] directly contrary to the purpose and spirit of this crucial protection for speech about government actions."

Another, largely overlapping group of fourteen national media organizations filed an amicus brief in support of Sparta Newspapers' petition and, if review is granted, on the merits. Among other things, the amici argued that the ruling was inconsistent with the public supervision rationale supporting the privilege, which they argued, relying upon Judge Sack's treatise, "is considered the paramount interest justifying the fair report privilege." The amici also argued that the court's strict attribution requirement impinged on the newspaper's editorial discretion and the court's application of the requirement was inconsistent with the precedent it relied upon. A separate amicus brief was filed by the Tennessee Association of Broadcasters in support of Sparta Newspapers' application as well discussing the importance of the privilege for reporting and the cases from other states that reach contrary results. As of November 25, 2018, the Court has not ruled on Sparta Newspapers' application.

With *Funk* and *Burke*, the Tennessee Supreme Court has an opportunity to bring the fair report privilege into the modern era of defamation law.

With *Funk* and *Burke*, the Tennessee Supreme Court has an opportunity to bring the fair report privilege into the modern era of defamation law. At the very least, its rulings on the *Funk* case and, if it takes it, *Burke*, will provide additional certainty for journalists working in Tennessee regarding the scope and application of the fair report privilege.

The coalition of national media organizations who were amici in the Funk and Burke cases are represented by Paul R. McAdoo from Aaron & Sanders PLLC in Nashville, TN. Funk is represented by James D. Kay, John B. Enkema, and Michael Johnson from Kay, Griffin, Enkema & Colbert, PLLC in Nashville, TN. Scripps Media is represented by Ronald G. Harris, Jon D. Ross, and William J. Harbison, II from Neal & Harwell, PLC in Nashville, TN. Burke is represented by W.I. Howell Acuff from Cookeville, TN. Sparta Newspapers is represented by Phillip M. Kirkpatrick, Lucian T. Pera, and J. Bennett Fox, Jr. from Adams & Reese's Nashville and Memphis offices. The Tennessee Association of Broadcasters is represented in Burke by Douglas R. Pierce from King & Ballow in Nashville, TN.

Indiana Court Issues Decision in Daniels v. FanDuel with Implications for Right Of Publicity Law And Online Sports Betting

By Kenneth L. Doroshow, Andrew J. Thomas, and Andrew G. Sullivan

On October 24, in *Daniels v. FanDuel, Inc.*, the Indiana Supreme Court ruled that uses of college athletes' names, likenesses, and statistical data in online fantasy sports contests are of "newsworthy value" under Indiana's right of publicity statute. The court's unanimous decision halts plaintiffs' bid to block fantasy sports platforms FanDuel and DraftKings from using this information without the players' permission. Daniels v. FanDuel, Inc., No. 18S-CQ-00134, 2018 WL 5275775 (Ind. Oct. 24, 2018).

The court's expansive reading of the newsworthiness exception to Indiana's right of publicity statute is likely to have an immediate impact on right-of-publicity jurisprudence nationally, given Indiana's status as a go-to venue for right-of-publicity claimants. The court's decision also hands a major victory to the online fantasy sports industry. This outcome—following on the US Supreme Court's recent decision to allow states to legalize sports betting in *Murphy v. NCAA*—sets the stage for further growth in the emerging online sports betting industry.

Background

Daily fantasy sports operators such as FanDuel and DraftKings allow fantasy league participants to compete for cash prizes by paying an entry fee and selecting from rosters of college and professional athletes, subject to a budget cap that prevents entrants from picking only the best players. The daily results from actual games determine the distribution of cash prizes among participants.

In May 2016, former Northern Illinois University football players Akeem Daniels and Cameron Stingily, and former Indiana University football player Nicholas Stoner, filed a class action lawsuit in the Southern District of Indiana against FanDuel and DraftKings based on the platforms' use of college athletes' names, images, and statistics. Plaintiffs' suit alleged violations of Indiana's right of publicity statute, which gives individuals the right to limit the use of their name and likeness for commercial purposes. Indiana Code Title 32. Property § 32-36-1-1. Indiana's statutory scheme—similar to those in many other states—makes an exception for personal information that has "newsworthy value" or is a "topic of general or public interest."

In September 2017, District Court Judge Tanya Walton Pratt granted defendants' motions to dismiss plaintiffs' suit, holding that Indiana's right of publicity statute's newsworthiness and public interest exceptions removed plaintiffs' claims from the statute's coverage. *Daniels v. FanDuel, Inc.*, No. 1:16-cv-01230-TWP-DML, 2017 WL 4340329 (S.D. Ind. Sept. 29,

(Continued on page 15)

(Continued from page 14)

2017). Plaintiffs subsequently appealed this ruling to the Seventh Circuit.

At oral argument last February, a panel of the Seventh Circuit expressed concern that Indiana state courts had never interpreted the scope of the statutory exceptions that were the basis of the district court's dismissal. Instead, the most relevant authority available consisted of federal court opinions interpreting similar provisions in other states' right of publicity statutes. In its opinion published in March, the Seventh Circuit—noting the "absence of precedent from Indiana" and "the dearth of precedent from other states"—declined to interpret the "ambiguous" scope of the newsworthy and public interest exceptions to Indiana's right of publicity statute. *Daniels v. FanDuel, Inc.*, 884 F.3d 672, 674 (7th Cir.).

Instead, the court certified the following question to the Indiana Supreme Court: "Whether online fantasy-sports operators that condition entry on payment, and distribute cash prizes, need the consent of players whose names, pictures, and statistics are used in the contests, in advertising the contests, or both." *Id.* The Indiana Supreme Court considered this question at oral argument held last June.

The Indiana Supreme Court's Decision

On October 24, 2018, the Indiana Supreme Court ruled unanimously that online fantasy sports operators' use of players' names, images, and statistics for online fantasy contests falls under the newsworthiness exception to Indiana's right of publicity statute. 2018 WL 5275775, at *6. While the court reiterated that its decision is limited to the "narrow[]" question before it, the court's opinion sets forth an unmistakably broad interpretation of the newsworthiness exception to Indiana's right of publicity statute that likely will have ramifications well beyond the case at hand. Id. at *1.

First, the court squarely rejected plaintiffs' argument that the newsworthiness exception "does not apply in the context of commercial use." *Id.* at *3. The court also rejected the plaintiff's argument that the exception is available only to news broadcasters and media companies. Instead, the court looked to judicial usage of the term "newsworthy" prior to the Indiana statute's 1994 enactment, which defined the word "'in the most liberal and far reaching terms'" as encompassing "all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general." *Id.* (citing *Time, Inc. v. Sand Creek Partners, L.P.*, 825 F.Supp. 210, 212 (S.D. Ind. 1993) (quoting *Rogers v. Grimaldi*, 695 F.Supp. 112, 117 (S.D.N.Y. 1988))).

The court also noted that the Indiana legislature's carve-out for newsworthy content was an "obvious attempt to avoid constitutional issues with the statute," and that "a broad interpretation of the term 'newsworthy value'" would achieve this purpose by "avoid[ing] a First Amendment issue in parsing acceptable forms of speech." *Id.* at *5.

Based on the foregoing, the Indiana Supreme Court ultimately held that—just as players' names, images, and statistics are published in "in newspapers and websites across the

(Continued on page 16)

(Continued from page 15)

nation"—this "information that is available to everyone" may also be used in conducting fantasy sports contests, whether such contests are paid or not. *Id.* As the court explained, "[t]his information is not stripped of its newsworthy value simply because it is placed behind a paywall or used in the context of a fantasy sports game." *Id.*

With respect to whether defendants' use of the players' names, images, and statistics constitutes unauthorized advertising, the court held that "it would be difficult to draw the conclusion that the athletes are endorsing any particular product" based on the manner in which their images and information are presented on defendants' website. *Id.* at *6. However, the court noted this finding "does not foreclose a court from closely scrutinizing the actions of a particular defendant to ensure no unauthorized endorsements are being made." *Id.* Because it found the defendants' conduct to be protected under the exception for "newsworthy" material, the court declined to examine whether the use also fell under the statute's "public interest" exception. *Id.* at *3.

Implications of the Court's Decision

While the Indiana Supreme Court's ruling in *Daniels v. FanDuel, Inc.* addresses only a single state's right of publicity statute, the decision has implications that reach far beyond Indiana. Indeed, the comprehensive protections provided by Indiana's right of publicity statute—combined with the state's aggressive choice-of-law and jurisdictional rules—have made Indiana a popular venue for right of publicity claimants. *See, e.g.*, K. Vick and J.P. Jassy, "Why A Federal Right of Publicity Statute Is Necessary," AMERICAN BAR ASSOCIATION, *Communications Lawyer*, Volume 28, Number 2, August 2011. This frequently includes claims brought by plaintiffs that have only a tenuous connection to the state. *Id.*; *see also CMG Worldwide, Inc. v. Bradford Licensing Assocs.*,2006 WL 3248423, at *6 (S.D. Ind. Mar. 23, 2006). Moreover, the Indiana Supreme Court's broad reading of the newsworthiness exception is likely to influence other courts' interpretations of similar provisions in their state's right of publicity statutes.

Beyond the online fantasy sports industry, the Indiana Supreme Court's decision in *Daniels v. FanDuel, Inc.* may help fuel the explosive growth in the wake of the United States Supreme Court's landmark decision in *Murphy v. NCAA* last June. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 200 L. Ed. 2d 854 (2018). In *Murphy*, the Supreme Court held that provisions of the Professional and Amateur Sports Protection Act of 1992 that prohibited state authorization and licensing of sports betting schemes violated the Constitution's anti-commandeering rule. Since *Murphy*, six states now allow legal sports betting (Delaware, Mississippi, Nevada, New Jersey, New Mexico, West Virginia), and three states have passed legislation allowing for its implementation (New York, Pennsylvania, Rhode Island). *See* <http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states>. A bill to allow sports betting was introduced in the Indiana Legislature last January

(Continued on page 17)

(Continued from page 16)

and is currently under committee review. *See* <https://www.americangaming.org/newsroom/press-releasess/aga-statement-proposed-indiana-sports-betting-legislation>.

Had the Indiana Supreme Court adopted the plaintiff's reading of the newsworthiness exception in *Daniels v. FanDuel, Inc.*, this would have been a significant boost for individual athletes and for the players' associations in their efforts to capture a piece of the sports betting revenue. Instead, the Indiana Supreme Court's held that fantasy sports platforms—just like newspapers and other media platforms—have a right to use publicly available information about player names, images, and statistics.

Kenneth L. Doroshow, Andrew J. Thomas and Andrew G. Sullivan are lawyers with Jenner & Block LLP. Kenneth L. Doroshow represented FanDuel in the Daniels v. FanDuel litigation. Former US Solicitor General Ian Heath Gershengorn of Jenner & Block argued on behalf of both FanDuel and DraftKings in the Seventh Circuit and the Indiana Supreme Court.

MLRC 2019 Events

January 17
Entertainment Law Conference
Los Angeles, CA

March 11
Latin American Media Law Conference
Miami, FL

May 20-21
Digital Law Conference
San Francisco, CA

September
London Conference
London, UK

November 6
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Robust Decision from the Southern District of Ohio Rejects Academic's Libel Claims Against The New York Times

By Dana R. Green

In November, a district court in the Southern District of Ohio delivered a significant victory to The New York Times in a libel claim brought by a prominent cancer researcher. Croce v. New York Times Company, No. 2:17-cv-402, 2018 WL 5808786 (S.D. Ohio Nov. 6, 2018). The court's nuanced and thoughtful reasoning creates valuable precedent in the Sixth Circuit for news organizations, especially when reporting on unproven allegations of wrongdoing.

Background

The plaintiff, Dr. Carlo Croce, is a prominent cancer researcher at Ohio State University and a prolific author in the field of cancer genetics. In early 2016, journalists James Glanz and Augustin Armendariz began investigating allegations that Croce's work was marred by data falsification and other scientific misconduct. On March 8, 2017 The New York Times published their resulting article on the front page of its digital version under the headline "Years of Ethics Charges, but Star Cancer Researcher Gets a Pass. Dr. Carlo Croce was repeatedly cleared by Ohio State University (OSU), which reaped millions from his grants. Now, he faces new whistle-blower accusations." The following day, the article appeared on the front page of the print edition, above the fold.

The court's nuanced and thoughtful reasoning creates valuable precedent in the Sixth Circuit for news organizations, especially when reporting on unproven allegations of wrongdoing.

As summarized by the Court:

> "[T]he Article describes Dr. Croce as a "prolific" scientist who "parlayed his decades-long pursuit of cancer remedies into a research empire." The Article reports on the "quotient of controversy" which has become attached to Dr. Croce, specifically "allegations of data falsification other scientific misconduct." The claims made by Dr. Croce's critics are recounted, as is Dr. Croce's response denying any wrongdoing. Varying explanations (from critics, Dr. Croce and other observers) are offered for the alleged bad data and errors—ranging from "falsification" to "reckless disregard" to "sloppiness" to "honest errors." The Article reports that Dr. Croce has not been sanctioned for misconduct by any oversight agencies or by Ohio State, which cleared him in at least five cases. The Article raises the concern that Ohio State has a financial incentive to overlook problems with Dr. Croce's work . . .

(Continued on page 19)

(Continued from page 18)

Croce alleged that 15 statements in the story were defamatory. He also alleged that Glanz defamed him in a post-publication radio interview and in a letter that Glanz sent to OSU seeking comment on some of the allegations against Croce. In bringing his claims, Croce repeatedly relied, both in his Complaint and briefing, on negative anonymous reader comments published on The New York Times' website, to support his preferred interpretation of the article.

The Times moved to dismiss, asserting that none of the statements at issue were actionable because they were, variously, subject to unique protections under Ohio law for balanced reports of controversies, the innocent construction rule, were substantially true or were opinion.

The Court's Decision

In a lengthy and detailed decision, the District Court dismissed all but one of Croce's claims, concluding that "the Article and the statements made therein are not defamatory because, when viewed in context, they represent an accurate and balanced report of the allegations made by others against Dr. Croce." The court went on to find a variety of other grounds that also supported dismissing all the claims arising from the story and the radio interview and most of the claims based on Glanz's letter.

The court observed that the article signaled to readers from the outset that they were about to read about a controversy "to which there must be two sides."

The court began by declining to recognize a broad "neutral reportage privilege" under Ohio law. However, the court adopted defendants' argument that publishers "may receive similar protection" pursuant to Ohio case law, which holds that "statements published in a 'balanced report of both parties arguments and defenses' are not, as a matter of law, defamatory in the first instance." Specifically, the court relied on three cases, *American Chemical Society v. Leadscope, Inc.*, 133 Ohio St.3d 366 (Ohio 2012), *Sabino v. WOIO,* LLC, 2016-Ohio-491 (Ohio Ct. App. 2016), and *Early v. The Toldeo Blade*, 130 Ohio App.3d 302 (Ohio Ct. App. 1998) for the proposition that allegedly defamatory statements must be read in context, and "an accurate and balanced report, though not privileged, may support a finding that statements contained within are not defamatory."

Applying this standard, the court observed that the article signaled to readers from the outset that they were about to read about a controversy "to which there must be two sides." The article was laced with "qualifying language" and emphasized "that the issues were not clear-cut." While critical of Croce, the article presented the allegations against him "not . . . as proven facts but as the 'allegations,' 'arguments,' 'claims,' and 'complaints' . . . [made by] 'critics,' a term inviting a reader to treat their accusations with caution." In counterpoint, the article included Dr. Croce's and Ohio State's responses, and "season[ed] its portrayal of the

(Continued on page 20)

(Continued from page 19)

controversy with a third-party view in Dr. Croce's defense." Taken as a whole, the court concluded, "the Article in its entirety presents an accurate and balanced report of the positions and arguments of both sides to the controversy" and therefore it was not defamatory as matter of law.

The court then turned to alternative arguments, beginning with the innocent-construction rule. Croce characterized the article as a hit piece that accused him of years of misconduct and fraud. Defendants characterized the article as a case study of a flawed system where institutions police the same researchers upon which they rely for prestige and money. The court observed that the article "contains elements of both parties' characterizations." Given a choice between two viable interpretations of the article—one defamatory, one innocent—the innocent-construction rule "tips the scales in favor of Defendants."

The court also granted dismissal of eight of the 15 statements on the alternative grounds that the statements were substantially true. In dicta likely to be helpful to future defamation defendants, the court emphasized that this was a "low threshold," and that truth could appropriately be addressed on a motion to dismiss. The court also dismissed two statements on the alternative grounds that they were non-actionable opinion. The statements at issue asserted that Croce had gone beyond norms of his profession. The court broadly held that "statements that someone toes a line of ethical conduct or that their behavior wasn't 'consistent' with professional standards are opinion."

The only statement to survive dismissal was an assertion made in a letter to OSU, seeking comment, that Croce had, as part of his involvement with the Tobacco Research Council, reviewed and awarded grants "in cases with clear conflicts of interest involving grantees at his own institution." The court held that the statement was one of fact, not susceptible to a motion to dismiss.

In response to the ruling, Croce voluntarily dismissed his claims as to the sole surviving statement in order to expedite an appeal to the Sixth Circuit. Croce filed his notice of appeal on November 26, 2018.

The New York Times was represented by Jay Ward Brown, Michael Sullivan, Matthew Kelley, and Dana Green of Ballard Spahr LLP, by Keith W. Schneider of Maguire Schneider Hassay, LLP, and by in-house counsel David McCraw. Plaintiff Dr. Carlo Croce was represented by Thomas Walter Hill and Loriann E. Fuhrer of Kegler Brown Hill & Ritter and by Damion M. Clifford, Gerhardt A. Gosnell, II, and James Edward Arnold of James E. Arnold & Associates Co.

Trump Uses First Amendment to Avoid Liability in Defamation Action

By Lee Brenner and Sarah Diamond

On October 15, 2018, U.S. District Judge James S. Otero of the Central District of California issued an order dismissing the defamation case brought by adult film star Stephanie Clifford, a.k.a. Stormy Daniels ("Daniels"). The case concerns President Trump's tweet about the allegedly anonymous man who threatened Ms. Daniels to keep quiet about her affair with Mr. Trump.

The Court found that Mr. Trump's tweet was an exercise of his right of free speech under the First Amendment, dismissed the case and awarded Trump his legal fees. The case is Stephanie Clifford v. Donald J. Trump, Case 2:18-cv-06893 SJO (FFMx) (C.D. Cal.).

The Tweet

Daniels alleges that in May of 2011, she agreed to cooperate with *In Touch* Magazine in connection with an article about her past relationship with Trump. Daniels agreed to speak to the magazine after her ex-husband approached *In Touch* without her approval. As alleged in her complaint, a few weeks after agreeing to speak to the publication, a man approached her in Las Vegas, Nevada, threatening her and her daughter to "Leave Trump alone. Forget the story." After Trump was elected President on November 8, 2016, Daniels worked with a sketch artist to render a sketch of the person who had threatened her in 2011. She released the sketch publicly on April 17, 2018. The next day, on April 18, 2018, Trump, using his personal Twitter account (@RealDonaldTrump), posted the following tweet:

> "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for fools (but they know it)!"

Daniels Sues Trump for Defamation Based on Trump's "Con Job" Tweet

In response to his tweet, Daniels filed a complaint for defamation against Trump on April 30, 2018 in the Southern District of New York. Daniels alleged that Trump's "tweet attacks the veracity of her account of the threatening incident that took place in 2011" and "suggests that she is falsely accusing an individual of committing a crime against her." She contended

(Continued on page 22)

(Continued from page 21)

that Trump meant to convey that she "is a liar, someone who should not be trusted, that her claims about the threatening encounter are false, and that she was falsely accusing the individual depicted in the sketch of committing a crime, where no crime had been committed." On this basis, Daniels alleged that Trump's tweet was false and defamatory, and constituted defamation per se because it charged her with committing a serious crime.

On August 8, 2018, the parties agreed to transfer the case from the Southern District of New York to the Central District of California. On August 27, 2018 Trump filed a motion to dismiss the complaint pursuant to the applicable anti-SLAPP statute. Welcoming the First Amendment protections that both the anti-SLAPP statute itself and judicial precedent provide, Trump argued, among other things, that his tweet was a non-actionable opinion.

Luckily for Trump, the district court recognized that the anti-SLAPP statute seeks to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury."

Tweet Constitutes Non-Actionable Rhetorical Hyperbole, Dismisses The Complaint And Awards Trump His Legal Fees As Required By The Anti-SLAPP Statute

The Court easily determined that the complaint related to Trump's exercise of his right of free speech and agreed with Trump that his tweet constituted "rhetorical hyperbole" which is protected by the First Amendment. The Court also held that Trump sought to use language to challenge Ms. Daniels' account of her affair and the threat that she purportedly received in 2011, and that the U.S. Supreme Court has held that a published statement that is "pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage" cannot constitute a defamatory statement." *See Milkovich v. Lorain Journal Co*., 497 U.S. 1, 32 (1990). Relying on judicial precedent regarding the First Amendment, the Court explained that even statements such as "ripping off" and "sleazy" constitute non-actionable opinion.

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The Day After Trump Wins Under The First Amendment, Nonprofit Sues Trump For Allegedly Using His Presidential Powers To Violate The First Amendment

Trump's victory on First Amendment grounds stands in stark contrast to his public criticisms of an expansive right to free speech. Trump has issued numerous tweets condemning the actions of journalists, which many argue constitutes an effort to impinge the rights of the media and freedom of speech. With repeated "Fake News" soundbites and tweeting about changing libel laws, Trump sure seemed to enjoy the protections of the First

(Continued on page 23)

(Continued from page 22)

Amendment when he was the defendant in a defamation action.

Nevertheless, the day after the Court dismissed Daniels' defamation case on First Amendment grounds, on October 16, 2018, Pen American Center, Inc.—a prominent nonprofit organization that works to defend free expression—filed a complaint against President Trump in the Southern District of New York. Plaintiffs allege that, acting in his official capacity as the President of the United States, Trump intended to stifle exercise of the constitutional protections of free speech and a free press, and therefore violated the First Amendment and his oath to uphold the Constitution. The complaint alleges that Trump has issued retaliatory directives to officials in Trump's Administration and public threats to use his government powers against news organizations and journalists who have reported on his statements, actions, and policies in unfavorable ways, including the following:

- Trump allegedly demanded that Jeff Bezos, Amazon, and *The Washington Post*, which Bezos owns personally, be punished because of *The Post's* coverage of him. This includes reports that Trump allegedly issued an executive order directing the U.S. Postal Service to double Amazon's delivery rates.
- Trump allegedly has threatened CNN and its parent company, Time Warner.
- Trump allegedly regularly threatens to withdraw the White House press credentials of individual reporters.
- Trump allegedly has threatened to challenge broadcast licenses for television stations owned by or carrying NBC and other networks.

Plaintiffs argue that Trump has First Amendment rights and is free to criticize the press, but he is not free to use the power and authority of the United States government to punish and stifle free speech. Plaintiffs contend that Trump has directed his threats and retaliatory actions at specific outlets whose content and viewpoints he views as hostile. As a result, journalists who report on the President seek a remedy for what they allege is the President's unconstitutional actions aimed at suppressing speech. Specifically, plaintiffs seek an order (a) declaring that Trump 's retaliatory acts violate the First Amendment, and (b) enjoining "Trump from directing any officer, employee, agency, or other agent or instrumentality of the United States government to take any action against any person or entity with intent to retaliate against, intimidate, or otherwise constrain speech critical of him or his Administration." The case is *Pen American Center, Inc. v. Donald J. Trump, in his official capacity as President of the United States*, Case: 1:18-cv-09433 (S.D.N.Y).

Given his arguments in *Stephanie Clifford v. Donald J. Trump*, it appears that President Trump is a big fan of the First Amendment. His arguments in response to the *Pen American Center, Inc. v. Trump* case, wherein he is flatly accused of stifling First Amendment protections, will be interesting to follow. Stay tuned.

Lee Brenner is a partner, and Sarah Diamond, a senior associate at Kelley Drye LLP in Los Angeles. Clifford is represented by Michael Avenatti. President Trump is represented by Charles J. Harder.

Gray Television Wins Privacy Victory in Mississippi

By Jacquelyn Schell

A recent Mississippi decision provides clarity on the limits of Mississippi's youth court confidentiality statutes and helpfully applied First Amendment protections for reporting on matters of public concern. *Doe v. Cmty. Newspaper Holding, Inc.*, No. 18-CV-038(C), 2018 BL 425671, 2018 Media L. Rep. 429 (Miss. Cir. Nov. 06, 2018).

Juvenile Sues for Reporting on Arrest of Unnamed High School Students

Plaintiff filed suit against WTOK-TV, The Meridian Star, and several reporters in Meridian, Mississippi, based on their reporting on the arrest of five juvenile students for sexual assault on a high school classmate. Although the reports did not identify the students by name or photograph, Doe claimed he was identifiable because the reports noted that one accused student was a baseball player.

Doe asserted claims for invasion of privacy, negligence, and intentional/negligent infliction of emotional distress. He alleged that Mississippi's youth court statutes prohibited defendants from publishing information about the arrest and events underlying the records of the youth court.

A recent Mississippi decision provides clarity on the limits of Mississippi's youth court confidentiality statutes and helpfully applied First Amendment protections for reporting on matters of public concern.

Court Rejects Privacy Theory and Affirms Protections for Reporting on Matters of Public Concern

As an initial matter, the court applied the Mississippi standard for adjudicating motions to dismiss, namely, that "the motion should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be [un]able to prove any set of facts in support of [his] claim."

Turning to the substance of the motions, the Court rejected plaintiff's theories and dismissed all three claims against the news outlets. First, the Court made clear that the youth court statute prohibits disclosure of records, not discussion of underlying events, under governing Mississippi Supreme Court precedent. *See* 2018 Media L. Rep. 429 (citing *In re R.J.M.B.*, 133 So. 3d 335 (Miss. 2013)). In explaining that the news reports fell outside the prohibitions of the youth court statute, the Court found it significant that the reports quoted the school superintendent and the chief deputy, who spoke publicly about the arrests.

Next, the Court affirmed the First Amendment's protection for reporting on matters of public concern. *See id.* (citing *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104 (1979), and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989)). The Court found that the defendants "lawfully obtained the information reported within the disputed stories" from the superintendent and

(Continued on page 25)

(Continued from page 24)

chief deputy, and that because "Plaintiff's claims arise out of the truthful publication about matters of public concern," his claims "are barred by under the First Amendment."

Seth D. Berlin and Jacquelyn N. Schell, Ballard Spahr LLP, Washington D.C. and New York, and William W. Simmons, Glover, Young, Hammack, Walton & Simmons, PLLC, Meridian, MS, represented Defendants Grey Television Group, Inc. d/b/a WTOK-TV and Candace Barnette.

Leonard D. Van Slyke, Jr. and Karen Howell, Brunini, Grantham, Grower & Hewes, PLLC, Jackson, MS, represented Defendants The Meridian Star, Whitney Downard, and Cheryl Owens.

O. Stephen Montagnet III and Zachary M. Bonner, McCraney Montagnet Quin & Noble, PLLC, Ridgeland, MS, represented Plaintiffs John Doe and Jane Doe.

J. Richard Barry of Barry, Thaggard, May & Bailey LLP appeared on behalf of Defendant, Superintendent Randy Hodges, but was not involved in the motion to dismiss briefing or hearing.

(Don't) Think Before You Retweet?

By Ed Klaris & Alexia Bedat

Every second, on average, 6,000 tweets are published on Twitter – that's 500 million tweets per day. Of these millions of tweeters, how many are considering defamation law when they retweet?

Probably not many. And yet, one click of a button could land you into legal trouble.

In some countries, you could be liable for retweeting a defamatory tweet authored by somebody else, in others maybe not. Put simply, defamation comes into play when one person publishes a statement about another person that is false, damaging to reputation, and baseless. For example, falsely calling someone a racist or a criminal could be defamatory if you haven't checked the story adequately.

Lawsuits for defamation by retweeting (i.e. simply passing on a tweet to your followers without adding more) have already been brought in countries outside of the United States. A court in **India**, for example, in 2017 held Twitter users can be liable for retweeting defamatory content (a particularly troubling finding in India where defamation remains a crime punishable by imprisonment for a term of two years and/or a fine).

Lawsuits for defamation by retweeting (i.e. simply passing on a tweet to your followers without adding more) have already been brought in countries outside of the United States.

In the **United Kingdom**, in 2013, Alan Davies paid in settlement £15,000 after retweeting Sally Bercow's tweet that suggested Lord McAlpine, a leading Conservative politician from the Thatcher years, had committed child abuse. McAlpine planned to sue at least 10,000 other people who had either retweeted Bercow's tweet or other Tweets that named McAlpine as the alleged child abuser. He eventually dropped the defamation claims against all retweeters with fewer than 500 followers.

Two countries have even found "liking" and "tagging" on Facebook to be sufficient grounds for a defamation claim. In **Switzerland**, the Zurich District Court in May 2017 fined a defendant 4,000CHF for "liking" a defamatory comment on Facebook that accused the plaintiff animal rights activist of racism and antisemitism. According to the Zurich District Court, even if the comments had not been authored by the defendant, by "liking" the comment, the "defendant clearly endorsed the unseemly content and made it his own" and had "thus made it [the content] accessible to a large number of people". In **South Africa**, where the first defendant posted a number of defamatory comments on her Facebook wall, merely tagging the second defendant in her comments, the North Gauteng High Court in Pretoria also found the second defendant liable, explaining its decision in 2013 only with the following sentence: "The second defendant is not the author of the postings. However, he knew about them and allowed his name to be coupled with that of the first defendant. He is as liable as the first defendant".

(Continued on page 27)

(Continued from page 26)

These decisions are noteworthy and concerning as they may reflect a trend of judges finding increasing responsibility for fairly passive behavior on the Internet.

What if the subject of your retweet is a US-based individual?

US courts have not yet addressed whether retweeting defamatory content can form the basis of a defamation claim. The issue was set to be considered by the Eastern District of New York in a lawsuit brought by Joy Reid, a known MSNBC host, against Roslyn La Liberte, a Trump supporter, in relation to a photograph in which La Liberte, wearing a MAGA hat, appeared to be shouting at a high school student during a City Council meeting. On November 13, however, La Liberte announced that she would be amending her complaint to remove the claim relating to the retweet, and limiting her lawsuit to Reid's Instagram and Facebook posts where Reid falsely accused La Liberte of shouting racial slurs at the boy.

While Reid has dropped the defamation by retweet claim, the coverage of the incident raised the question whether Section 230 of the Communications Decency Act ("CDA") would bar such a claim.

Section 230 was enacted by Congress in 1996 to prevent the threat that tort-based lawsuits might present to freedom of speech in the (then) new and burgeoning Internet medium. It immunized online platforms and internet service providers from liability for the content posted by users of such platforms or websites ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider", 47 U.S.C. § 230). Section 230 is what, absent behavior that would place them outside the statutory immunity, prevents providers such a Twitter, YouTube or Facebook from being liable for content posted on their platforms.

US courts have not yet addressed whether retweeting defamatory content can form the basis of a defamation claim.

In addition to protecting Twitter, Section 230 could also immunize a retweeter from liability if the words "*user* of an interactive computer service" would be construed as applying to such an individual.

So who is a "user" under Section 230?

The term "user" is not defined in Section 230 and the limited legislative record does not indicate why Congress included the word "user" as well as "provider". Case law, however, suggests that retweeters could indeed be "users" for Section 230 purposes.

In Barrett v. Rosenthal (2006), which involved the liability of an individual rather than a service provider – Rosenthal had posted an allegedly defamatory article authored by her co-defendant Bolen on the website of two newsgroups –the California Supreme Court asked the parties to address the definition of the statutory term "user". Like Reid on Twitter, Rosenthal had no supervisory role in the operation of the newsgroup websites where the allegedly

(Continued on page 28)

(Continued from page 27)

defamatory material appeared and was clearly not an "interactive computer service". The Supreme Court concluded that the word "user" plainly referred to someone who uses something and found that the statutory context made it clear that Congress simply meant "someone who uses an interactive computer service". Rosenthal had used the Internet to gain access to newsgroups where she posted Bolen's article, and was therefore a "user" under the CDA.

The California Supreme Court also made it clear that the word "user" extended to "active" as well as "passive" users. Citing the Ninth Circuit in Batzel v Smith, the court agreed that for Section 230 purposes, no logical distinction could be drawn between a defendant who actively selects information for publication and one who screens submitted material and removes offensive content. Though the California Supreme Court noted that it "shared the concerns" of those who had expressed reservations over the broad interpretation of Section 230 immunity, by declaring that no "user" may be treated as a "publisher" of third-party content, Congress had "comprehensively immunized republication by individual Internet users".

Applying the reasoning in *Barrett*, a retweeter "uses" the internet to gain access to Twitter, where he or she merely retweets an original tweet, and as such, could also be considered a "user" under Section 230.

This raises the issue of a clear gap between the literal interpretation of Section 230 and its practical consequences.

While retweeters may be literal users of Twitter, Reid or other individuals retweeting original content would do themselves a favor not to count on being deemed a "user" for Section 230 purposes. Courts have indicated some doubts over a very broad interpretation of the statute, and Congress recently took away immunity if providers or users post online sex trafficking adverts. See the Fight Online Sex Trafficking Act.

One could argue that the use of the words "provider or user of an interactive computer service" were necessary to cover the situation where a website operator doesn't just "provide" a website but also "uses" it, in so far as the website operator exercises editorial control over the website's content. For example, in Donato v. Moldow (2005), the operator of an electronic community bulletin board website devoted to discussion of local government activities, who also controlled the content of the discussion forum by banning users or deleting messages he deemed offensive, was found to be both a "provider" and "user" of an interactive computer service within the meaning of Section 230. Without the word "user", Section 230 immunity would be lost as soon as any website operator took on any sort of active role.

If Reid, for example, is a "user" for Section 230 purposes, what is the limit to the literal interpretation of Section 230? Taken to its logical extreme, the reasoning in *Barrett* would mean that any "user" of Twitter, or any other website, could copy and paste an entire defamatory article written and published on another website by a third party (i.e. "information provided by another information content provider"), publish it via a number of tweets and not be liable for defamation, even as the original tweeter. By that same rationale, a newsreporter having obtained a quote from a source containing defamatory content could freely republish that quote in her online news story because the quote was "information provided by another

(Continued on page 29)

(Continued from page 28)

information content provider." The uncomfortable result of a strict interpretation of Section 230 was forewarned by Judge Gould in 2003, who in issuing the minority opinion in *Batzel* argued that the majority's opinion:

> licensed professional rumor-mongers and gossip-hounds to spread false and hurtful information with impunity. So long as the defamatory information was written by a person who wanted the information to be spread on the Internet (in other words, a person with an axe to grind), the rumormonger's injurious conduct is beyond legal redress.

Courts have consistently refused to bridge the gap between the specific wrongs Congress intended to right in enacting Section 230 immunity and the broad statutory language it used to achieve such immunity. *La Liberte v. Reid* would have provided an opportunity do so, or at the very least, re-examine Section 230 and its application to online providers, such as Twitter, that did not exist at the time the statutory language was drafted and highlight the troubling results of an excessively literal interpretation of Section 230.

Twitter makes it incredibly easy for users to retweet a post, with a built-in retweet button. How does the ease and lack of substantive thought that goes into a retweet fit into the actual malice analysis?

In the event Section 230 does not immunize retweeters from libel claims, in the United States, an individual who republishes a defamatory allegation is as liable as the third party who originally made the statement. No U.S. court, however, has considered whether a retweet is a "republication" of defamatory content. Would U.S. courts take a position similar to other countries such as India, Switzerland and South Africa and consider a retweet, like a "like" on Facebook, to be both an act of "endorsement" and an act of "dissemination"? Such a result would arguably be at odds with the reality that people usually don't think twice about "liking" or "retweeting" something. These tools are often used as a way of flagging or sharing content and are not necessarily intended as an endorsement of third-party content. On the other hand, retweeting does present the defamatory content before the retweeter's followers, which are most likely different from and possibly greater than the original tweeter's followers. In La Liberte's case, for example, Reid's retweet increased the tweet's potential viewership from approximately fourteen thousand viewers (Vargas' followers) to 1.24 million viewers (Reid's followers) (or even more depending on subsequent retweets by Reid's followers).

The second question, the issue of how much care you need to exercise before publishing a defamatory statement, arises in the United States because a higher constitutional standard of fault is applied to defamation claims against public figures, who must prove that the defendant acted with actual malice (i.e., that the defendant had knowledge of falsity or had reckless disregard for the truth). Private figures, generally, need only show that the plaintiff acted negligently, although some states, like New York, apply a higher fault standard to private individuals where the issue is of public interest. Where the subject of the retweet is a public

(Continued on page 30)

(Continued from page 29)

figure, it raises the interesting question of how, if at all, the nature of Twitter influences the "actual malice" analysis.

Twitter makes it incredibly easy for users to retweet a post, with a built-in retweet button. How does the ease and lack of substantive thought that goes into a retweet fit into the actual malice analysis? While anger or hostility against a subject or political bias alone may not suffice for a finding of actual malice, a combination of these factors may suffice to show the requisite state of mind. See e.g. Reader's Digest Assn. v. Superior Court (1984) (where the court held that factors such failure to investigate, anger and hostility toward the plaintiff, reliance upon sources known to be unreliable, or known to be biased against the plaintiff, could, in appropriate cases, indicate that the publisher had serious doubts regarding the truth of the publication). Twitter is a medium that both lends itself to rash and hostile exchanges and preserves a digital trail of a defendant's bias and/or animosity towards a specific cause or individual. Plaintiff's counsel will invariably refer to the defendant's Twitter history and you may wish to consider the circumstantial evidence that could be used against you before clicking "retweet".

In short, think about where the person is from before retweeting or you may get drawn into court someplace in the world where the law protects reputations more than the United States, and, if you are merely a "user" watch out for the judge who decides that Section 230 immunity does not apply to you.

Ed Klaris is the founding partner of Klaris Law PLLC. Alexia Bedat is an Associate at the firm.

MLRC Forum Brings Together Pulitzer Winners Jodi Kantor And Ronan Farrow

Panel Tackles Journalistic, Editorial and Legal Challenges of Breaking Harvey Weinstein Scandal

Left to right: David McCraw, Rebecca Corbett,and Jodi Kantor of the New York Times, and Ronan Farrow and Fabio Bertoni of the New Yorker. *Photo by Mickey Osterreicher*

This year's MLRC Forum, which took place immediately before the annual dinner on November 7, brought an all-star panel together to provide an insider's look at the reporting that led to the downfall of one of the most powerful producers in Hollywood.

The Forum, titled "Breaking the Harvey Weinstein Story & Issues in #MeToo Reporting," was sponsored by Microsoft & Prince Lobel. The panel featured investigative reporters Ronan Farrow (of the *New Yorker*) and Jodi Kantor (of the *New York Times*), who each was awarded the 2018 Pulitzer Prize for Public Service (along with Ms. Kantor's *New York Times* colleague, Megan Twohey) for their separate reporting that exposed decades of allegations of sexual harassment and assault by Mr. Weinstein and efforts to cover-up his behavior.

Although Mr. Farrow and Ms. Kantor had previously met and appeared together, the Forum was their first joint panel discussion. A remarkable fact that they reiterated during the discussion was that in the thousands of words that they independently reported and published (just a few days apart), Ms. Kantor and Ms. Twohey in the *Times*, and Mr. Farrow in the *New Yorker*, there was virtually no overlap in the sources and allegations printed in the two stories. Indeed, Ms. Kantor indicated that she only became aware that the *Times* and the *New Yorker*

(Continued on page 32)

(Continued from page 31)

were in a "footrace" to break the story at the very end.

Joining Ms. Kantor and Mr. Farrow on the panel were Rebecca Corbett, Assistant Managing Editor for the *Times*, Fabio Bertoni, General Counsel for *The New Yorker*, and David McCraw, Vice President and Deputy General Counsel for the *Times*, who also served as the panel's moderator. The packed audience of MLRC members gave a rousing applause to the prize-winning journalists at the beginning of the session, but both of them (Mr. Farrow, a Yale Law graduate, and Ms. Kantor, who became a journalist upon dropping-out of Harvard Law School) showed great appreciation for their lawyers' dedication to finding a way for them to report their stories.

Ms. Kantor called Mr. McCraw "unflappable" in the face of legal threats from Weinstein's lawyers, and indicated that while many lawyers see their job as saying "no," Mr. McCraw saw his job as finding a way to say "yes" to publishing the Weinstein story. Mr. Farrow, who had joined the *New Yorker* at a time when he had a story, but no news outlet, said that Mr. Bertoni and the magazine had "gone out on a limb" to bring him into the fold. Mr. Farrow further expressed his appreciation for the constitutional legal protections for journalists in the United States, noting the difficulty of doing the same kind of reporting in other countries where libel lawsuits pose more of a threat to journalism.

One of the knottier legal challenges discussed was how to handle the concerns of sources who were afraid of violating the terms of non-disclosure agreements.

While the challenges of reporting the story ranged from the routine (how to get Gwyneth Paltrow's phone number) to the alarming (being surveilled by private investigators like the Israeli intelligence firm, Black Cube), Ms. Corbett, the *Times* editor on the story, underscored that the process of corroborating the facts of the Weinstein story was no different than any other story. Nevertheless, Ms. Kantor said that she and Ms. Twohey worked with the knowledge that every phone call they made might be taped and that every email they sent could be leaked, and that this forced them to be extremely disciplined in their approach to reporting the story and avoid making any comments that could be taken out-of-context to discredit them.

With respect to threat letters that were received from Weinstein lawyer, Charles Harder, Mr. Bertoni commented that while they were long (containing multiple pages of document retention demands), they contained little substantive argument that the magazine could be held liable for publishing Mr. Farrow's story.

One of the knottier legal challenges discussed was how to handle the concerns of sources who were afraid of violating the terms of non-disclosure agreements. The consensus on the panel was that news organizations must not offer any legal advice to sources who have signed NDAs, yet Ms. Kantor described a nuanced approach to persuading sources to cooperate notwithstanding any NDAs. The pitch starts with "I'm not a lawyer" and "I cannot give you legal advice," and then is followed by a "but" that appeals to the source's sense of fairness:

(Continued on page 33)

(Continued from page 32)

that the source did not agree (in signing the NDA) to cover up sexual abuse or to help suppress the truth and that "you're not going to let the bullies do that to you," and that they may not be enforceable.

Ms. Kantor noted that the Weinstein story resonated more than other sexual harassment allegations because the victims/witnesses were, in the main, famous actresses the public knew and believed. While both Ms. Kantor and Mr. Farrow expressed being gratified that publishing their stories on Mr. Weinstein have led to a #MeToo movement that has enabled so many other victims of sexual abuse to tell their stories, Ms. Kantor said that she is "haunted" by the number of emails she still receives from women who want her to tell their stories, an experience that Mr. Farrow too echoed. They both indicated that they are heartbroken that they are not able to tell the stories of all these other women.

Judge Grants Partial Access to Jury Selection in El Chapo Trial

By Al-Amyn Sumar

In a decision rendered in late October, the district judge presiding over the trial of Joaquin "El Chapo" Guzman in the Eastern District of New York granted the press partial access to *voir dire* proceedings. U.S. v. Joaquin Archivaldo Guzman Loera (E.D.N.Y. Oct. 30, 2019).

The judge had previously indicated he would conduct jury selection in chambers outside the view of the public and any press. In light of the press's objections, however, he reconsidered and opted to hold the proceedings in the courtroom, with five pool reporters present.

Background

Guzman, who gained worldwide notoriety for repeatedly – and in dramatic fashion – eluding law enforcement and escaping custody, was formerly at the helm of Mexico's Sinaloa cartel. Prosecutors allege that as head of the cartel, Guzman oversaw drug trafficking in massive quantities and conspired in the murder of cartel enemies. Because of the nature of these charges, the district judge had earlier directed that the jury be anonymous and partially sequestered. He also indicated that he would hold jury selection proceedings in his chambers without any public or press present.

The Times argued that the public's First Amendment right of access could not be abridged merely because of intense media coverage of the trial.

The New York Times Company ("The Times") and other news organizations requested access to the *voir dire*. Citing the Second Circuit's decision in *ABC, Inc. v. Stewart*, 360 F.3d 90 (2d Cir. 2004), The Times argued that the public's First Amendment right of access could not be abridged merely because of intense media coverage of the trial. The Times proposed that a group of reporters be permitted to observe the proceedings from the jury box, with a single pool reporter present for sidebar conversations. The parties objected. Stressing the need for juror candor, they asked the judge to limit access to the proceedings to a video feed, observable either by a single pool reporter (as the Government proposed) or a wider group of journalists (as Guzman's counsel requested).

District Court Ruling

Judge Brian Cogan granted partial access to the proceedings. He found that full access was not warranted: the "highly-publicized nature" of the trial, though not a sufficient basis to close proceedings, risked inhibiting the candor of jurors. So did "queries on potentially charged topics, such as federal narcotics policy and law-enforcement relations between the United States and Mexico" (discussing *United States v. King*, 140 F.3d 76 (2d Cir. 1998)). And

(Continued on page 35)

(Continued from page 34)

because of the nature of the charges against Guzman, potential jurors might be loath to voice an unpopular view out of fear that onlookers would "connect that response to their appearance in a way that could put their safety at risk."

Judge Cogan also considered reasonable alternatives to closure. Though a gallery or jury box filled with reporters might be intimidating to prospective jurors, a small number of press would not. Judge Cogan was not persuaded that a video feed would lessen the risk of intimidation, and – given Guzman's concern about the need for multiple viewpoints among the press covering the case – rejected the Government's suggestion to have a single pool reporter attending the proceedings.

Though the procedure that Judge Cogan ultimately fashioned did not grant the full public access that The Times and others sought, it nonetheless assured partial live access. Judge Cogan opted to hold jury selection in the courtroom, with five pool reporters observing from the jury box. However, sidebar conversations with prospective jurors would be held *in camera*, and the transcript of the proceedings, including sidebar conversations, would be released at the end of the proceedings.

David McCraw, Vice President & Deputy General Counsel The New York Times Company, and Al-Amyn Sumar, New York Times First Amendment Fellow, acted on behalf of The New York Times Company in this matter.

Federal Court Orders Release of Internal Investigation Report Concerning Anchorage Police Department

By John McKay

A federal judge presiding over an Alaska employment suit filed by a former Anchorage Police Department lieutenant granted a motion by *Anchorage Daily News* and KTUU-TV for access to an internal investigation report that led to the firing of the lieutenant and secret suspension of the former Anchorage police chief. *Henry v. Municipality of Anchorage*, Case No. 3:15-cv-0187 RRB (D.Ak. September 25, 2018).

The "Brown Report," for which the Municipality paid over $50,000, was produced under contract with a retired Pennsylvania State Police lieutenant colonel. He concluded that the APD lieutenant had interfered with investigations into allegations of sexual misconduct by National Guard members, and had not been candid during the investigation. The Report also determined that the chief of police had failed to investigate serious allegations of misconduct against the lieutenant. (After trial of former APD lieutenant Henry's civil suit, a federal jury in November awarded him $2.3 million, finding that his termination was in part based on improper retaliation for earlier protected activity on behalf of a fellow officer with a disability.)

The press intervened, filing a motion for access to the Brown Report and related judicial records that had been used by the parties and considered by the court in connection with summary judgment and other motion practice.

The Municipality argued that the Brown Report and its attachments "contain highly confidential and sensitive information regarding sexual assault victims, confidential informants, and other law enforcement investigations." It also argued that if the court were to grant access to the Brown Report "in whole or in part," it should delay access until after trial.

The press intervened, filing a motion for access to the Brown Report and related judicial records that had been used by the parties and considered by the court in connection with summary judgment and other motion practice.

The court granted the Press's motion. Public disclosure of the Report avoided arguments for closing portions of the trial where the Report was to be discussed, or for denying access to the Report despite its presentation to the jury.

The court noted that where a party obtains a blanket protective order without making a particularized showing of good cause with respect to any individual document, it could not reasonably rely on the order to hold these records under seal forever, citing the Ninth Circuit's holdings in *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006), and *Foltz v. State Farm Mut. Auto. Ins. Co*., 331 F.3d 1122, 1138 (9th Cir. 2003).

(Continued on page 37)

(Continued from page 36)

While a "good cause" showing under Rule 26(c) may suffice to keep records attached to non-dispositive motions sealed, the court said, compelling reasons are required to maintain secrecy of documents attached to dispositive motions—even if the motion, or its attachments, were previously filed under seal or were under a protective order. The court also acknowledged that more recent Ninth Circuit rulings reject a mechanistic rule, so that a presumption of public access applies even to documents considered in connection with a motion that is not technically dispositive, so long as the motion is not simply tangential to the case, citing *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1099 (9th Cir. 2016).

The court found "superficially persuasive" arguments that the jury pool would be tainted before trial began if the Report were the subject of news stories and could be uploaded on the websites of news organizations. It agreed with the Press that "potential jurors" who are "tainted before trial even begins" would be identified during jury selection and excused.

The court also agreed that limited redactions of certain information such as the names of sexual assault victims, confidential informants, and HIPAA protected material would be adequate to rebut the Municipality's claims that there was a compelling interest in not disclosing sensitive information, including information protected by federal and state statutes and regulations.

The Municipality argued that confidential references to investigations and activities of law enforcement agencies other than APD also provided compelling justification for keeping the documents at issue under seal, and that it was not in a position to provide "specific findings" as to activities it was not privy to. The Press argued that the Municipality had simply presented a parade of abstractions, and factually inadequate conjecture. Here, too, the court found that redactions would be sufficient to work around any legitimate concerns of the Municipality.

The court noted that where a party obtains a blanket protective order without making a particularized showing of good cause with respect to any individual document, it could not reasonably rely on the order to hold these records under seal forever.

The court allowed the parties time to address proposed redactions to protect victims, informants, and other sensitive information prior to release of the Brown Report. It ordered the parties to provide the court with joint proposed redactions or a brief explaining why they could not agree, with the ultimate decision about redactions to be determined by the court. The court recognized that by the time the process of finalizing redactions was completed, jury selection would be starting soon in the employment suit. The court said there were no compelling reasons to withhold the Report, once redacted, but exercised its discretion to delay the entry of the Report until a jury had been seated. It found that a brief delay to avoid requiring an additional layer of questioning jurors that might be necessitated by press coverage right before voir dire, and could possibly result in the need for a change of venue, would not significantly prejudice the

(Continued on page 38)

(Continued from page 37)

Press Intervenors, and was in the interest of justice. The Report was released promptly as the trial began.

Before the verdict, the Press requested access to all admitted jury exhibits. Pursuant to its normal practice, the federal court returned exhibits to the parties. However, it ordered that they could provide the Press with all of the thousands of pages of admitted exhibits, with the exception of one set of documents relating sexual assault investigations of National Guard members, which the federal agency providing them insisted remain confidential.

Related State Proceedings

Before filing their federal court motion, the press sought to obtain the Brown Report through a state court suit where it had been used by two former APD detectives alleging racial discrimination and related employment claims. In that case, the Report was admitted, but as "comparator evidence" to show APD was more thorough and professional in investigating non-minority officers, rather than to prove the truth of the investigator's findings. It was marked as an exhibit and provided to the state jury for its deliberations.

In this state case, the judge declined to release the Report to the Press. A significant reason for this was that trial exhibits had been ordered returned to the parties. In particular, the court had directed that the Report and related documents be returned to the Municipality as provided in the protective order pursuant to which they had been produced. The state judge said the documents were no longer "judicial records" in that case, and so were not subject to disclosure based on case law governing access to judicial proceedings and records. Unique circumstances affected the timing of the press's request in this case, but this underscores the need to request access to trial exhibits well before they are to be returned to the parties, usually before the end of trial.

At the outset of the state court trial, the judge in that case had initially ordered, over objections of the Municipality, that the plaintiff could use a redacted version of the Brown Report for limited purposes, and that it would be made public. At the last minute, as prospective jurors were awaiting the start of voir dire—and without notice to the press—counsel for former APD lieutenant Henry intervened and persuaded the state judge to back off on making the Report public to protect his interests in the pending federal employment case.

When the Press later sought access to the Report, the state judge expressed lingering concerns over privacy interests of assault victims that could be impaired through release of the documents he had initially ruled would be public. Also, Henry and the Municipality argued that in the state case, use of the Brown Report was tangential (within the meaning of *Center for Auto Safety*), and that release of the Report should more appropriately be addressed by the federal court. Henry's counsel claimed there were arguments they could not make in state court because they were based on documents sealed pursuant to a protective order in the federal case, including summary judgment rulings issued *under seal* by the federal court

(Continued on page 39)

(Continued from page 38)

shortly before arguments on the state court motion. The state judge declined to grant the press access to the Report in that case, and deferred to the federal court.

In subsequent proceedings in federal court, where it ultimately prevailed, the Press moved to unseal the summary judgment rulings relied upon by the intervening former APD officer in the state case. The federal judge granted this motion. The orders, when unsealed, did not support the claims that had been made by Henry's counsel in state court. The Press preserved its right to appeal to the state supreme court from the denial of access in the state court proceedings. After it successfully obtained the documents in federal court, the appeal was deemed moot.

Press Intervenors Anchorage Daily News and KTUU-TV were represented by John McKay, of the Law Office of D. John McKay in Anchorage, Alaska. Plaintiff Lt. Henry was represented by Molly Brown and Meg Simonian, of Dillon & Findley, Anchorage, and the Municipality of Anchorage was represented in the federal litigation by David Symes and Douglas Parker, partners in the Portland, Oregon, office of Littler, Mendelson.

Eleventh Circuit Holds That Annotations of the Official Code of Georgia Annotated Are Not Copyrightable

By Ryan K. Walsh, Mary Alexander Myers and Rebecca M. Nocharli

On October 19, 2018, the Eleventh Circuit issued a decision in Code Revision Commission v. Public.Resource.Org, Inc., overturning a Northern District of Georgia ruling and holding that the annotations contained in the Official Code of Georgia Annotated ("OCGA") are not copyrightable. No. 17-11589, 2018 WL 5093234 (11th Cir. Oct. 19, 2018) (hereafter "Op."). This decision provides an important message with respect to the public nature of the law and how private companies make use of public legal documents.

Background

The Georgia Code Revision Commission (the "Commission") was established by the Georgia General Assembly in 1977 and was initially tasked with the recodification of Georgia's laws. In 1982, the Commission first published the OCGA, an annotated compilation of Georgia statutes. Since then, the Commission has updated and published the OCGA annually.

The OCGA is comprised of both statutory text and annotations. The statutory text is the official published version of Georgia's laws. The annotations consist of summaries of judicial opinions, opinions of the Attorney General of Georgia, and advisory opinions of the State Bar; legislative history; cross-references; and other research references. While the annotations are part of the official Georgia code, the OCGA makes it clear that the annotations do not have the force of law. *See* Op. at 6.

The annotations were initially prepared by a division of the LexisNexis Group ("Lexis") under the supervision of the Commission, pursuant to an agreement with the State of Georgia (the "Agreement"). The Agreement provided instructions to Lexis about the types of annotations that should be included, the process of generating and arranging the content, and publication of the OCGA. For example, the Agreement required Lexis to publish a free, unannotated, online version of the Code and limited the price that Lexis could charge for the OCGA. The Agreement also gave Lexis the exclusive right to produce and sell the OCGA; gave the Commission all royalties on the sale of electronic copies of the OCGA; and gave the State of Georgia ownership of the copyright in the annotations.

The Facts

Public.Resource.Org ("PRO") is a nonprofit organization whose aim is to improve public access to government records and primary legal materials. In 2013, PRO purchased the print

(Continued on page 41)

(Continued from page 40)

version of the OCGA, scanned it, and uploaded it to the PRO website. PRO also distributed digital copies of the OCGA by mailing USB drives to Georgia legislators and by sending copies of the OCGA to other organizations.

The Commission sent PRO numerous cease and desist letters stating that PRO's copying and distribution of the OCGA infringed the State of Georgia's copyright. PRO, however, refused the Commission's demand. On July 21, 2015, the Commission—on behalf of the Georgia General Assembly and the State of Georgia—sued PRO for copyright infringement in the Northern District of Georgia and sought injunctive relief. In its answer to the Commission's complaint, PRO argued that the State of Georgia did not hold an enforceable copyright in the Code and alternatively asserted the defense of fair use. PRO also filed a counterclaim for a declaratory judgment "that the State has no valid copyright in the OCGA because it is in the public domain." Op. at 10.

District Court Decision

The district court granted the Commission's motion for partial summary judgment and concluded that the annotations in the OCGA are not public domain material, because the annotations do not have the force of law. Further, the district court rejected PRO's challenges to the validity of the State of Georgia's copyright and PRO's fair use defense. The district court entered a permanent injunction against PRO and ordered PRO to stop its unauthorized use of the OCGA (including removing the OCGA from its website). PRO appealed to the Eleventh Circuit Court of Appeals.

On appeal, the Eleventh Circuit held "that no valid copyright interest can be asserted in any part of the OCGA," (Op. at 2), and consequently reversed-in-part, vacated-in-part, and remanded the district court's ruling.

Eleventh Circuit Decision

On appeal, the Eleventh Circuit held "that no valid copyright interest can be asserted in any part of the OCGA," (Op. at 2), and consequently reversed-in-part, vacated-in-part, and remanded the district court's ruling. In reaching its decision, the Eleventh Circuit noted that the concept of "authorship" is essential to copyright law in the United States. Then, it discussed the authority and precedent establishing that the term "author" should be interpreted to mean "the People" when it comes to certain governmental works, such as judicial decisions, statutes, and regulations. The Eleventh Circuit relied on United States Supreme Court cases from the nineteenth century—the last time the Court addressed issues relevant to this case. It also considered lower courts' applications of the Supreme Court precedents, and the codification of those rules in the Copyright Acts of 1909 and 1976.

The Eleventh Circuit explained that the principle underlying the rule that certain

(Continued on page 42)

(Continued from page 41)

governmental works should be attributed to the authorship of the People has always been that under democratic rule, the People are sovereign and they govern themselves through representatives. In other words, lawmakers essentially exercise delegated authority as servants of the People, and the People are the constructive authors—and owners—of lawmakers' works. Further, such works are "intrinsically public domain material and [must be] freely accessible to all so that no valid copyright can ever be held in [them]." Op. at 21. In support, the Eleventh Circuit cited several sources, including the Declaration of Independence (stating that the government derives its powers from "the consent of the governed"), the Federalist papers (stating that representatives of the people pronounce "the public voice"), and President Lincoln's Gettysburg Address (stating that our form of government is one "of the people, by the people, and for the people"). Op. at 20–21.

The Eleventh Circuit noted, however, that the rule is not so broad such that every government employee's works can be interpreted as those of the People; rather, the rule is triggered when a government official is entrusted with the power to bind every citizen to their interpretation of the law. Thus, to determine whether a work is attributable to the constructive authorship of the People, and not copyrightable, the work must be sufficiently law-like.

The court concluded that the annotations are constructively authored by the People and intrinsically public domain material, such that no valid copyright can subsist in them.

The Eleventh Circuit applied a three-part inquiry to determine whether the annotations of the OCGA meet the threshold of "sufficiently law-like." It inquired whether the work: (1) was "written by public officials who are entrusted with the exercise of legislative power"; (2) was authoritative; and (3) obtains its legal effect through a mandatory prescribed process. Op. at 28.

First, the Eleventh Circuit established that the annotations are written by public officials entrusted with legislative power. The court observed that the Commission, which is ultimately responsible for the annotations' drafting, is an arm of the Georgia General Assembly because of its composition, funding, and staff. As such, the Georgia General Assembly, made up of Georgia's elected legislators, was the driving force behind the creation of the annotations. Similarly, the General Assembly played a central role in the approval of the OCGA, since it was required to vote on the OCGA annually to make it official. Moreover, the Georgia Supreme Court has held that the Commission's work is legislative in nature. The Eleventh Circuit concluded that these aspects of the Code's drafting show that it is in fact written by public officials entrusted with legislative power.

Second, the Eleventh Circuit found that the OCGA's annotations are authoritative sources on statutory meaning and legislative intent. The OCGA's annotations are treated as authoritative law by Georgia courts; they have been intentionally merged with the statutory text by the Georgia General Assembly; and they have been labeled "official" and stamped with the state's imprimatur. Additionally, the OCGA's annotations were created through a

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(Continued from page 42)

"legitimate exercise of delegated, sovereign power." Op. at 49. As a result, the Eleventh Circuit concluded that the OCGA's annotations are sufficiently authoritative.

Finally, the Eleventh Circuit explained that the OCGA's annotations were created through a process similar to the process by which laws are enacted. More specifically, the Georgia General Assembly used bicameralism and presentment, both central to lawmaking in the State of Georgia and in the federal government, to adopt the annotations and merge them with the statutory text.

As a result of this three-part inquiry, the Eleventh Circuit determined that the annotations of the OCGA are "part and parcel of the law . . . [and] are so enmeshed with Georgia law as to be inextricable." Op. at 28. Accordingly**,** the court concluded that the annotations are constructively authored by the People and intrinsically public domain material, such that no valid copyright can subsist in them.

Ryan K. Walsh is a partner with Jones Day in Atlanta and Mary Alexander Myers and Rebecca M. Nocharli are associates with Jones Day in Atlanta. The Code Revision Commission was represented in the Eleventh Circuit by Anthony B. Askew, Lisa Pavento, and Warren James Thomas with Meunier Carlin & Curfman, LLC; Public.Resource.Org, Inc. was represented by Elizabeth Hannah Rader, Sarah Parker LaFantano, and Jason Demian Rosenberg with Alston & Bird.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

10 Questions to a Media Lawyer: Lynn Carrillo

Lynn Carrillo is Vice President, Legal, at NBCUniversal News Group in Miami, Florida.

1. How'd you get into media law? What was your first job?

My first job in media was in high school working for the *Miami Herald* compiling listings of local events. I was lucky enough to be assigned to the Miami Beach neighborhood when South Beach was beginning its renaissance, so there was a great deal to write about. After a few months on the job, the editors gave me the opportunity to do some feature stories. A year later, one of the reporters was promoted and I ended up writing weekly pieces for the local and Living sections of the newspaper.

When I was accepted into law school, the head of recruiting for *Tribune* – who also happened to be their in-house counsel – encouraged me to leave and go to law school. I followed her advice. Two years later, when I bumped into her at a conference, she advocated on my behalf and told her local counsel to hire me.

My first legal job was working for a boutique media litigation firm that represented my former newspaper.

2. What do you like most about your job? What do you like least?

What I like most about my job is the incredible team of colleagues that I get to work with both remotely and locally. I also appreciate the vast variety of matters that I have the opportunity to handle and sometimes learn about on any given day.

3. What's the biggest blunder you've committed on the job?

Coming out of law school, as a young lawyer, I thought I had all the answers for every problem or situation. After almost missing the deadline for a new filing I worked on because I didn't know the process for that particular court, I knew that I had a lot more to learn. I also realized very early in my legal career to not be afraid to ask questions and that your support team is critical to your success and deserve as much - or more - respect than others.

4. Highest court you've argued in or most high-profile case?

The highest Court I have argued in is the 11th Circuit Court of Appeals and the Florida Supreme Court.

(Continued on page 45)

Carrillo speaks on media access at an event in Costa Rica.

(Continued from page 44)

One of the cases that I am most proud of was a shield law case in Florida's 3rd District Court of Appeal. A state court judge, on the day before the court closed for the Christmas holiday, ordered one of our reporters to be deposed and potentially reveal his source regarding a public corruption and sex-texting case. I spoke to my team and, although it meant working over the holidays (filing on New Year's Eve), we all agreed that it was important and we filed an emergency appeal. We received a written order that mirrored much of what we had put in our brief and supported a reporter's right to be protected.

5. What's a surprising object in your office?

The trophy given to me by the junior varsity girls basketball team that I coached once.

6. What's the first website you check in the morning?

In the morning, I check my email and the WhatsApp chat that includes updates about my kids' school, so I don't miss any updates. For news, I read Apple News summaries, New York Times headlines and the Law360 daily briefing email.

7. It's almost a cliché for lawyers to tell those contemplating law school: "Don't go." What do you think?

I believe that law school is the best preparation you can have for any professional job. The training you receive in law school teaches you to understand risk and analyze matters. I love the law and believe in it. I am grateful every day that I work in media law because I feel I can make a difference.

(Continued on page 46)

Unusual office items including a trophy from a junior varsity basketball team Carrillo coached, and a painting made by her grandfather.

(Continued from page 45)

8. One piece of advice for someone looking to get into media law?

Today, more than in any other era, you need to understand the media business. To be effective advocates and partners to your clients, you need to understand the needs and challenges facing the fast-changing media industry.

9. What issue keeps you up at night?

Usually, it's my eight-year-old. Otherwise, I'm concerned about show scripts that have not come in and still need review. As part of the NBCUniversal News legal team, all counsel are assigned weekly rotations that consist of reviewing scripts and legal questions from all news and cable networks, 24x7. It's my responsibility to help advise each business to help them manage their legal risk and remain competitive.

10. What would you have done if you hadn't been a lawyer?

I would have loved to have been a travel reporter or an investigative reporter. I never thought I was as good a writer as I was a reporter, so discovering new things to write about and uncovering issues that affect the people are still very appealing to me – which is why I love supporting the investigative journalists in their pursuit of the truth.

MLRC 2018 Annual Meeting

New Chairperson Elected; A Review of MLRC Projects and Events

The Annual Meeting of the Media Law Resource Center, Inc. was held on November 7, 2018, at the Grand Hyatt in New York.

Chair of the Board of Directors, Lynn Oberlander, called the meeting to order.

Elections of Directors

The membership elected two new Directors to serve two-year terms: Lynn Carrillo of NBCUniversal and James McLaughlin of the Washington Post.

The Directors whose current terms lapse at the 2018 Annual Meeting and whom the membership reelected for two-year terms were:

Jonathan Anschell, CBS Broadcasting, Inc.
Ben Glatstein, Microsoft
Lynn Oberlander, Gizmodo Media Group

The Directors who were elected last year and will be entering the second year of their two-year terms are:

Ted Lazarus, Google
David McCraw, The New York Times Company
Gill Phillips, The Guardian
Randy L. Shapiro, Bloomberg L.P.
Regina Thomas, Oath, Inc.

Finance Committee Report

Regina Thomas delivered the Finance Committee's report. She referred the Board and attendees to the Statement of Financial Position and noted that MLRC had a good year. Executive Director George Freeman added that while the organization had a few more expenses than usual, MLRC's reserves are healthy and its financial situation is sound.

Executive Director Report

Given the current economic climate, George Freeman stated that MLRC should be pleased with membership levels. The state of MLRC is healthy, and we have on net not lost members in contrast with other associations, such as the ABA, who have shown losses.

(Continued on page 48)

(Continued from page 47)

Mr. Freeman also spoke about the 2018 Media Law Conference held in September in Reston, Va. The conference had 350 attendees and very successful plenary and breakout sessions.

Mr. Freeman also introduced MLRC new Legal Fellow, Josef Ghosn, who comes to MLRC following two and half years of litigation experience in Orlando, Florida.

Mr. Freeman also highlighted MLRC's new initiative: A consortium with the Reporter's Committee, CPJ, and PEN in response to the increasingly hostile relationship between the press and the current administration. The first project will be a digital publicity campaign focusing on the importance of a free press and the First Amendment. The message is still being formulated, but will not be overtly political.

Miami, Berlin, and London Conferences

Deputy Director Dave Heller announced that MLRC had an extremely successful year with its international conferences.

The Latin American Law Conference held in March was a success, and has become a hub for media lawyers in South Florida to meet with counterparts from Latin America. Highlights from the 2018 conference included: 1) A session on media coverage in Puerto Rico of Hurricane Maria; 2) a session on Fake News in Latin America focusing on the history of populism & anti-press propaganda in the region; and 3) a Q&A Miami Herald reporter Nic Nehamas on the newspaper's Panama Papers coverage. The next Latin American Law Conference will be held on Monday, March 11, 2019 at the University of Miami School of Communication.

This year, MLRC also held the European Media Lawyers Conference. The conference took place in Berlin in June and was hosted at the offices of one of a member firms in Germany: Raue LLP. Highlights included: 1) A debate on whether and how hate speech should be regulated; 2) a session on fake news & online disinformation; and 3) a session with a German copyright court judge discussing fair use issues. This conference is an effort to build new bridges to lawyers in Europe. Attendees included lawyers from Bertelsmann, Bauer, Axel Springer all new to MLRC events. The next conference will take place in Berlin in June 2019.

Planning is also underway for the next MLRC London Conference to be held in September 2019 at The Law Society. The first planning meeting was held during the Virginia Conference with numerous productive suggestions for topics and speakers.

Entertainment Law Conference and Northern California Initiatives

Deputy Director Jeff Hermes reported on next year's Entertainment Conference, which includes discussions on topics encompassing reporting in the age of #MeToo; Copyright, Trademark and the Public Domain: The New Era of Intellectual Property Management;

(Continued on page 49)

(Continued from page 48)

Developments in Idea Submission Law; and Controversial Celebrities Causing Online Outrage: Dealing with a Social Media Backlash.

The 16th annual Entertainment conference, co-sponsored by Southwestern University School of Law, will be held on January 17, 2019.

Mr. Hermes reported on the status of the MLRC's Northern California In-House Counsel Call Series. The Call Series began last year and brought in house counsel together on the phone to discuss important media, intellectual property, and other relevant issues. It is comprised of 15-20 in house attorneys and ten usually participate in the call. The most recent call was concerned recent law suits regarding digital platforms and public forums.

Mr. Hermes then reported on the MLRC digital membership outreach initiatives. The initiatives concentrate on Law Clinic Membership, focusing on law schools with First Amendment programs and clinics. Currently, MLRC is working with the law schools at Arizona State, Yale, and Cornell. The clinics will be treated as DCS members regarding the materials accessible to them. The goal is to introduce the MLRC to law students with an interest in First Amendment work. Currently the dues are $500 per academic year and those dues cover instructors and materials.

Finally, Mr. Hermes presented on the Knight Foundation's proposal for an attorney referral service to be managed by the MLRC in order to refer attorneys to represent media companies in media lawsuits brought against them.

Digital Conference, Forum, and Publications

MLRC Staff Attorney, Michael Norwick, presented on the Digital Conference, upcoming publications, and annual Forum. Currently, MLRC is editing the 50 State Surveys and, as of 2016, publishing an e-book in cooperation with LexisNexis.

MLRC published two bulletins this year. The first was in April and was an updated trial damages study to include 650 trials from 1980-2017. A key takeaway was that the amount of trials in libel and privacy cases were greatly decreasing over that time period. In May, the MLRC published the digital bulletin. There were 716 downloads of the FOSTA article and analysis of the *Goldman v. Breitbart* copyright case

Mr. Norwick then presented on the Digital Conference. The 2018 Digital Conference was moved to the Mission Bay Conference Center in San Francisco and will be there again next year on May 20-21, 2019. Two new co-chairs, Lawrence Polgram of Fenwick and Samir Jain of Jones Day, will join chair emeritus Kelly Craven of Facebook. There will be a session on the *Goldman* case and approaches to embedded linking. Additionally, there will be a session on the California Consumer Privacy Act. There will also be a planning session on content moderation with hypotheticals that will illustrate the tension between free speech and a safe online environment on social media platforms. Currently, MLRC is in the early stages of inviting an FTC chair to engage in a keynote / fireside chat conversation as the FTC is holding hearings on consumer protection and online platforms relating to antitrust issues, data privacy, and consumer protection.

(Continued on page 50)

(Continued from page 49)

Report on New MLRC Website and MediaLawLetter

Production manager Jake Wunsch presented on plans for a new MLRC website and new distribution approaches for the MediaLawLetter. At the Virginia Retreat in September, issues with the old site and goals for a new website were discussed. The main takeaway was that much of the information on the site could be used more productively if it was better presented and searchable. Mr. Wunsch stated that the way ahead will be to simplify navigation, to invest in good search functionality, and more user-friendly presentation.

Mr. Wunsch received bids from a half-dozen web designers before the Retreat. He will circle back with the developers and submit revised bids and plans to the advisory group.

Mr. Wunsch also reported that after eliminating the PDF version of the LawLetter last month, members raised issues so MLRC will continue to produce the publication both online and as a standalone PDF.

DCS Report

DCS Secretary Jay Brown reported on the work of MLRC's committees and task forces (set out in detail in the DCS Annual Meeting Report). George Freeman thanked Jay and the entire Executive Committee for their excellent work in overseeing all the committees and their projects.

Additional Approvals

The membership voted to approve the Amendment of DCS By-Law Section IV.2 "Number and Term" to state that all Executive Committee Officers shall serve one year in each position.

The Board also voted to approve Randy Shapiro of Bloomberg L.P. as the incoming chairperson of the Board.

Conclusion

There being no further business, the 2018 Annual Meeting concluded.