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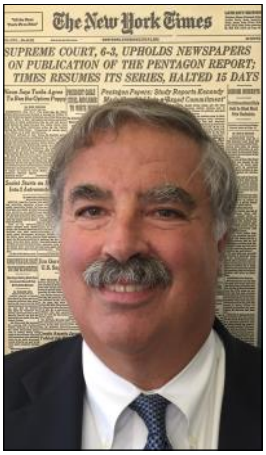
From the Executive Director's Desk

The First 100 Days: Trump and Press - A Q&A

I write this on the 100th day of the Trump Presidency. It has been a period of drama, with a crisis a day. For the media, it has been a time of constant criticism and a continual barrage of threats and anti-press bloviation. On the other hand, newspaper sales are up, as are ratings for news shows and networks. Indeed, I have advised my lieutenants that in every conference we put on, "Trump" has to be in the title of every headline program. To paraphrase former Yankee Reggie Jackson, he puts fannies in the seats.



George Freeman

I have been speaking on a pretty regular basis during the past few months before law and journalism school audiences, bar groups and elsewhere on what Trump means for the media. So I thought for this column I would synthesize those programs and do a conglomerate Q&A of what I've been asked and how I (and in some cases fellow panelists) have answered.

President Trump has tweeted that the press is "the enemy of the American people." Is this kind of sentiment and rhetoric unusual coming from a President?

It's unusual but not entirely unprecedented. After all, Nixon and Agnew unleashed some pretty strong epithets and haymakers at the press too – recall their being the "nattering nabobs of negativism," a colorful phrase coined by soon-to-be New York Times columnist Bill Safire. And much of Nixon's thoughts on the press, as heard on his tapes, were x-rated and not fit for a family or professional publication as our LawLetter. But given Trump's ability and inclination to tweet at all hours of the day, the anti-press offensive is more concerted and unyielding than ever. And, I would add, it really undercuts and is not very helpful to our democracy. But, then again, almost everything this President has done is about him, and not the country.

Why does he do it? Does he really mean what he says?

That's a good question. Because on the one hand, he loves the press. He apparently lines the wall of his office (hopefully not the Oval Office) with cover photos of him on scores of magazines. Even when he is the subject of bad news, such as the unsuccessful vote in Congress on Obamacare, he picks up the phone and calls reporters at the "failing" New York Times and

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Washington Post. So I think it's all politics. First, his supporters love it. He got his best response at campaign rallies when he pointed to the press pen and lambasted them. But more important, he is trying to minimize and destroy the credibility of an institution that he knows is unsupportive of him. It's no surprise that the two institutions he has attacked the hardest are the press and the judiciary, the two branches which can monitor and limit him. And he has to have enemies – or else, he has no narrative.

Speaking of presidential tweets, there was a fear that his tweeting would undermine the press's role as conduits to the public. Has that come to fruition?

No, it hasn't. As it's played out, the tweets themselves only make news and only have an effect when they're carried by the mass media. So the role of the media is the same whether he's tweeting or saying something to reporters at the White House. It still is up to the press to decide how to play it and, indeed, whether to give it attention.

He keeps saying that CNN and other mainstream media offer "fake news". Is this rhetoric effective?

In the long run, I don't know if it will be effective, but it certainly is dangerous and adds to the polarization of the citizenry. It has led to either side hearing developments they don't like and reflexively calling them fake news. This is terrible for us lawyers, whose profession, after all, is based on a search for the truth. Now that search is not even on the table, as people, led by the President, have simply denied versions of events they don't like. Hopefully, sooner rather than later, the public will realize the folly and emptiness of this game.

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Trump has said he wants to "open up the libel laws". Are you worried about that?

No, of all his anti-press offensives, this worries me least. First, the President can't change the law, certainly not constitutional law that has been in place for over 50 years; only the Supreme Court can do that. And, btw, there is nothing in Justice Gorsuch writings which would lead me to believe that he would try to undercut Sullivan. Second, defamation arises from state tort law; it's really not even a federal matter. Third, and most important, when questioned at a Washington Post editorial board meeting about what he meant, Trump said that if a newspaper intentionally said false and harmful things about people, they should be able to win lots of

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money. But as we all know, that's pretty much the actual malice standard we have now. So what he is advocating we change to is exactly what the law already is now. He just doesn't understand that. Finally, he should be careful what he wishes for: given his attacks on so many, he is far more likely to be a libel defendant who needs the very defenses he seems to be criticizing than a libel plaintiff.

The MLRC published an article in the fall whose theme was that Trump was a "libel bully". Do you think he will sue the Times or another media outlet while he is President?

No, I really don't. Much as he likes and has lived on litigation, I really think he's a bit too busy for that. He may well threaten or cajole, but it's hard to see him wanting to sit for discovery in a case he brings. I was glad to see the White House settled Melania's libel suit against the Daily Mail. The specter of FLOTUS suing about an article alleging that she was an escort – and, therefore, perhaps having to answer questions about her sex life -was a little tawdry even for me. On the other hand, given his admitted goal of using the courts to financially squeeze and chill his opponents, the chance of his signing a federal Anti-SLAPP law seems pretty slim.

He should be careful what he wishes for: given his attacks on so many, he is far more likely to be a libel defendant who needs the very defenses he seems to be criticizing than a libel plaintiff.

So despite his history of suing for libel and repeatedly advocating for easing the burden on public figure plaintiffs, you don't fear an increase in defamation suits?

No. In fact, in recent years anecdotally there has been a decrease in the number of libel suits. Insurance company numbers indicate no change, but it certainly seems that big city newspapers and tv stations on the two coasts have been sued much less than decades earlier. My only worry is the Peter Thiel/Gawker model, that the very rich will start financing libel suits against media companies they don't like, not because of the gravity of the alleged libel, but in an attempt to bankrupt or financially ruin the media entity. I'm not sure what can be done about that – probably nothing other than perhaps requiring disclosure of such financing – but that seems like a bigger threat than the law changing.

It seems that in the first 100 days there have been more leaks coming out of the White House than ever. Why?

One reason is that the president hasn't yet filled all the positions he can make appointments

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to, and therefore many Obama appointees and career civil supporters remain; they wouldn't be particularly loyal to Trump and may be the sources of the leaking. { On one panel, after I said the above, Floyd Abrams trumped me. He smiled coyly and said one word: "Patriotism."}

Do you worry about reporters being ensnared in leak investigations?

Well, we've seen that one of Trump's tactics is to turn any attacks or investigations about him into a threatened investigation about how the bad news about him was leaked. That certainly has been the pattern about the investigation looking into his contacts and those of his campaign with Russia. His answers have not been substantive; instead he has parried the criticisms with calls for leak investigations. But these days the government can often find the identity of the leaker by searching its own email and phone records; they often don't have to reach the point of a subpoena on the press. And, as we know, his predecessor didn't shine in this area: Obama's administration went after more leakers than prior administrations.

What I'm most worried about is that this administration might try to prosecute the press for publishing leaked national security information. That would be unprecedented, and it would be a real gamechanger.

So leaks are not an area of increased concern?

Actually, quite the opposite. This is the area I'm most worried about. Not because reporters might get subpoenaed in leak investigations – though that's a scary scenario, it's nothing new. What I'm most worried about is that this administration might try to prosecute the press for publishing leaked national security information. That would be unprecedented, and it would be a real gamechanger. There have been no prosecutions of the press under the Espionage Act, let alone any successful ones, so that would really change the delicate balance between the government and the press. Don't forget, in the Pentagon Papers case four justices suggested that though a prior restraint may not be constitutionally viable, a prosecution might be the way to go. At a 25th anniversary program, I asked the U.S. Attorney who litigated the case, Whitney North Seymour, why a prosecution was not forthcoming. It's easy, he said; "I'm a litigator and litigators don't like to lose. Prosecuting The New York Times in New York for Nixon during the unpopular Vietnam War was a loser, and I wasn't going to do it. And I told the President that." I'd also point out that days after the Times article in 2005 on the Bush Administration's warrantless wiretapping, Bush, Cheney and Rumsfeld all publicly said the Times should be prosecuted, but no prosecution – or even a subpoena – was forthcoming. That's why if Trump were to prosecute the press it would be a radical departure.

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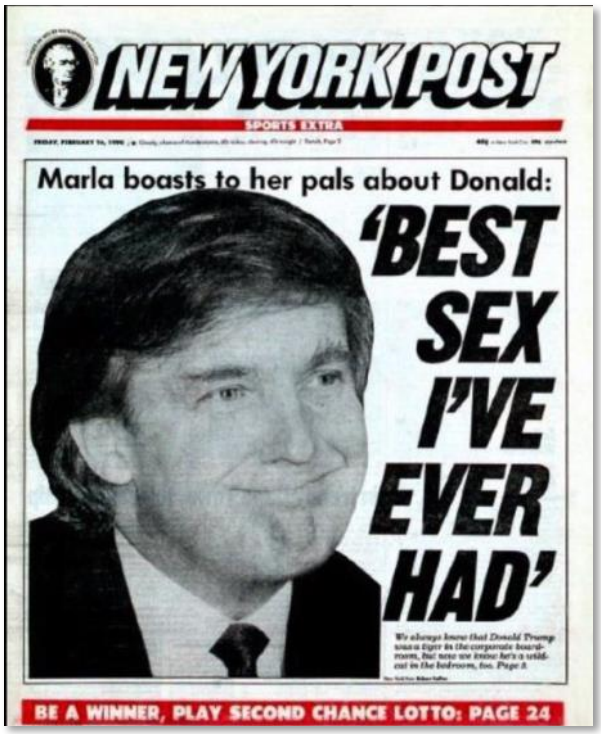
But if a prosecution were brought, wouldn't the press win the case?

There would be many defenses raised, especially since the Espionage Act is so poorly drafted – an unconstitutionally vague statute and a lack of intent to harm the country would be among the defenses put forward. However, the main defense, I would think, would be a Florida Star and Bartnicki defense that the Supreme Court has repeatedly held that even if a statute bars publication of something, such publication can't constitutionally be punished if the information was truthful, newsworthy and was not illegally obtained. However, there is a fourth prong, absent a government interest of the highest order. How this Supreme Court would weigh that prong is an open question, and since there have been no such prosecutions in our history so far, there is not much precedent.

What do you think about the recent announcement that the administration is planning to prosecute Julian Assange and Wikileaks for their leaks?

It is not altogether clear what role Wikileaks played in its disclosures. But any possible prosecution of the press or other media entity for publishing true and newsworthy government documents that it did not illegally obtain would be unprecedented, would violate constitutional law as articulated several times by the Supreme Court, and, perhaps as important, would go against the traditions and ethos of over 225 years of press-government relations in our country. Even though that relationship has often been contentious - and since the press is supposed to be the overseer of the government in our constitutional framework, that tension is not surprising - the specter of government taking criminal action against the press for publishing accurate and newsworthy information would be frightening, not just for the press, but for the entire citizenry which counts on the media to give it information about what its government is up to.


NEW YORK POST

SPORTS EXTRA

Marla boasts to her pals about Donald:

'BEST SEX I'VE EVER HAD'

BE A WINNER, PLAY SECOND CHANCE LOTTO: PAGE 24

The President also has attacked the press' use of anonymous sources, saying they should "not be allowed". Is that a cause of concern?

That's rich. Trump's staff have used the cover of anonymity to leak to the press on a daily basis. More ironically, Donald Trump himself was an anonymous source, indeed a fake anonymous source, when he

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used to call up the New York tabloids feigning to be a Trump p.r. person and anonymously as his own p.r. agent tell the tabloids how good Trump is in bed. So for him to now complain about anonymous sources is rich indeed.

Do you fear that Trump will lessen access to the White House, particularly to publications and reporters he views as "unfavorable"?

So far that has not happened with regularity. He certainly favors calling on conservative outlets at press conferences, but that is not a legal issue and probably his prerogative. There was the famous incident in February where Sean Spicer disinvited a number of publications the administration disfavors to his gaggle, but, interestingly, and I think wisely, no legal proceeding was brought. I think we have to save our powder on the access/transparency/retaliation issue to a case that's a winner, and not one, such as the press' not being told the President is eating dinner with his family at The 21 Club, that looks like the press is needlessly whining. If he were to repeatedly bar certain "unfavorable" reporters or publications from presidential press conferences, which have traditionally been open to all the press, that would be a good case to bring. But I think we have to discipline and police ourselves not to bring less sympathetic and winnable cases.

The news media are being very aggressive lately in reporting that Trump is lying. Is "liar" a term that should be used when describing the President? Doesn't that exacerbate the view that the press is biased against him?

However, Trump doesn't spin the way other politicians did; he makes blatant falsehoods and he does this repeatedly. So the old formula of a few counter-quotes became insufficient.

This does represent a sea change in journalism, but one which I believe is totally warranted. When I was a kid, the press essentially saw its role as a transcriber, mainly about what government was doing. Pages upon pages of the Times was filed with articles on reports from the Department of Agriculture and other agencies. Presidential affairs and afflictions were hidden. Even though Edward R. Murrow broke with that tradition by bringing down Joe McCarthy, a pretty non-questioning attitude towards government continued through the 60's. Then came Vietnam and Watergate, and the obvious reality that government was lying to the press and the public. So the press became more cynical and critical. It wouldn't call governmental spin lies or false, but would more subtly question politician's statements by choosing quotes and facts suggesting that the statements were inaccurate. However, Trump doesn't spin the way other politicians did; he makes blatant falsehoods and he does this repeatedly. So the old formula of a few counter-quotes became insufficient. I mean the press'

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main responsibility is to its readers and if it doesn't clearly tell them that presidential statements are definitely false, it is not doing its job. So depictions of "false" "inaccurate" and even "lie" Sbecame necessary. I think "lie" is more dangerous than the others since it connotes actual intent in the President's mind, but if the President contradicts himself in a short time or otherwise seems to be intentionally making stuff up, as he is wont to do, that word is appropriate. Sure, it may lead to accusations of bias, but hopefully most readers will understand that by using that descriptor the newspaper is doing as good an objective job as it can. The press cannot let the President get away with constant lying if it is to do its job.

So what keeps you up at night?

North Korea and the president's foreign policy

We welcome responses to this column at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

Ninth Circuit Affirms Dismissal of Extreme and Outrageous Conduct Claim

Case Arose from Newspaper Editor's Ill-Considered Email

By Steve Zansberg

On April 14, 2017 the Ninth Circuit Court of Appeals affirmed dismissal of an IIED claim against the *Durango Herald* newspaper and its former Arts & Entertainment Editor, Ted Holteen. *Delevin v. Holteen*.

Although the Ninth Circuit issued only an unreported Memorandum Decision, having no precedential value, and it relied exclusively on Colorado state tort law, the case has entertaining/interesting facts and some useful practice pointers for others defending extreme and outrageous conduct claims.

Background Facts

The Plaintiffs are members of a "religious order"/"spiritually-based community" based in Tumacacori, Arizona, called the Global Community Communications Alliance. To gain a fuller understanding of this group, simply Google their name, or visit their website, http://gccalliance.org/. Plaintiff Tony Delevin is the group's spiritual leader, having adopted the name Gabriel of Urantia. In his role as frontsman of the group's 11-person traveling band (the "Bright & Morning Star Band"), Delevin goes by the name "Talias Van of Tora." Two of the other plaintiffs in this case are members of the band. Plaintiff Sharon Plyler a/k/a Mycenay, is a member of the religious community and serves as the band's booking agent and publicist.

As the band was preparing to perform a series of concerts in Colorado, New Mexico, Arizona, and California, in the summer of 2011, Ms. Plyler placed three display advertisements for the band's opening performance, on July 8, 2011, in Durango, Colorado, in the Defendants' newspaper, The Durango Herald. In June 2011, Plyler sent e-mails to The Durango Herald and to Ted Holteen, the newspaper's Arts & Entertainment Editor, requesting free editorial coverage of the band's upcoming performance in Durango.

On July 8, 2011, the morning of the scheduled concert, Holteen sent an e mail addressed to

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Ms. Plyler, and copied to the station manager for the campus radio station at Fort Lewis College (the site of the concert). The text of Mr. Holteen's e mail addressed to Ms. Plyler, a/k/a Mycenay, reads, in its entirety:

> Mycenay, or whatever the hell your name really is – If I had my way you'd all be in prison or worse. I hope you play to an empty venue tonight to exemplify just how irrelevant you are. It's disgusting the way you people prey on the unsuspecting and trusting, and it's only a matter of time before TONY DELEVIN – not Gabriel, not a prophet, not a seer – TONY DELEVIN gets what's coming to him. And any of you that help him perpetuate his crimes are just as guilty. Oh yeah – and you no-talent hacks produce the singularly worst music I've ever heard in my life. You'll be lucky to leave Durango without being in handcuffs or slaughtered by an angry mob – we're not idiots around here like the suckers you rope in down in Arizona. If there was a hell I'd wish you to burn there for eternity, but since no such place exists I can only hope that you suffer horribly painful deaths. Shame on you.

Plaintiffs reported the above email message to the Durango police, who referred the matter to Fort Lewis College campus police. A peace officer was dispatched to the concert venue, and informed Plaintiffs of the procedure by which they might apply to have a court issue a TRO against Holteen. No criminal charges were filed against Holteen and no TRO was entered. Plaintiffs proceeded to perform the concert that evening, (although only 11 tickets had been sold). Subsequently, the band cancelled the remainder of its planned concerts in Colorado, New Mexico, Arizona, and California.

Proceedings Before the Trial Court

On February 22, 2012, Plaintiffs filed their complaint in the U.S. District Court for the District of Arizona, asserting three claims against Holteen and his employer, The Durango Herald: (1) Intentional Infliction of Emotional Distress through extreme and outrageous conduct; (2) a claim labeled "Threat"; and (3) violation of Colorado's Bias-Motivated Intimidation Statute, which provides a private cause of action for victims of ethnic- or religious -based intimidation. All three claims were premised exclusively on a single communication—Holteen's emailto Plyler, on July 8, 2011, as set forth above.

On March 26, 2013, Defendants filed a Motion to Dismiss the Complaint for failure to state a claim. Defendants argued that because the sole basis for all three of Plaintiffs' claims was the communicative impact of Holteen's speech (contained in the Holteen's email), no tort liability

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could be imposed upon the Defendants unless that speech was found by the Court to fit within a category of "unprotected speech" under the First Amendment. *See Snyder v. Phelps*, 562 U.S. 443 (2011) (holding that First Amendment barred claims for IIED and intrusion on seclusion premised on defendant's highly disturbing protest at the military funeral of plaintiff's son, a fallen soldier, because that expressive conduct did not fit within a recognized category of unprotected speech).

Defendants argued that because the single email in question cannot, as a matter of law, be found to constitute a "true threat," (the only potentially applicable category of unprotected speech), the First Amendment bars all three of Plaintiffs' claims. Defendants also argued, in the alternative, that all three of Plaintiffs' pleaded causes of action failed to state claims upon which relief could be granted under applicable Colorado law: (1) Holteen's single e mail was not sufficiently "outrageous conduct" to serve as the basis for an intentional infliction of emotional distress (IIED) claim; (2) Colorado does not recognize a tort claim for "threat," and (3) Colorado's bias-motivated intimidation statute is expressly limited to "fighting words" which the Holteen E-mail was not.

Following the completion of full briefing on Defendant's motion to dismiss, 0n August 3, 2015, (more than two years after the motion had been filed) the District Court (Hon. Frank R. Zapata) granted Defendants' motion to dismiss all three pleaded claims, with prejudice. The District Court ruled that, as a matter of law, the pleaded allegations in Plaintiffs' complaint failed to state any of the three asserted claims under Colorado common law: (1) the Court considered both the content and context of Holteen's email, and concluded, as a matter of law, that it was not sufficiently "extreme and outrageous" to constitute tortious IIED under Colorado law; (2) Colorado does not recognize a civil tort claim for "threat," and (3) the Holteen's email does not constitute "fighting words" to which the Colorado's Bias-Motivated Intimidation Statute is expressly limited. Accordingly, the District Court dismissed all three claims with prejudice.

Because it dismissed all three of Plaintiffs' claims on Colorado common law grounds, the District Court deemed Defendants' alternative legal defense t—that the First Amendment bars the imposition of civil damages on account of Holteen's fully-protected speech—moot.

Subsequently, the District Court ordered that Plaintiffs must pay the Defendants $ 87,000 in attorneys fees for successfully obtaining dismissal of Plaintiff's tort claims on a Rule 12(b)(6) motion, as required under Colorado Rev. Statutes § 13-70-102 (2016).

Issues Presented Before the Ninth Circuit

The Plaintiffs did not to appeal the dismissal of their claims for "threat" and for violation of Colorado's Bias-Motivated Intimidation statute. So, the "merits" appeal was limited to a single

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question: Did the District Court err in granting defendants' motion to dismiss the IIED claim on grounds that the email from Holteen to Plyler did not constitute sufficiently extreme and outrageous conduct to give rise to liability for intentional infliction of emotional distress, as a matter of law. Plaintiffs also appealed the trial court's order awarding attorneys fees to The Durango Herald under Colorado's mandatory fee shifting statute, arguing that the Arizona District Court erred in applying Colorado's statute, because, according to Plaintiffs, "the law of the forum state [always] determines eligibility for attorney's fees."

The Court's Ruling

After full briefing on both of Plaintiffs;' appeals, and one week after hearing oral argument, the Ninth Circuit issued its Memorandum Opinion, affirming both of the District Court's rulings: First, the Court held, the single email from Holteen to Plyler was not sufficiently "extreme and outrageous conduct," as a matter of law, to make out a claim for IIED under settled Colorado law. *See, e.g., Pearson v. Kancilia,* 70 P.3d 594, 597 (Colo. App. 2003) ("Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities are insufficient."). Second, the Ninth Circuit held, the District Court did not abuse its discretion when it granted Defendants' motion to dismiss "with prejudice," instead of *sua sponte* inviting Plaintiffs to amend their complaint (which they did not request); it was clear that any attempt to cure the complaint's deficiencies through amendment would be futile.

Third, the Ninth Circuit ruled, the District Court did not err in applying Arizona's conflicts of laws jurisprudence, which utilized the "most significant relationship" test, as set forth in the Restatement of Conflicts of Laws, to determine which state's substantive law supplies the rule of decision. Because Arizona's courts have held that attorney's fees tied to the merits of a claim presents a substantive issue, the District Court appropriately found that Colorado's fee-shifting statute governed, just as Colorado's substantive law provided the rule of decision for the Plaintiff's tort claims.

Practice Pointers

Even though both the District Court and the Ninth Circuit did not reach the First Amendment defense the defendants had raised to the three claims originally pleaded, others can benefit from the overall defense strategy employed in this case.

What makes this case noteworthy is that the speech that served as the basis for Plaintiffs' IIED claim was not alleged to be defamatory of Plaintiffs, but instead threatening to them. As everyone knows, in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the Supreme Court held that to state a valid IIED claim premised on speech that is allegedly false and defamatory,

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a public figure plaintiff must prove actual malice. Without such proof, the speech in question does not fit within the category of unprotected speech, "defamation," and therefore it cannot give rise to civil liability consistent with the First Amendment. *See Snyder v. Phelps*, 562 U.S. 443 (2011);*Cf. Hatfill v. N.Y. Times Co*., 416 F.3d 320, 336-337 (4th Cir. 2005) ("If [plaintiff asserting both defamation and intentional-infliction claims] ultimately cannot prevail on his defamation claims because he is unable to satisfy constitutional requirements for recovery, then he likely will be unable to prove that . . . such misconduct was sufficiently outrageous to warrant recovery.").

In cases like this one, where the speech alleged to provide the basis for an IIED claim, or *any other* state tort claim, is not claimed to be defamatory, *Snyder* expressly holds that the First Amendment bars the imposition of civil liability unless the speech at issue fits within some *other* historically recognized category of unprotected speech. Moreover, defendants argued that all courts must construe a state's tort law *to avoid raising such constitutional questions*. In other words, the First Amendment limitation established in Snyder should appropriately be incorporated into the parameters of actionable "tortious conduct" under the state's common law.

Thus, in determining how extensive and severe (emotionally distressing) challenged speech must in order be to give rise to a claim under Colorado's tort law, the court must necessarily consider whether the speech --although in some sense "threatening," and unquestionably highly offensive and insulting -- rises to the level of being actionable as a matter of law, the court should construe a state's common law as not imposing civil liability upon constitutionally protected speech. In this regard, practitioners should make note of this helpful comment in the Restatement of Torts:

> Some courts have avoided the need for employing the First Amendment as a bar to state tort liability by holding that publishing truthful facts, regardless of how detrimental to the subject's emotional health, is not extreme and outrageous as a matter of law. *See*, *e.g., Alvarado v. KOB-TV, L.L.C*., 493 F.3d 1210 (10th Cir. 2007) (citing cases). Thus, this imports First Amendment constraints into the law applicable to the tort addressed in this Section.

Restatement (Third) of Torts: Phys. & Emot. Harm § 46 cmt. f (2012).

Steve Zansberg, a partner at Levine Sullivan Koch & Schulz, in Denver, CO, represented the defendants together with Tom Kelley and Shaina Jones Ward. Plaintiffs were represented by Celinas Ruth, Global Family Legal Services, Tumacacori, AZ.

"Vlad the Impaler" Loses Libel Suit vs. Time Inc.

Hyperbole and Golf Are No Strangers

A Kansas federal district court granted summary judgment to Time Inc. and a Kansas golf club on libel and emotional distress claims brought by a former manager who was referred to as "Vlad the Impaler" and criticized for mismanagement of the club. *Clark v. Time Inc*., No. 15-9090 (D. Kan. March 16, 2017) (Crabtree, J.).

The court found that no genuine issues of fact existed that would allow a jury to conclude that plaintiff was injured by the article, or that the article was false and defamatory.

Background

At issue was May 29, 2014 article on GOLF.com website about the Hillcrest Country Club, in Kansas City. The focus of the article was the resurgence of the club after bankruptcy and mismanagement by plaintiff. The plaintiff, the former general manager of the club, was fired after a series of disputes with club members and questionable management decisions. The article never referred to plaintiff by his actual name, but used the pseudonym, "Vlad the Impaler" (the 15th Century despot of legendary cruelty) to describe how plaintiff drove away members and was eventually fired.

Among the anecdotes in the article: "Vlad told the chef to stop ordering Heinz ketchup as a rebuke to Democratic presidential candidate John Kerry." "Vlad even had an answer for those who quit Hillcrest: He sued them for breach of contract." "`Vlad thought that if you didn't overseed, you didn't have to hire somebody to mow.'"

Plaintiff sued for libel and intentional infliction of emotional distress, alleging the article was a "hit piece against Plaintiff, filled with false statements and intentional lies"; that "Vlad the Impaler" was "an infantile and highly non-professional false name designed to subvert the rules of law"; and that everyone in the Kansas City golf and business community knew the article was about him even though it did not use his name. Defendants agreed the article was about plaintiff, but moved for summary judgment on a variety of grounds.

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Summary Judgment

Granting summary judgment for defendants, the court noted that "Hyperbole and the game of golf are not strangers to one another." Reasonable readers would clearly understand that references to "Vlad the Impaler" were merely opinions about plaintiff's management style, not a factual allegation that plaintiff committed acts of atrocities. In other words, plaintiff "killed off club membership" not club members.

Other statements in the article about club membership issues were also either opinion, true, or not directed at plaintiff. Moreover, plaintiff failed to offer any admissible proof that his reputation was actually harmed. His own friends stated they did not believe the allegations. And simply claiming that the "scurrilous article" was available online and caused loss of income was "nothing but speculation."

Finally, the court dismissed the IIED claim because the facts of the case "simply cannot rise to the level of extreme and outrageous conduct necessary to support a triable claim for an intentional infliction of emotional distress under Kansas law."

Plaintiff acted pro se. Time Inc. was represented by Bernard J. Rhodes, Lathrop & Gage, LLP, Kansas City, MO. The golf club was represented by Timothy R. West, Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP.

Defamation, "Puppy Mills" and "A Dog's Purpose"

By Joseph E. Martineau

In the opening scene of the movie, *A Dog's Purpose*, based on the novel by Bruce Cameron, a Golden Retriever puppy escapes from a wire cage when the door is inadvertently left unlatched while a commercial breeder is showing a prospective purchaser a variety of dogs. Cages are stacked upon cages, and though the animals do not appear malnourished or mistreated, many observers would describe the operation as a "puppy mill." In fact, that is exactly how it was described in a book review in *Publisher's Weekly*.

But what is a "puppy mill," and is the term legally defamatory? This is an issue that recently had to be decided by the Missouri Supreme Court in Mary Ann Smith, d/b/a Smith's Kennel v. Humane Society of the United States and Missourians for the Protection of Dogs, SC 95175 (April 25, 2017).

The case involved an animal rights advocacy group's accusation that a dog breeder was operating a "puppy mill" and one of the "worst puppy mills" in the State. The Supreme Court of Missouri determined that this language, which was used "during a hotly contested political campaign" over proposed animal rights legislation, was "rhetorical hyperbole" and "lusty and imaginative expression" that could not reasonably be interpreted as stating actual facts, but constituted protected opinion. As such, the statements were not actionable defamation as a matter of law.

THE HUMANE SOCIETY OF THE UNITED STATES

SUMMARY REPORT: MISSOURI'S DIRTY DOZEN

A report on some of the worst puppy mills in Missouri

October 2010

Researchers at The Humane Society of the United States (HSUS) have spent weeks poring over state and federal inspection reports, investigators' photographs, and enforcement records received via the Freedom of Information Act and state Sunshine Law requests to compile a list of some of the worst puppy mills in Missouri, known as "Missouri's Dirty Dozen." The 27-page report also lists eight "dishonorable mentions."

The purpose of the report is to demonstrate current problems that could be addressed by the passage of Proposition B, which Missouri citizens will vote on in November. Under Proposition B, the Puppy Mill Cruelty Prevention Act, many of these dealers' horrific violations would be backed by stronger enforcement opportunities.

ABOVE: A small Sheltie in an outdoor pen appears to have no protection from the cold and snow at S&S Family Puppies. 2010/The HSUS

Background

The case concerned an October 2010 Report of the Humane Society of the United States entitled, "Missouri's Dirty Dozen" ("Report"), which urged voters to support the Puppy Mill

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Cruelty Prevention Act. The Act, which was later approved by the voters but then limited by the legislature, would have capped the number of dogs used for breeding at 50, mandated rest periods between breeding, and required daily feedings. According to the Humane Society, the purpose of its Report was "to demonstrate current problems that could be addressed by the passage of [the Act], which Missouri citizens [would] vote on [that] November."

The Report listed what the Humane Society believed were the 12 worst Missouri "puppy mills," referencing them as "The Dirty Dozen." Included among the "Dirty Dozen" was plaintiff Mary Ann Smith's kennel, based on the Humane Society's analysis of the number and severity of state and federal animal welfare violations received by Smith's kennel.

The section of the Report devoted to Ms. Smith's kennel began, "Smith's Kennel has a history of repeat USDA violations stretching back more than a decade, including citations for unsanitary conditions; dogs exposed to below-freezing temperatures or excessive heat without adequate shelter from the weather; dogs without enough cage space to turn and move around freely; pest and rodent infestations; injured and bleeding dogs; dogs with loose, bloody stools who had not been treated by a vet; and much more." The Report then cited quotations about Ms. Smith's kennel from inspection reports:

> "In the adult building there are approximately 14 dogs with extremely long toenails. It is noted that some of these nails are turning the toes sideways as the dogs walk and hanging down through the wire flooring." (June 2009)
>
> "There are 3 outdoor pens that have Igloos for housing units that have no bedding material in them. The weather has been reaching temperatures of 20–30 degrees F at night for approximately the past week." (USDA Inspection, Nov. 2008)
>
> "The owner has issues with this facility that remain consistent with each inspection and more issues have surfaced since the last inspection." (2008)

Smith sued for defamation and false light invasion of privacy because the Report labeled her kennel as a "puppy mill" and among the "worst" puppy mills in the State. She also claimed that several other statements from the Report and later Humane Society news releases and news reports were defamatory, but most of these were generalizations about puppy mills and did not specifically identify Smith or her kennel.

The trial court dismissed Smith's claims based on arguments that the statements, though negative, were protected opinion and not factual. A court of appeals reversed and remanded.

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Although acknowledging "Plaintiff does not allege … that any of the information specifically about Plaintiff's kennel in the Report was false," the court of appeals held that "the contention that Plaintiff's kennel was a puppy mill with the definitions given as to what constitutes a puppy mill was, under the totality of the circumstances in this case, a factual contention" susceptible to trial for a jury determination falsity. From there, the case was appealed to the Missouri Supreme Court.

The Legal Issues

Under what is commonly referred to as the "opinion" defense, Missouri defamation law—like the law elsewhere—has consistently protected subjective and conclusory statements about a plaintiff's conduct, character, or motives where the factual basis for the statements are either stated or known. *See, e.g., Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis, Inc.,* 354 S.W.3d 234, 241 (Mo. App. E. D. 2011) (company's Better Business Bureau rating based on a subjective interpretation of data and not actionable as a matter of law). In such cases, courts have recognized that the audience is in a position to gauge for itself whether the speaker's conclusions carry weight in light of the stated facts. However, if the facts supporting the opinion are false or intentionally distorted in a material way, the statement, even though expressed as an opinion, may be actionable.

Further, statements that are subjective, imprecise, or not objectively verifiable are usually held protected opinion. Moreover, context can be determinative: statements in a political context or a newspaper editorial are more likely protected. Finally, Missouri, like many jurisdictions, has rejected claims based on ratings such as best or worst, or a grade of A, B, or C, etc.

In Smith's case, much of that would support a finding the accusations about her kennel were protected opinion. Though some might not agree with the conclusion that the facts stated about Smith's kennel—none of which she disputed—made the kennel a "puppy mill," the recipients of the Report had the information needed to decide for themselves. Moreover, though having a negative connotation, the term "puppy mill" is not particularly precise or exactly verifiable. Additionally, the political context of the "puppy mill" accusation in the Humane Society's Report was obvious. Finally, once you accept that the "puppy mill" accusation is protected expression, how can one reasonably gauge whether it is the "worst," any more than gauging whether a particular retailer is the worst in town?

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The Missouri Supreme Court's Opinion

None of this established precedent was lost on the Missouri Supreme Court, which readily recognized that describing Smith's kennel as a "puppy mill," while also setting forth the undisputed facts about her kennel, constituted protected opinion.

The Court rejected Smith's attempt to claim that the Report's generalized description of conditions at "puppy mills" comprising the Dirty Dozen constituted the applicable definition for determining whether she had a viable claim. Smith claimed all the conditions described in the puppy mill Report were necessarily attributed to her. She claimed that because some of these conditions did not exist at her kennel, the Report contained factual statements that could be proven false. The Court, however, rejected this argument, saying that the generalized statements in the Report describing "puppy mills" were "clearly not intended to apply to each and every kennel," but simply "aggregated some of the specific violations found."

The Court then noted that competing definitions for "puppy mill" existed, making the term imprecise. Smith advanced a dictionary definition that described a "puppy mill" as "[a]n establishment that breeds puppies for sale, typically on an intensive basis and in conditions regarded as inhumane." But, the Court quoted another definition: "a commercial farming operation in which purebred dogs are raised in large numbers"—an apt description of Smith's kennel and one that was hardly defamatory. Even if the Report intended "a negative connotation" for the term, the Court said that alone would not make it actionable. The Court said "[a]s used in the report, the term 'puppy mill' is imprecisely used as 'rhetorical hyperbole' and a 'lusty and imaginative expression of the contempt' of political advocates during a hotly contested political campaign that cannot, therefore, 'reasonably [be] interpreted as stating actual facts.'"

The term "puppy mill" is imprecise, essentially unverifiable, and the type of rhetoric reasonably expected and legally protected in politically-charged debates.

Next, the Court rejected Smith's claim that by calling her kennel among the "worst puppy mills in Missouri," the Report implied that she had more and more-severe animal welfare violations than other Missouri kennels. The Court noted that Smith did not dispute the Report's recitation of the violations found at her kennel. It then said "[t]he "severity" of a kennel's violations is, however, subjective and is not provable as false. A ranking or list, which includes the subjective interpretation of data, leads to subjective conclusions that cannot be provable as false." Because of this, rating her kennel as among the worst could not be actionable. Moreover, characterizing the various problems found at the "puppy mills" referenced in the

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Report as "atrocious," "unconscionable," "major," or "flagrant" was "purely subjective" and did not "imply objective facts provable as false."

The Court also rejected Smith's claim that malicious motives were behind including her kennel in the Report and for describing it as one of the "worst puppy mills," As noted by the Court, Smith was the mother of a state legislator, Jason Smith, who strongly advocated against the Puppy Mill Cruelty Protection Act and later introduced legislation seeking to limit it. The Court recognized that this does not affect the determination that the statements in the report were subjective opinion and not actionable fact. In fact, though the Court did not cite any support for this contention, it has long been the law that a person's motive for expressing negative opinion does not make an opinion actionable. *Castle Rock Remodeling,* 354 S.W.3d at 241.

Finally, Smith's attempts to salvage her lawsuit by asserting an alternative false light invasion of privacy claim were rejected by the Court, holding that where a claim is nothing more than a classic defamation case where one party alleges that the other published a false fact, then a false light claim will not lie. The Court said it had never adopted the false light tort and that only one Missouri appellate decision had condoned such a claim under vastly different factual circumstances. "[B]ecause Ms. Smith [did] not make any allegations cognizable as a false light invasion of privacy claim, it [was] not necessary for [the] Court to denominate a new cause of action for this tort at this time."

Conclusion

Free expression is fundamental in a democratic society and especially important in the political arena. The term "puppy mill" is imprecise, essentially unverifiable, and the type of rhetoric reasonably expected and legally protected in politically-charged debates. The Supreme Court's opinion preserves, as it recognized, important "constitutional guarantees of free speech and free press and the attendant commitment to maintain 'uninhibited, robust, and wide-open' debate on public issues."

Joseph E. Martineau is a partner at Lewis, Rice LLC. Lewis Rice LLC submitted an amicus brief in support of the Humane Society on behalf of the St. Louis Post-Dispatch, Kansas City Star, Council of Better Business Bureaus, and the Better Business Bureau of Eastern Missouri and Southern Illinois, in conjunction with Bruce Brown, in-house counsel for the Reporter's Committee for Freedom of the Press. The Missouri Press Association, represented by Maneke Law, submitted a separate amicus brief. Defendants were represented by Bernie Rhodes, Lathrop & Gage in Kansas City.

On Poker and Pokemon: Candy Lab Case Tests the Boundaries of Free Expression in Augmented Reality

By Brian D. Wassom

Augmented reality ("AR") promises to be a revolutionary new medium of expression—if it can overcome reactionary attempts to regulate it. Now, the first shot in the battle for free speech rights in AR has been fired.

In February 2017, Milwaukee County, Wisconsin adopted an ordinance regulating "virtual and location-based augmented reality games." Written as a knee-jerk reaction to the number of people visiting County parks during last summer's Pokemon Go craze, the law prohibits "companies" from "introducing virtual and location-based augmented reality games into" Milwaukee County Parks without a permit.

This is what makes Milwaukee's reaction to the game different from every other municipality's across the country. To solve the problem of the occasionally unruly or trespassing player, other cities did what cities always do: enforce the rules of conduct against those who break them. Milwaukee went a giant leap beyond that by regulating the companies publishing an entire genre of games.

Augmented reality promises to be a revolutionary new medium of expression—if it can overcome reactionary attempts to regulate it.

Candy Lab AR has been creating location-based mobile content for more than six years. Its latest release, "Texas Rope 'Em," functions much like Pokemon Go in many ways. Players need to visit game stops at designated geographic coordinates in order to collect digital items that they can then use to play a game. Except here, the items are playing cards rather than Pokemon, and the game is Texas Hold 'Em poker.

Some of the game stops in Texas Rope 'Em are located in Milwaukee County Parks. According to the County, that means the company must seek and obtain a permit from the County before it publishes or even advertises the game. The prerequisites to obtaining that permit, though, are absurdly burdensome. The 10-page application requests a vast amount of information, such as estimated attendance, location in park, event dates and times, site map, whether and how the event will be advertised. It requires detailed plans for garbage collection, on-site security, and medical services, and warns that applicants will be responsible for these services. Applicants must have liability insurance and make it available on-site for inspection. It also requires payment of several fees, and reserves the limitless discretion to demand more. Even after all this, submitting the application does not automatically grant an applicant a permit.

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Like most of the companies publishing innovative location-based and AR software, Candy Lab AR can't realistically afford to go through this process with one municipality, much less all the others that will jump on the bandwagon if laws like this are allowed to stand.

Of course, game publishers shouldn't have to worry about this at all, because no public body has the right to prohibit the publication of video games in the first place. "Video games communicate ideas—and even social messages," said the Supreme Court in *Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729, 2733 (2011), "through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection."

Prohibiting a company from publishing augmented reality video games, merely out of fear of how people might use those games, is a classic example of prior restraint. If Candy Lab AR had authored a book or paper map describing where to find certain objects, there is no question the County could not prohibit the company from publishing that content. There is no Constitutionally cognizable distinction between that and publishing the same content in the medium of AR software.

The terminology of the ordinance is also incredibly vague. It does not even attempt to define "location-based augmented reality game," for example, and there at least a half-dozen different types of games that could potentially fit that definition. "Virtual gaming" is defined so broadly as to include even playing with toy lightsabers. And the phrase "introduce [an AR game] into" the parks is nonsensical, because the AR content *isn't really there.* It's just imagery displayed

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on a mobile device screen over a live video feed. The only place a company "introduces" its mobile app "into" is an app store.

That's why Candy Lab AR filed a civil rights lawsuit against Milwaukee challenging this ordinance on First Amendment grounds. Andrew Couch, CEO of Candy Lab AR, issued this statement: "We made the decision to take a stand against this ordinance because it was the right thing to do – not only for our company, but for the entire industry," he said. "Augmented reality promises to be one of the most important media for expression and communication in the 21st century. Combining augmented reality with location-sensing technology not only enables great gameplay, but also provides unique methods of storytelling, art, navigation, commerce, and more. We can't let ill-conceived laws like this one hamper the medium before it even gets off the ground."

With a similar bill currently being debated in the Illinois legislature, scores of new AR applications in the works, and AR-creation platforms being recently announced by Facebook and Snap, now is the time to remind those in power that even new methods of expressing speech are entitled to the centuries-old protections of the First Amendment.

Candy Lab AR's preliminary injunction motion should be heard sometime in May or June 2017.

Brian D. Wassom is a partner with the Michigan-based law firm of Warner Norcross & Judd LLP, and the author of Augmented Reality Law, Privacy, and Ethics *(Elsevier 2015). He is lead counsel for Candy Lab AR in its lawsuit against Milwaukee County.*

Veteran Loser Perfect 10's Latest Ninth Circuit Defeat

By Mitchell Zimmerman

In the 1940s, Jehovah's Witnesses, tenaciously litigious in defense of free expression, generated a half-dozen Supreme Court decisions that came to define First Amendment rights in the 20th century. With comparable persistence, but in the service of less lofty interests, erotic-photo publisher Perfect 10 has fought—and nearly always lost—a series of reported cases that have, in significant part, come to define the contours of the law of copyright infringement in the online realm. The company's latest Ninth Circuit loss, however, in *Perfect 10 v. Giganews*, does not so much resolve unsettled questions of copyright law as confirm established standards.

Background

Perfect 10's copyrighted images of naked women are found across the internet, and Perfect 10 has devoted considerable energy to trying to hold third parties responsible for alleged infringements, meeting many defeats.

In *Perfect 10 v. CCBill*, the court rejected Perfect 10's claim that CCBill was liable for providing web hosting and online credit card services to internet enterprises that allegedly infringed Perfect 10's copyrights. In *Perfect 10 v. Amazon, Inc.* (involving Google), the Ninth Circuit held that the copying of images by Google's visual search engine, in order to display thumbnail search results, represented fair use. The court further held that Google did not itself publicly display images (and hence did not directly infringe) when its search engine employed "frames" to facilitate end users' viewing of allegedly infringing content stored on other websites. And in *Perfect 10 v. Visa*, the court held Visa and MasterCard were not secondarily liable for processing payments for merchants Perfect 10 had accused of infringement.

Perfect 10 has fought—and nearly always lost—a series of reported cases that have, in significant part, come to define the contours of the law of copyright infringement in the online realm.

Perfect 10 remained undaunted by losses, perhaps because the company is not so much in the business of publishing as in the business of extracting revenue from litigation settlements—largely, it appears, against parties not in a position to fully litigate. As the district court observed in *Giganews*, across the lifetime of Perfect 10, most of its revenues have been derived not from publication but from litigation and, more specifically, from settlements and defaults because "Perfect 10 has never obtained a judgment in a contested proceeding."

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In its latest foray, Perfect 10 tilted against two USENET service providers, Giganews and Livewire, which respectively host or provide access to USENET newsgroups and messages. USENET users upload and download materials through the defendants' automated systems, and Perfect 10 alleged that its images were featured. Asserting that Giganews and Livewire had failed to remove them, Perfect 10 claimed direct, contributory and vicarious copyright infringement.

Ninth Circuit Decision

The Ninth Circuit shot down the direct infringement claims by applying the by-now-familiar principle, endorsed by four federal courts of appeal, that direct infringement requires "volitional conduct." Passively providing an automated system that others may use to infringe does not mean the system provider has engaged in the act of infringement. The Ninth Circuit panel referred to this requirement as "causation," but the different terminology appears to be of little importance.

The main legal issue on the direct infringement claim in *Giganews* was whether the U.S. Supreme Court's 2014 decision in *ABC v. Aereo* had *sub silentio* overruled the unbroken line of cases requiring volition or causation. The Ninth Circuit's answer: No. Neither providing automated access services to USENET users, nor providing a binary file reader, nor a technical facility allowing for automated posting and availability constitute volitional acts supporting a direct infringement claim when they occur as a result of automated processes.

In its latest foray, Perfect 10 tilted against two USENET service providers, Giganews and Livewire, which respectively host or provide access to USENET newsgroups and messages.

For liability to attach, a defendant, *with knowledge* of an infringing activity, must *materially contribute* to the infringement or *induce* it. The court in *Giganews* found that in an internet context, a defendant can be deemed to have "materially contributed" if they could have taken "simple measures to prevent further damage to copyrighted works, yet continue[d] to provide access to infringing works." In this case, the issue turned on Giganews' process for taking down infringing works in response to notices from Perfect 10.

"Giganews presented sufficient evidence that Perfect 10's proposed method for locating infringing messages," using search terms rather than readily available machine-readable Message–ID codes, "was onerous and unreasonably complicated." Since Perfect 10's method was "unreliable and burdensome," it was not a "reasonable and feasible means" of removing

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infringing matter, so Giganews's failure to use that method cannot be deemed to have materially contributed to the infringement.

As for the inducement branch, Perfect 10 offered no meaningful evidence that the defendants had a purpose of promoting infringement, disposing of that part of its claim.

Vicarious liability requires that the defendant has (1) the right and ability to supervise the infringing conduct and (2) a direct financial interest in the infringing activity.

In internet cases, the Ninth Circuit has held the financial element may be satisfied when infringing matter *acts as a draw* to a website. The draw need not be substantial, but it is not enough to allege that *infringing matter in general* draws users to a defendant's service. Rather, as the court held in *Giganews,* a plaintiff must show that "there is [a] causal link between the infringement of *plaintiff's own copyrighted works* and any profit to the service provider" (emphasis added). Perfect 10 offered no such evidence; hence, summary judgment was appropriate.

Mitchell Zimmerman is a partner at Fenwick & West LLP. The firm represented Giganews in this litigation. The Internet Infrastructure Coalition, Internet Association, Computer & Communications Industry Association, Electronic Frontier Foundation, Public Knowledge, the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries, supported Giganews with amicus briefs. Perfect 10 was represented by David N. Schultz, Law Offices of David N. Schultz, Los Angeles; and Eric J. Benink, Krause Kalfayan Benink & Slavens, San Diego.

Ninth Circuit Holds Website Can Lose DMCA Safe Harbor by Using Moderators

By Jim Rosenfeld, Ambika Doran, and Rachel Herd

Earlier this month, the Ninth Circuit Court of Appeals held that an online provider may become ineligible for the safe harbor provided by Section 512(c) of the Digital Millennium Copyright Act if its moderators help select content submitted by users. Mavrix Photographs, LLC v. LiveJournal, Inc., (9th Cir. Apr. 7, 2017).

The decision may signal a departure from the traditional expansive protection under Section 512(c), which protects websites from claims that user content infringes copyright if they expeditiously take down the content upon notice.

Background

Mavrix concerns LiveJournal.com, a social networking service used to create "communities" where users can post and comment on a particular topic. LiveJournal's most popular community—and the forum for the alleged infringement— is "Oh No They Didn't" ("ONTD"), which focuses on celebrity gossip.

Not all submissions are posted to the ONTD community. Instead, users submit posts to volunteer moderators, who review them to ensure compliance with LiveJournal's rules, including a prohibition on copyright infringement. In addition, LiveJournal pays one full-time employee, who, among other things, also reviews and approves posts.

The Ninth Circuit held that the safe harbor might not apply to LiveJournal because there were issues of fact whether the photos were stored "at the direction of the user."

Mavrix Photo, a "Celebrity News Photo Agency," sued LiveJournal, claiming twenty of its photographs were posted on ONTD without permission. Notably, Mavrix did not use LiveJournal's notice and takedown procedure before filing suit. As soon as the lawsuit commenced, LiveJournal took the infringing pictures down.

The district court granted summary judgment to LiveJournal, finding it protected under the DMCA's safe harbor provision. 17 U.S.C. § 512(c). The Court of Appeals reversed.

Under Section 512(c), a provider may claim safe harbor immunity if, in addition to complying with the DMCA's technical requirements (e.g., having an appropriate notice and takedown policy), it can establish (1) the infringing content is stored "at the direction of a user;" (2) the provider does not have actual or "red flag" knowledge of the infringing material; and (3) upon obtaining knowledge of the infringing material, the provider "acts expeditiously to remove, or disable access to, the material." 17 U.S.C. § 512(c).

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Ninth Circuit Decision

The Ninth Circuit held that the safe harbor might not apply to LiveJournal because there were issues of fact whether the photos were stored "at the direction of the user." It distinguished between a provider that passively allows infringing content to be posted and one that screens and posts allegedly infringing material. The court held the former is eligible for the safe harbor, but the latter may not be. A court should apply agency principles to decide whether a moderator's actions can be imputed to the provider, removing it from the safe harbor's protection.

Applying this rule to the facts before it, the Ninth Circuit held a reasonable juror could conclude that an agency relationship between LiveJournal and its moderators existed because (1) LiveJournal selected moderators and provided them specific directions; (2) evidence existed suggesting LiveJournal users may have reasonably believed that the moderators had authority to act for LiveJournal; and (3) LiveJournal maintained significant control over ONTD and its moderators by providing substantive supervision and selecting and removing moderators. According to the court, whether the moderators were paid was not dispositive.

The Ninth Circuit's opinion may signal a narrowing of what has historically been a broad immunity,

This portion of Mavrix is in tension with at least one other federal circuit court decision, CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 556 (4th Cir. 2004), in which the Fourth Circuit held that a website's automated and manual review of user photos, including for infringement, did not strip the site of the DMCA safe harbor. Although the Mavrix court suggested that automated review does not threaten a website's protection, manual review does: "The question for the fact finder," the court held, "is whether the moderators' acts [are] merely accessibility-enhancing activities" or whether their acts go "beyond the automatic and limited manual activities we have approved as accessibility-enhancing." As a result, providers may be more likely to stop screening for infringing content or, at a minimum, scale back any manual review.

The Ninth Circuit discussed the remaining elements of the safe harbor "to provide guidance to the district court." It held a provider cannot claim it has no actual knowledge of the infringement merely because the plaintiff does not provide notice of infringement, i.e., send what are commonly referred to as "DMCA takedown notices." Instead, Mavrix was entitled to take the depositions of the moderators to discover their subjective knowledge. Applying agency principles, the moderator's knowledge of infringement could be imputed to the provider.

Even if Mavrix could not show actual knowledge of infringement, the Ninth Circuit suggested LiveJournal may have had "red flag" knowledge, i.e., was aware of facts that would have made the specific infringement objectively obvious to a reasonable person. Some of the

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allegedly infringing photographs bore a watermark containing the URL for Mavrix's website. The court stated: "the fact finder should assess if it would be objectively obvious to a reasonable person that material bearing a generic watermark or a watermark referring to a service provider's website was infringing."

LiveJournal's structure may create more complex questions under the DMCA than a traditional, exclusively volunteer-run "community." The evidence suggests factual questions existed as to the extent of ONTD's only paid moderator's control. Theoretically, had LiveJournal not overseen its volunteers, the court may have reached a different conclusion.

Regardless, the Ninth Circuit's opinion may signal a narrowing of what has historically been a broad immunity, and is one of only a handful of appellate decisions discussing what it means to store content "at the direction of a user."

Jim Rosenfeld, Ambika Doran, and Rachel Herd are lawyers with Davis Wright Tremaine. The Plaintiff in the case was represented by Peter Afrasiabi, One LLP, Newport Beach, CA. Defendant was represented by Wayne Barsky, Blaine H. Evanson, and Brandon J. Stoker, Gibson Dunn & Crutcher LLP, Los Angeles.

Court Refuses to Issue Subpoena to Journalist in Hernandez Murder Case

By Tom Curley

In what appears to be a matter of first impression in New Jersey, a trial court refused to issue an interstate subpoena for testimony to a former USA Today reporter sought by Massachusetts prosecutors in the Aaron Hernandez murder trial. *In the Matter of the Proceedings to Compel Attendance of Kelly Whiteside in the State of Massachusetts*, Essex County (N.J.) Superior Court (Feb. 27, 2017).

The court held that the public policy reflected by New Jersey's Shield Law barred the subpoena over the objection of prosecutors who argued that the reporter's privilege issue should not be given consideration.

The prosecution argued that it was "entirely frivolous" for the journalist to assert that New Jersey's Shield Law applied, a position rejected by the court:

> This Court finds that the State has simply not recognized, let alone met, its burden to overcome this important public policy of protecting a free press. Much has been written lately and debated about the quality of the press and its veracity, but that is not an issue here. The press cannot be so readily controlled or even influenced by the government because of the importance of its independence and the need to avoid a chilling effect on its mission.

A trial court refused to issue an interstate subpoena for testimony to a former USA Today reporter sought by Massachusetts prosecutors in the Aaron Hernandez murder trial.

Although the court declined to issue the subpoena to the journalist, which had been sought weeks prior to trial, it also offered Massachusetts the opportunity to renew its attempt on an emergency basis if "additional facts and circumstances arise" during the murder trial warranting the need for reconsideration. The prosecution declined to do so, however.

Hernandez was recently acquitted at trial and apparently took his own life shortly thereafter. His murder trial received intense media coverage in light of Hernandez's incredible odyssey from a celebrated member of the New England Patriots football team to an accused murderer.

In fact, Hernandez was already a convicted murderer at the time of his most recent trial, serving a life sentence without parole for a 2013 killing. At his most recent trial, he was accused of murdering two more individuals the prior year. Prosecutors alleged Hernandez became enraged after one of the victims bumped into Hernandez at a nightclub, causing him to spill his drink.

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Smoking Gun?

The prosecution's case focused in part on the meaning of the words and images on Hernandez's prolifically tattooed body. Of particular interest were tattoos Hernandez received after the murders – two were pictures of handguns and a third said, "God forgives" — written backward so it could be read in a mirror. The prosecution contended that the guns depicted matched those used by Hernandez and that one of the images depicted the chamber of a revolver with five bullets. Prosecutors claimed Hernandez shot the two men with five bullets.

Prior to trial, the Suffolk County (Mass.) District Attorney issued a subpoena to Kelly Whiteside in New Jersey, where she lives and works. Whiteside formerly worked for USA Today and is currently an assistant professor of sports media and journalism at Montclair State University.

In 2009, years before the murders or tattoos at issue, Whiteside authored an article about Hernandez while he was attending college at the University of Florida. The article explained how the football player's body art reflected the struggles he faced following the sudden death of his beloved father. Whiteside began: "Aaron Hernandez's arms tell his life story. From his shoulders to his knuckles, it's drawn in pictures and verse." The article continued:

> "On this side, everything is good," he says, starting from his right shoulder. There's a tattoo representing God's hands, a nod to his big brother and to his father and the day he died. There's the sun representing all the good days he had with his dad. Beneath those rays are clouds and rain. "It all ends in heaven," he says, now near his wrist, pointing to the angels.

The public policy reflected by New Jersey's Shield Law barred the subpoena over the objection of prosecutors who argued that the reporter's privilege issue should not be given consideration.

Although the prosecution had other testimony regarding Hernandez's tattoos, including from the artist responsible for the "God Forgives" handgun tattoos, they sought Whiteside's testimony regarding her interview with Hernandez in an attempt to demonstrate to the jury that the defendant's choice of body art was of deep biographical significance to him.

Choice of Law

Because Whiteside resides in New Jersey, and had declined to voluntarily testify, Massachusetts prosecutors, pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, sought an Order To Show Cause in Essex

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County Superior Court in New Jersey to compel testimony in Massachusetts. The prosecution saw the issue as a simple one: a valid request for a subpoena had been issued, the New Jersey courts were duty bound to honor it in accordance with the interstate compact on the issuance of subpoenas in criminal cases, and the reporter's privilege argument should be addressed to a Massachusetts court to the extent not already foreclosed by the subpoena's issuance. (Whiteside's interview with Hernandez took place in Florida. Neither side argued for the application of Florida law.)

In this case, the choice-of-law question was likely dispositive, as New Jersey's Shield Law is nearly absolute and would certainly preclude testimony by Whiteside about any unpublished information, even if that information was not confidential.

The New Jersey Shield Law, N.J.S.A. 2A:84A□21, et seq. and N.J.R.E. 508, "affords newspersons a broad privilege against compulsory disclosure of the information they gather and the identities of the sources of that information." In re Schuman, 222 N.J. Super. 387, 390 (App. Div. 1988), rev'd on other grounds, 114 N.J. 14 (1989).

Simply put, "New Jersey has one of the most far-reaching shield laws in the country, providing the 'strongest possible protection' to the news gathering and news reporting activities of the media." In re Venezia, 191 N.J. 259, 269 (2007) (citation omitted).

By contrast, Massachusetts law afforded uncertain protection in these circumstances.

His murder trial received intense media coverage in light of Hernandez's incredible odyssey from a celebrated member of the New England Patriots football team to an accused murderer.

Influence of Holmes Decision

The trial court ordered multiple rounds of briefing and held two hearings before ultimately denying the request to subpoena Whiteside. It rejected arguments that the journalist was not a "material" and "necessary" witness, given the subject matter of the expected testimony, or that it was otherwise an undue burden to force Whiteside to travel two hundred miles to be available during multiple trial days. "Accordingly," the court squarely confronted "the task of assessing whether, or to what extent, the freedom of the press can take priority here."

Although there did not appear to be controlling precedent in New Jersey, the Superior Court appeared influenced by the decision of the New York Court of Appeals in Matter of Holmes v. Winter, 22 N.Y.3d 300 (2013). That case similarly addressed the protection afforded a journalist in applying the Uniform Act to Secure the Attendance of Witnesses. Notably, in Holmes the Court of Appeals looked to the principles embodied by the New York Shield Law in declining to issue a subpoena requested by a Colorado court.

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Here, the prosecution contended it was an "entirely frivolous argument" to claim, as Whiteside did, "that the public policy of New Jersey would be violated if this Court required her appearance to testify in Massachusetts because of her role as a journalist."

For her part, Whiteside emphasized that if "Hernandez were being tried in New Jersey, there would be no question that Ms. Whiteside could not be compelled to testify. It is illogical and fundamentally unfair to conclude that a foreign state can compel her attendance and testimony in connection with her work as a New Jersey journalist despite the absolute privilege afforded to her in this State."

The court sided with Whiteside, holding that "[c]learly the State underestimates the broad goals of protecting a free press underlying this legislative and judicial history [of the Shield Law]. … The news media's responsibility is to inform the populace independent of those with authority in government. Independence is key."

Tom Curley is Associate General Counsel for Gannett Co., Inc., the parent of USA Today. Kelly Whiteside was represented by Thomas J. Cafferty and Nomi I. Lowy of Gibbons P.C. in Newark. The Commonwealth of Massachusetts was represented by Stephen A. Pogany of the Office of the Essex County Prosecutor.

New York Court Orders Further Review of Body Camera Footage

By Christine Walz, Madelaine Harrington, and Lin Weeks

A New York Supreme Court judge has ordered the New York City Police Department to provide the cable news channel Time Warner Cable NY1 with footage from its officers' body cameras requested under New York's Freedom of Information Law.

The order requires the NYPD to review body-worn camera footage identified in NY1's FOIL request, to produce any video that is not exempt from production within 60 days of the order. Any footage withheld will be the focus of a later hearing on whether the NYPD can redact exempt information from the footage "without unreasonable difficulty."

Background

In August 2013, a federal judge for the Southern District of New York ordered that the NYPD undertake a body-worn camera pilot program in at least five precincts for one year as part of a remedy addressing the Department's violations of the Fourth and Fourteenth Amendments through its "stop and frisk" practices. *Floyd v. City of New York*, 959 F. Supp. 2d 668, 684-86 (S.D.N.Y. 2013). Prior to the planned start of that program, in July 2014, Eric Garner was killed after being put in a chokehold by an NYPD officer outside a storefront in Staten Island. Garner's death, which was captured on video recorded on the cellphones of bystanders, received international attention. On December 3, 2014, a Staten Island grand jury declined to indict the police officer who had placed Garner in a chokehold; non-violent protests resulted throughout the city.

As the NYPD appealed the decision ordering it to implement a body-worn camera pilot program, it independently announced that it would begin distributing body-worn cameras to its officers who volunteered to wear them. Fifty-four officers received body-worn cameras at the beginning of that program in December 2014, and in April of 2015, a reporter for NY1 sent a FOIL request to the NYPD for the unedited recordings taken during five one-week spans during that period.

The NYPD replied that it could not provide NY1 with unedited footage, arguing that release of the footage could potentially constitute an invasion of privacy, breach confidentiality of ongoing investigations, endanger the life or safety of subjects of the recording, reveal police communications, or interfere with the security of NYPD information technology systems. The NYPD also estimated that it would cost $36,000 to review and edit the footage before it could be produced. NY1 administratively appealed the denial and fee, but the NYPD denied the appeal.

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In its order denying the administrative appeal, the NYPD stated that although it believed it would be justified in denying NY1's request altogether, if NY1 were to pay the $36,000 fee, the NYPD would review and edit the video and provide the non-exempt portions.

First Interim Order

Following the denial of its administrative appeal, NY1 filed a petition under NY CPLR Article 78 seeking a judgment directing the NYPD to produce the requested videos without conditioning the production on fees tied to review and editing. In an Interim Order addressing NY1's petition, Judge Katheryn E. Freed highlighted the 2013 decision in *Floyd v. City of New York*, which found that the NYPD exhibited a "pervasive and persistent" practice of targeting and stopping young black and Hispanic men without reasonable suspicion. 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013). This practice violated not only the Fourth and Fourteenth Amendments, but also "the bedrock principles of equality."

Notwithstanding this recognition, the court found that the NYPD had demonstrated that some of the footage requested would fall within the FOIL exemptions, including footage that would constitute an unwarranted invasion of privacy, footage that would endanger the life and safety of a person, and footage that would interfere with law enforcement investigations or judicial proceedings. The court also agreed with the NYPD, that, pursuant to Civil Rights Law § 50-a(1), footage relating to an incident that subjects an officer to discipline, and becomes part of her personnel record, is confidential and not subject to disclosure under FOIL.

NY1 challenged the NYPD's unsubstantiated assertion that redaction would be too burdensome with its existing technology.

Because the NYPD had demonstrated that review and redaction were necessary to comply with NY1's request, the court next questioned whether it would be unduly burdensome for the NYPD to redact footage subject to an exemption and disclose the remainder. NY1 challenged the NYPD's unsubstantiated assertion that redaction would be too burdensome with its existing technology. The court agreed, noting that the NYPD had neglected to update its software to any of several programs that could significantly decrease the cost and time needed to redact exempt footage. This position was "untenable" given the "substantial likelihood that the footage captured would be subject to a FOIL request." Still, Judge Freed found burdensomeness of review and redaction to be a question of fact and set a hearing to address the issue.

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Second Interim Order

NY1 challenged the necessity and propriety of that hearing in a motion for reargument filed October 28, 2016. In its brief in support of that motion, NY1 argued that a "burden" exemption is only available in specific circumstances: (1) "needle-in-a-haystack" scenarios, in which requested documents are extremely difficult to identify, and (2) instances in which an advanced computer program is needed to access otherwise inaccessible data, effectively forcing the public agency to create a "new record" to respond to the FOIL request. NY1 challenged the contention put forth by NYPD that FOIL contained a more general burdensomeness exemption on both legal and public policy grounds. In the alternative, NY1 requested that the court grant leave to appeal and stay the present proceedings pending that appeal's resolution.

The NYPD responded, highlighting that NY1 conceded that a "burden" exemption may apply in particular situations. The NYPD then argued that NY1's characterization of the "burden" exemption was too narrow, and asserted that the 2008 amendments to FOIL "added a broader burdensome element to the analysis." Specifically, the NYPD pointed to N.Y. Pub. Off. Law 89 (3)(a) which provides: "[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome… if the agency may engage an outside professional services to … provide the copy…". (emphasis added by NYPD). The NYPD interpreted this statement as conditional; in essence arguing that an agency may deny a request if unable to engage an outside professional service to copy and produce the footage. Additionally, the NYPD filed a cross motion to appeal from Judge Freed's first interim order.

The court concluded that each video should be disclosed unless the particular video contained exempt footage and it was unduly burdensome to redact the footage.

On April 13, 2017 Judge Freed entered a second interim order clarifying the former: "It is well settled," she wrote, "that a request pursuant to FOIL cannot be rejected merely because of its 'breadth or burdensomeness.'" The only question, according to the court, was "whether the NYPD can be compelled to redact those moments in the BWC footage containing exempt material, so that *all* of the videos can be turned over in some form," or whether the NYPD would be allowed to simply withhold videos with exempt material in their entirety. (emphasis added).

The court concluded that each video should be disclosed unless the particular video contained exempt footage *and* it was unduly burdensome to redact the footage. The determination of whether to disclose a particular video would be contingent on this narrow issue only, and made on a case-by-case basis. To that end, the NYPD could not claim that the

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act of *identifying* the videos subject to a possible exemption was itself unduly burdensome. It was directed to "review the videos and make an individual determination as to each one prior to the hearing," and to provide NY1 with a copy of the videos that do not contain exempt material within 60 days of the order.

Conclusion

Both the NYPD and NY1 were granted permission to appeal the court's ruling. Of particular note, the NYPD was granted permission to appeal on the issue of whether there is a "burden exemption" to a FOIL request. As it stands, the enumerated FOIL exemptions outline categories of *content*, but there is no portion of FOIL directly stating that an agency may withhold information, regardless of content, based on the burden of identifying, redacting, and producing the material.

A ruling establishing a "burden exemption" would give rise to a new question: whether an agency may rely on the "burdensomeness" of responding to a request alone to deny a FOIL request. The answer to this question would have a profound effect on agencies' power to reject FOIL requests, and their corresponding duty to integrate current technology in their data storage and processing systems.

Christine Walz, Madelaine Harrington, and Lin Weeks are associates in the New York office of Holland & Knight. They are members of the Next Generation Committee.

The Other Side of the Pond: Updates on English Media Law Developments

By David Hooper

Twitter Is Not the Wild West. Tweet at Speed, Repent at Leisure.
Monroe v Hopkins [2017] EWHC433

In a decision handed down in March 2017 Mr Justice Warby awarded a food blogger and cooking journalist £24,000 libel damages divided as to £16,000 for the first tweet and £8,000 for the second tweet for a false allegation that she condoned and approved of scrawling on war memorials and vandalising monuments commemorating those who had fought for freedom.

The libel had arisen in rather bizarre circumstances. There were anti-austerity protests after the Conservative Party's General Election victory in May 2015 which led to "Fuck Tory Scum" being scrawled on a war memorial to Women in World War II. The Defendant who was a journalist with astonishingly 570,000 followers on Twitter and who wrote for the Mail Online and The Sun had become involved in a spat with a left-wing columnist called Laurie Penny who writes for The New Statesman and who had expressed some sympathies with the protestors and the graffiti artist. This led Ms Hopkins to attack Ms Penny in terms which might have got harridans a bad name. One gets the general drift of Ms Hopkins' unpleasantness and intellect when one sees that she had, amongst other things, tweeted that Ms Penny should be made a woman of ISIS (presumably for sexual purposes) and had also helpfully suggested that Ms Penny might be well employed by scrubbing the monument with her tongue.

The Courts do not view Twitter as the Wild West where anything goes.

The delightful Ms Hopkins then appears to have confused Ms Monroe, the Claimant in the case with Ms Penny for she attacked Ms Monroe by asking whether she had "*vandalised the memory of those who fought for your freedom? Grandma got any medals*?" Ms Monroe replied with some justification "*I never scrawled on a memorial, you're a piece of shit.*"

Ms Hopkins seems to have thought better of her first tweet and took it down after about two hours, having received this complaint from Ms Monroe but she unwisely sent out a second tweet, the effect of which was that Ms Monroe was as bad as Ms Penny and was for good measure described by Ms Hopkins as *'social anthrax'*.

Ms Monroe was guilty of nothing worse than having left-wing views and left-wing views, clearly not shared by Ms Hopkins and she came from a military family and was subjected to a torrent of abuse after Ms Hopkins' tweets. She was understandably outraged. She demanded that Ms Hopkins, who had not taken down the second tweet, pay £5,000 to a charity. Ms

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Hopkins declined to do so and it proved to be a very expensive mistake. The Court case lasted three days with expert evidence from Twitter Analytics as to the extent and mechanics of publication.

Ms Hopkins has been ordered to pay £107,000 in legal costs to Ms Monroe with the prospect of paying at least the same again when the costs are fully assessed. Ms Hopkins is seeking permission to appeal but has so far been unsuccessful and one would not have thought that her prospects on an appeal were at all good.

The case is interesting for its analysis as to how the English Courts will approach libels with the requirement under Section 1 Defamation Act 2013 that there should be evidence of serious harm. The judgement also has an annex with a useful beginner's guide to the world of Twitter.

The Judge had little difficulty in deciding that the threshold of serious harm had been met. The harm to Ms Monroe's reputation was serious albeit not very serious or grave, but she was entitled to reasonable compensation. The level of compensation was somewhat higher than in previous libellous tweeting cases where the damages tended to be in the range of £5,000 - £10,000. However as with all English libel litigation, the real expense was in the legal costs.

What one gathers from the case is that the Courts do not view Twitter as the Wild West where anything goes. The capacity to damage reputation on Twitter is potentially very great. People like Ms Hopkins are at some considerable risk in such cases when they have a massive Twitter following and are likely to be re-tweeted and to go viral.

In this case, the spat was reported in nine newspapers. The Judge broached the question of meaning by taking account of the conversational and somewhat transient nature of tweets. One should approach meaning on an impressionistic basis taking account of the whole tweet and the context in which a reasonable reader would read that tweet.

Ms Monroe had not suffered actual harm in the sense of losing her job but the Judge was satisfied that these were extremely unpleasant allegations that appeared to have led to considerable abuse of her and the allegation of scrawling on a war memorial was an accusation of a criminal offence. He therefore found that the threshold of the libel having caused serious harm or being likely to cause serious harm was met.

The lessons one would draw from such a case is that those who engage in such hard-hitting attacks need to think before they let their prose run away with them. The risk is greater if they are high profile and have a wide following and if, as in the case of Ms Hopkins, they have a reputation for expressing virulent right wing views about the world at large. Complaints need to be taken seriously and acted upon promptly. Here Ms Hopkins accepted that she had got confused about the identity of Ms Monroe. However, she felt unable to give a proper apology and she left the second tweet in place.

Clearly, people are not going to rush to their lawyers before they post a tweet but this decision means that they might be well advised to do so promptly when they have a determined

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complainant. Defendants will have a much better prospect of being able to defend a claim and to assert that there was no serious damage if they can show that they took proper steps to put matters right at the earliest possible opportunity. This would probably mean taking down the offending tweeting possibly posting some form of correction or apology as soon as possible.

Conditional Fee Agreements and After the Event Insurance:
A Cop-out by the Supreme Court
Times Newspapers Limited v Flood, Miller v Associated Newspapers Limited,
Frost v MGN Limited *(2017) UKSC33*

Judgment was given in April 2017 by the Supreme Court after a three-day hearing in January as to whether successful Claimants could in contingency litigation recover success fees of up to 100% on top of the base fees and the premiums payable for After The Event insurance (ATE). In each case the media lost, but there are some grounds for optimism that it may become more difficult to enforce such Conditional fee Agreements (CFAs) and ATEs in future. A further appeal to the European Court of Human Rights seems likely and the media may fare better there.

The case underlines the horrifying costs of libel litigation in the UK. The Supreme Court hearing exercised the attention of seven Queen's Counsel and six Junior Barristers and five firms of Solicitors. The Supreme Court however failed to clarify the law and decided the case on relatively narrow grounds.

A further appeal to the European Court of Human Rights seems likely and the media may fare better there.

The background to CFAs and ATEs is complicated. They were introduced by the Access to Justice Act (AJA) 1999 which was enacted in large measure to replace the old Legal Aid system where impecunious litigants could receive public assistance in respect of funding their legal costs. Depending on how far the litigation had proceeded successful Claimant lawyers were able to claim a success fee of up to 100% on top of the contractual fees thereby doubling their fees in recognition of the fact that they had underwritten the risk of the litigation. This meant that lawyers could be charging up to £500 or £600 per hour which they then doubled up.

The flaws in the system had been recognised by the House of Lords (the predecessor of the Supreme Court) in the *Campbell v MGN* litigation (2005) 1WLR3394. The notable flaws were that in practice Claimants Solicitors only took on CFAs where the risk was not that great. Furthermore the fact that Claimants Solicitors did not have a paying client encouraged them to work more slowly and to write discursive eight page missives as opposed to eight paragraph letters. In 2012 the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) had been passed to take effect from 1 April 2013 and that in effect abolished the recoverability of

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CFAs and ATEs from the losing party. Payment in respect of CFAs and ATEs became a matter simply between the Claimant and his Solicitor who rather as in the USA took a slice of the damages recovered but could not claim over and above the basic costs from the Defendant.

This in practice had a dampening effect on CFAs and ATEs as damages in the UK are relatively modest compared to the USA.

Unhappily, however, for media Defendants defamation and privacy claims were specifically excluded from LASPO by Article 4 of the LASPO Commencement and Saving Provision Order 2013. So it was business as usual for the Claimant lawyers. Matters were further complicated by criticisms made of the whole regime under the 1999 AJA by a Court of Appeal Judge Sir Rupert Jackson in his review of the cost of litigation. The European Court of Human Rights in *MGN v United Kingdom (2011) 53 EHRR 5* held that the order for costs which included a CFA and ATE and which had been earlier in the litigation upheld by the House of Lords under the name of *Campbell v MGN* infringed the Article 10 rights of MGN.

The matter was yet further complicated by the recommendations of another Court of Appeal Judge Sir Brian Leveson into the regulation of the press in 2012 which had led to the as yet unimplemented Section 40 of the Crime & Courts Act 2013. That in effect sought to compel newspaper publishers to become a member of an approved press regulator so that they would participate in the Regulators' Arbitration Scheme with the carrot that they could thereby avoid being lumbered with the Claimant's Court costs if the matter should have been arbitrated but with the stick that if they did not sign up with an approved press regulator they could not recover their legal costs from an unsuccessful Claimant and were liable to pay the Claimant's legal costs, win or lose.

The issue in the Supreme Court was essentially therefore whether the enforcement of CFAs and ATE premiums infringed Article 10 of the European Convention of Human Rights.

To gauge the full horror of the legal costs which face the media in the UK it is worth looking in a little detail at the underlying cases in the Supreme Court. The *Flood* case concerned a newspaper report of an investigation into an allegedly corrupt Police Officer. The Times eventually established that there was a legitimate public interest and a valid *Reynolds* defence in respect of reporting the corruption investigation. However, the paper had failed to take the original story down or sufficiently update it to reflect the fact that Flood had ultimately been exonerated in the corruption enquiry. For that lapse the newspaper was ordered to pay £60,000 damages. It has been noted that the claim had been commenced in May 2007 - nearly 10 years ago - and that in addition to the Trials relating to the applicability of the *Reynolds* defence and the damages issue there were two hearings in the Court of Appeal, two appeals to the House of Lords and nine other hearings.

In the *Miller* case the base costs in a case where a businessman had been awarded £65,000 libel damages totted up to a small matter of £633,006.08 on top of which the Claimant's

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Solicitors sought a congratulatory success fee of £587,000 plus payment of the ATE premium of £248,000.

The *Frost* case involved 23 Claimants who had been awarded between £72,500 and £260,250 damages in respect of their phone hacking claims for breach of privacy. In the Court of Appeal hearing alone which lasted two days the Claimants sought base costs of £739,456.87 on top of which they wanted a tasty success fee of £645,799.88 plus payment of an ATE premium of £318,000.

The Supreme Court accepted that the European Court of Human Rights decision in the *MGN and Campbell* litigation was full and careful and that the reasons were largely sound and that there was a powerful argument for concluding that the additional liabilities imposed on Defendants in respect of CFAs and ATE premiums under the Access to Justice Act *would* normally breach a publisher's Article 10 rights. However, in something of a cop-out the Court declined to express a concluded view on the question of an actual breach of Article 10 or to rule on the non-recoverability of CFAs and ATEs, as the Government which had been a party to the European Court decision was not a party in the present Supreme Court proceedings. For the same reason the Court declined to make a declaration that the Access to Justice Act 1999 was incompatible with the European Convention of Human Rights.

Instead the Supreme Court approached the matter on the basis of the parties in the litigation having conflicting Convention rights. In the case of *Miller and Flood* the Court took the view that they had entered into the litigation under a legitimate expectation that their rights under the Access to Justice Act would not be retrospectively invalidated and that to do so would infringe their rights under Article 6 of the Convention (relating to the right of access to Court) or under Article 1 of the First Protocol to the Convention (right to property) and this outweighed the media's Article 10 rights.

In relation to *Frost* the position was somewhat different in that the CFA and ATE agreements were entered into after the decision of the European Court of Human Rights in the *Campbell and MGN* litigation. However the Supreme Court felt that the unlawful conduct of the newspaper in relation to phone hacking affected the weight to be placed on the paper's Article 10 rights and that therefore the CFA and ATE claims should be upheld. In consequence therefore the decision in that case was affected by its unusual facts and it should become increasingly difficult to recover CFAs and ATE premiums from unsuccessful Defendants.

The solution however appears to be largely a political one relating to issues of how the press is to be regulated and whether the present scheme of voluntary self-regulation under IPSO is sufficient and how the Leveson recommendations are to be implemented and whether Section 40 Courts & Crimes Act is to be implemented. Nothing will happen until after the UK General Election in June 2017. A future Government may well feel that it is prudent, particularly if there is a sufficient parliamentary majority to get the matter through Parliament, to reach

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agreement on a suitable form of voluntary regulation and to apply LASPO to privacy and defamation claims which will mean that CFAs and ATE premiums will not be payable by unsuccessful Defendants.

Reuters Barred from Publishing Confidential Hedge Fund Documents

Brevan Howard Asset Management LLP (BHAM) -v- Reuters Limited (2017 EWHC 644)

In March 2017 Mr Justice Popplewell granted an injunction preventing Reuters from publishing information which had been supplied to them by a third party based on confidential documents circulated by BHAM to 36 potential institutional investors. BHAM is one of the largest hedge fund managers in Europe and it has circulated seven files containing five documents which were said to be highly confidential and to contain commercially sensitive information with a view to encouraging those investors to invest in their funds. The documents were marked private and confidential not for distribution and each recipient also received a unique password to access them.

The case shows what an effective remedy the law of confidence can provide to those seeking to prevent disclosure of confidential documents. The hearing was in private. The precise nature of the information was never made public and Reuters as Defendants appear to have had some difficulty in defending the case having only received third party information rather than in February 2017the documents themselves in that they were limited in terms of spelling out the full nature of their defence in what they could themselves disclose regarding the nature of that information by virtue of their need to protect their confidential source.

The case shows what an effective remedy the law of confidence can provide to those seeking to prevent disclosure of confidential documents.

The case which may go to appeal is a good example of the predisposition of English Judges to grant interim injunctions to prevent the disclosure of confidential information.

There are five elements in a claim for an injunction restraining a breach of confidence. The information must have the quality of confidence – and that was satisfied in the Judge's view by the form in which the information had been communicated together with the nature of the information -, the information must have been received in circumstances denoting a duty of confidence, there must be a threat on the part of the Defendant to make an unauthorised disclosure of that information, the Court must be satisfied that any public interest defence would fail and damages must be an inadequate remedy.. In addition a Court has to consider the provisions of Section 12 Human Rights Act 1998 before granting an injunction. Under Section 12(3) the Applicant has to show that it is more likely than not that he would obtain a permanent injunction at trial. The jurisprudence at the European Court of Human Rights applies an

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enhanced merits test reflecting the importance of an independent press within a democratic society. The Court should be extremely slow to make an interim restraint order and it will go into some detail the merits of the case to assess the Applicant's prospects of success at trial. Under Section 12(4) the Court is also required to have particular regard to the right of freedom of expression and the Court needs to consider the extent to which the information has become available to the public and the public interest in that information being disclosed.

One of the points raised by Reuters was that they did not have the documents themselves but the Court concluded that the nature of the information and the expertise of the journalist would have made it clear to Reuters that this information was derived from the confidential BHAM documents. The Court also laid stress on the decision in the case of the Prince of Wales -v- Associated Newspapers Limited (2006) CH57 that when one considered public interest in disclosure a Defendant also had to show that there was a public interest in breaching the confidence. The Court noted that there was a clear countervailing public interest in maintaining and upholding obligations of confidentiality. In this case the Court concluded there was a public interest in a hedge fund manager such as BHAM making full and candid disclosure which involved disclosing commercially sensitive information so that investors could reach their decisions. There was no evidence of illegal dealings, hypocrisy or incompetence on the part of BHAM.

The case highlights the dilemma of media organisations where there is no iniquity to be disclosed. Reuters certainly considered there was a public interest in publishing information about the notoriously secretive world of hedge funds and that this would bring transparency into a secretive world and had the potential of providing information to the ultimate investors in the funds run by institutional investors. That, however, was insufficient in the view of the Judge. Furthermore as a responsible publisher Reuters had sought the comments of BHAM on the information which they proposed to publish that had caused BHAM to make an immediate application to the Court for an injunction. When Applicants respond swiftly by applying to the Court for an interim injunction they may well have a good prospect of obtaining an interim injunction preventing disclosure.

Bloomberg Prevents Businessman's Attempt to Obtain Injunction

ZXC -v- Bloomberg **(2017) EWHC 328**

A markedly different result was obtained by Bloomberg when Mr Justice Garnham rejected the attempt by a businessman presently and pending a possible appeal known only as ZXC to obtain an injunction against Bloomberg which published the fact that ZXC and his company were under criminal investigation.

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The case shows how these applications are fact specific and is worthy of note in that it demonstrates how the media Defendant *should* act and how a Claimant *should not* act. Bloomberg also had the advantage that the material had by the time an application has been made to Court been published, so it was a question of a possible removal of the material from their website rather than preventing publication altogether.

The hearing took place in March 2017 and concerned an article placed on Bloomberg's website in December 2016. Bloomberg were assisted by the fact that in 2013 media organisations including Bloomberg had reported an announcement by a law enforcement agency that it was conducting a criminal investigation into a company which was named and noted that it was focusing on allegations of fraud, bribery and corruption relating to the activities of its subsidiary. Bloomberg had published an update in December 2016 on the criminal investigation which would have been seen by its 300,000 subscribers.

The basis of the complaint by ZXC was that the 2016 report was based on a highly confidential law enforcement document which he contended had been leaked to Bloomberg in breach of confidence.

At first sight ZXC appeared to be assisted by the case of *ERY -v- Associated Newspapers* (2016) EWHC 2760 where a businessman who was also subject to a criminal investigation *had* obtained an injunction preventing the publication of that fact. There the newspaper wished to publish the fact that he has been interviewed by the Police under caution. The information had not been previously published and the newspaper had however – no doubt for good reason - conceded that ERY did have a reasonable expectation of privacy in respect of that information.

The case shows how these applications are fact specific.

The Court will firstly consider in such cases whether the Claimant has a reasonable expectation of privacy and whether his right to privacy is engaged. The Court then will weigh that against competing considerations. In the ZXC case the Claimant's right to privacy *was* engaged and that his Article 8 rights came into play. He was a businessman and not a celebrity seeking publicity. The law enforcement document was confidential and it had been leaked. The criminal enquiries were not concluded and had not been made public nor had ZXC been arrested or questioned in public nor had he consented to publication. The fact however that his solicitor had spoken to Bloomberg about the nature of the allegations in 2016 did count against ZXC's article 8 rights.

The Court then considered the competing article 10 considerations, for example, the fact the investigation had been in the public domain since the original 2013 articles. Bloomberg had published a further article in mid-2016 when ZXC's solicitor had spoken to Bloomberg and put forward ZXC's comments on and answer to the investigation. When the latest article in December 2016 was published on the Bloomberg website it was nine days before the ZXC's

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solicitors complained. The Court also noted that the distress which ZXC claimed he had suffered as a result of the Bloomberg report may well have been due to the fact of the investigation itself. The Judge also noted that Bloomberg did not suggest that ZXC was guilty of any crime. ZXC also, the Court noted, failed to provide a detailed witness statement in the litigation particularising the nature of his complaint.

The Court noted that this was a serious piece of journalism without any of the salacious content that characterises many of these privacy or breach of confidence injunction cases. Factors against Bloomberg's right to publish were that this was confidential information, that the enquiries were not complete and that they have been seemingly leaked to Bloomberg in breach of confidence. However in exercising the balancing process between the article 8 and article 10 rights the Judge was not satisfied that ZXC was entitled to an injunction and Bloomberg were therefore entitled to keep the story on their website.

There was also an application by ZXC under section 10 Data Protection Act 1998 seeking an order that Bloomberg cease processing the data and remove the offending article. This was a claim that was not dependant on ZXC establishing an article 8 right of privacy. Bloomberg were entitled to rely on the Defence under section 32 Data Protection Act that this involved the processing of information of journalistic, literary or artistic material and that as data controllers they reasonably believed that having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest. Bloomberg did submit a witness statement in contrast to ZXC which showed that the decision to publish was taken after careful consideration of the relevant circumstances including the public interest in the disclosure of ZXC's involvement in the investigation. The Judge was not prepared to go behind the facts of the assertion as to their reasonable belief publication was in the public interest. The case demonstrates the advantages of a media defendant recording how it reviewed the merits of publishing and how it reached the decision that to do so would be in the public interest, so that it can demonstrate to the court that it asked itself the right questions and therefore was entitled to rely on the defence under Section 32(1) Data Protection Act 1998.

The journalist's defence against having to produce unpublished material upon request under the Data Protection Act (DPA) 1998 is upheld as not being incompatible with European Union law

Stunt v Associated Newspapers Ltd *(2017) EWHC 695*

The case of ZXC v Bloomberg (above) showed how increasingly in respect of published material, powerful and wealthy claimants are trying to use the DPA either to prevent unwelcome material being published about them (Section 10) or to try to discover the journalist's sources (Section 7*)*.

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Just such an attempt had been made by the billionaire diamond prospector Benny Steinmetz against the campaigning organisation Global Witness who had been publishing material about corruption in West Africa. The Information Commissioner ruled in December 2015 that the defence under Section 32 (1) DPA extended not just to conventional media journalists but also to campaigning NGOs.

In Stunt v Associated Newspapers Ltd the son in law of the billionaire operator of Formula One brought an action seeking a whole raft of orders against the Mail newspapers in respect of twenty seven articles concerning his business and social activities. He wanted Associated to comply with subject data requests in respect of both published and unpublished material to show what data they held about him, to cease processing such data and to destroy it.

Stunt also sought to invalidate the journalists' defence under Section 32(4) DPA in respect of unpublished material claiming it was incompatible with EU Directive 95/46/EC and that it was incompatible with the Charter of Fundamental Rights of the European Union. He sought a direction from the Court to that effect. The Directive seeks to strike a balance between freedom of speech rights under Article 10 and data protection rights to protect the data subject.

This decision is a welcome check on the increasing tendency of claimants to hire the top DPA lawyers to try to get access to materials held by journalists.

The protection under Section 32(4) is wider in respect of unpublished material than under Section 32(1) for published material in that there are no requirements such as a reasonable belief on the part of the data controller that publication is in the public interest or that compliance with the data protection principles would be incompatible with the purposes of journalism.

Under Section 32(4) applications of the sort made by Mr Stunt would fall to be stayed if the data was only being processed for artistic, literary or journalistic purposes and it had not been previously published by the data controller. The stay would be granted as a matter of right until either of the conditions set out in Section 32(5) were met.

Wealthy claimants have increasingly sought to try to get hold of the materials published and unpublished held by journalists about them. On the face of it the newspaper had a complete defence under Section 32(4) to the claim under the DPA brought by Mr Stunt, but he ambitiously sought an open sesame to journalists' files.

The claim that Section 32(4) was incompatible with EU law was firmly rejected by Mr Justice Popplewell. The Court considered that the Section fell within the margin of appreciation permitted under the Directive to member states in striking a balance between fundamental rights of privacy and freedom of speech and that the parliamentary debates while the statute was being enacted confirmed this. Furthermore it was recognised in domestic and European jurisprudence that in the field of journalism the protection of freedom of expression

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required particular importance to be attached to protection from pre-publication restraint. Investigative journalism often required the acquisition and retention of data which is protected by the Act over a period of time and used for a number of stories. Investigative journalism would be seriously hindered and discouraged were the data subject to have access to the detailed extent and direction of the investigation prior to publication and were the data subject able to go to court to seek orders to produce such information and for it to be destroyed.

This decision is a welcome check on the increasing tendency of claimants to hire the top DPA lawyers to try to get access to materials held by journalists and to see what the journalists know about them, what they are looking into and who they are talking to. Media organisations need to ensure that such information is held just by the journalists and not by non-journalists third parties such as public relation agents or outside experts who would be unlikely to have the protection of Section 32 DPA.

Vindication of the First Lady

Melania Trump v Mail Online

Melania Trump - An Apology

By DAILY MAIL and MAILONLINE
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The Mail Online website and the Daily Mail newspaper published an article on 20th August 2016 about Melania Trump which questioned the nature of her work as a professional model, and republished allegations that she provided services beyond simply modelling. The article included statements that Mrs. Trump denied the allegations and Paulo Zampolli, who ran the modelling agency, also denied the allegations, and the article also stated that there was no evidence to support the allegations. The article also claimed

On 11 April 2017 the settlement of two libel actions brought by Melania Trump in England and the USA against the publishers of the Mail Online was publicly announced.

In a statement read in open court the Mail apologised for the distress and embarrassment the articles may have caused the First Lady. It accepted that the allegations which they had published in August 2016 were untrue and they published a retraction and apology on their website (*please add a link)*. This stated that Melania had been paid damages, although without the adjective "substantial" which is often used for significant five figure sums. The retraction itself was amended a couple of days later to state that the Mail had paid damages *and costs*. The figure was not disclosed, but the press was briefed that it was $2.9 million (£2.4 million), a staggering figure given that the ceiling for libel damages in England is capped at £300,000. However, if correct, the figure may have reflected the reimbursement of the legal costs of Charles J Harder (he of Hulk Hogan fame) and the other lawyers retained by Melania in Maryland and New York and in England. The figure may also have factored in a possible threat to sue additionally in Ireland and Northern Ireland, a tactic

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increasingly adopted by claimant lawyers acting for the well-heeled. The settlement figure was however a fraction of the $150,000,000 that Mr Harder had claimed.

The proceedings in the USA had followed a rather chequered path. Initially they had started in Maryland against Media Mail Inc. and a blogger called Webster Tarpley who was based in Gaithersburg, Maryland. Tarpley promptly retracted the allegations and settled with Melania but the Montgomery County judge, Sharon Burnell, threw the case against the Mail on the grounds of jurisdiction. She did, however, observe that referring to Melania as a "high-end escort" was an allegation of prostitution and there could be no more defamatory statement than to call a woman a prostitute. After that setback, Melania's lawyers filed a complaint in the unpromising libel jurisdiction of New York (in its Supreme Court, Commercial Division) seeking $150 million in damages for defamation and intentional infliction of emotional distress.

Curiously they based the monetary claim on economic damage to the First Lady's brand, licensing and marketing opportunities, claiming the article had harmed her chances of establishing multimillion business relationships. Merchandising rights of a First Lady or, had things gone differently for the Donald, a failed presidential candidate appeared to be a novel concept.

The focus of the litigation then seems to have shifted to England with the underlying threat of also litigating in Ireland and Northern Ireland. What the Mail had done was in the context of the presidential election to repeat some very dubious allegations (later accepted to be false) made by an anonymous author in a self-published book in Slovenia, whence the First Lady hailed, and in an obscure Slovenian magazine that she had worked as an elite escort in the sex business and that she had falsified the circumstances in which she had met Donald Trump.

The Mail considered it was simply reporting in a neutral fashion a controversy which could affect the presidential election where a great many other unsubstantiated allegations were flying about, not least on Donald's side. It felt that by pointing out that the allegations were unreliable and unsubstantiated it fell the right side of neutral reportage. Melania's argument was that showed that the Mail need the allegations were false, as they had apparently been told by the magazine owner. The neutral reportage argument might have succeeded in New York but it was clearly vulnerable in England under the repetition rule where the defendant who repeats a libel does so at their peril and is likely to have to justify its substance and not just that the allegations had indeed been made. What might well have done for the Mail in the English action was the fact that the article was accompanied by a nude picture of Melania taken some years ago with her front against a wall but her fact turned to the camera. An English Court might well have felt that the publication of this photograph significantly watered down the claim of the neutrality of its reportage.

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What one learns from the case is that claimants are increasingly using the English and Irish Courts to bolster up US libel claims which might otherwise be likely to fail and to secure large settlements based on the threat of heavy legal costs in multiple jurisdictions and on the possibility of an American jury awarding multi-million damages (even if such an award might ultimately not survive the Appeal process.

Donald's Wee Victory in Scotland

Beyts v. Trump International Golf Club (Scotland) Ltd. (Edinburgh Sheriff Court)

A 62 year old retired social worker failed in her claim for damages for distress which she said had been caused to her by the failure of Trump International to register under the Data Protection Act 1998. Her claim failed on the grounds of causation namely that the sheriff failed to accept that this regulatory oversight by Trump International would have caused her distress. Had she formulated her claim on the basis of straightforward breach of the Data Protection principles Ms Beyts would probably have been awarded £750 against Trump International.

The facts of the case were particularly bizarre. The Pursuer, as plaintiffs are called in Scotland, was a protester opposed to a planning application being made by Trump International in relation to its golf complex. She was exercising her right of access to the golf course, but halfway through felt the need to urinate on the golf course. She was photographed whilst doing so by the club's security officer and rather appropriately by their irrigation technician. She sued under the Data Protection Act for her distress arising out of the company's failure to register. Arguably the club might have had a defence if she had brought a more promising claim for breach of data protection principles on the basis that the photograph had been taken with a view to the prosecution of an offender under Section 47 Civic Government Scotland Act 1982, namely using the golf course for a purpose for which it was not designed. However, the Sheriff clearly found the activities of the golf club so distasteful that he almost certainly would have thrown out this defence. He condemned the club officials as officious bystanders and viewed their conduct as bordering on the criminal offence of voyeurism.

David Hooper is a Consultant at Howard Kennedy in London.

Ten Questions to a Media Lawyer

Barbara Wall

Barbara Wall is senior vice president & chief legal officer at Gannett Co., Inc. in Virginia. If you'd like to participate in this ongoing series, let us know - medialaw@medialaw.org.

How'd you get into media law?

Luck! When I was at the University of Virginia Law School, one of the top media law firms in New York City, Satterlee & Stephens, sent interviewers to the school every September. As a lifelong news junkie, and former college newspaper editor, I couldn't imagine a better practice. I signed up to talk to them, got an interview, a call back, and an offer within ten days. I accepted immediately and it was one of the best decisions I've ever made--I loved the firm and the First Amendment work I did there.

How did you wind up at Gannett?

Again—luck! After spending six years in New York, my husband was transferred to the Washington DC office of his firm. Since I wasn't interested in having a commuter's marriage, I started looking for a place in DC where I could continue to work on First Amendment issues. Gannett had just launched USA TODAY, was moving its headquarters from Rochester to DC, and had an opening for a lawyer. I think I was the first person to apply. Though I misspelled the name of the general counsel in my cover letter, I got an interview anyway and an offer shortly after that. Again, I accepted immediately and have never looked back.

What do you like most about your job?

I love journalists. I've always been a bit of a skeptic-- some of my friends might say I'm a cynic--so I love working with reporters who live by the bromide "If your mother says she loves you, check it out." I also love the excitement of a big story, whether it's breaking news on a tight deadline, or an investigative piece that takes months to complete. And I love the fact that the stories Gannett journalists work on make a difference in the lives of the communities they serve.

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What do you like least?

Having to defend frivolous lawsuits. News organizations get targeted by pro se litigants –many of them in jail—with nothing but time on their hands. Unfortunately defending those suits takes resources that would be better spent on producing more journalism.

What was your first big case?

My first big case was filed May 6, 1980 after I'd been at Satterlee only nine months. ABC was suing popular sportscaster Warner Wolf who'd become well known for his colorful on air performances on WABC-TV. ABC claimed Wolf had failed to negotiate for a renewal of his contract in good faith and was seeking specific performance of the first refusal clause of his contract which would have kept Wolf off the air for two years. In the meantime, Wolf had signed a contract with Satterlee client CBS. When the case was filed, Satterlee was short staffed, and despite my lack of experience, I was the associate assigned to the case. It was on an incredibly fast track: we had a preliminary injunction hearing, expedited discovery and a full trial on the merits which concluded June 9. I was drafting all the briefs, so I slept very little during that month! We were thrilled when the trial court dismissed the complaint and dissolved the preliminary injunction. The trial court's decision includes one of my favorite passages in any court opinion: "Many times [Warner Wolf] has asked his viewers to 'Gimme a break.' Equity can, and this court shall." The case was appealed and affirmed by the Appellate Division, First Department and eventually by the New York Court of Appeals.

A photo in Wall's office of reporters Claire Gillis and James Foley being released in Libya in 2011.

Most important legal matter you've ever handled?

Oh that's a tough question. I'm the sort of lawyer who usually thinks whatever I'm working on at any given time is very important. But one matter that stands out involved the kidnapping of Claire Gillis—who'd been reporting for USA TODAY and The Atlantic from Libya -- on April

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5, 2011. Gillis was taken captive along with Global Post reporter James Foley and they were held for 44 days. The government in Libya had essentially collapsed so negotiations for Gillis and Foley's release were fraught with peril. One of the happiest days of my legal career was the day Claire and Jim were released. One of the saddest was August 19, 2014 when I learned that Jim Foley—who had later gone on to report for Global Post in Syria—had been beheaded by ISIS.

Tell us about some of the things in your office?

I have a picture that was taken of Claire Gillis and Jim Foley on the day they were released—that's pretty special. I also have some great Jazz Fest Posters. As you probably know, I'm a New Orleans native, and we're all very proud of Jazz Fest's success. I also have a great framed photo taken by Susan Raines of a corner in the French Quarter—I love the fact that in the photo there's a sign pointing to Arnaud's restaurant -- the place my family celebrated important occasions when I was growing up -- and a USA TODAY newsrack!

Framed photo from Wall's hometown of New Orleans. "I love the fact that in the photo there's a sign pointing to Arnaud's restaurant -- the place my family celebrated important occasions when I was growing up -- and a USA TODAY newsrack!"

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

USA TODAY, of course!

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

For starters, full disclosure: neither of my children went to law school and I didn't encourage them to. That said, they've always been pretty independent so they probably wouldn't have listened to me if I had! (My daughter is a doctor and my son started his own business.) But I have loved almost every minute of my career. For young people who really want to be lawyers, I would say "go." The world isn't getting any less complicated, so in my view there will

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always be a need for smart, committed lawyers to resolve the legal disputes that will inevitably develop along the way.

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

Go to a media firm that is short staffed, and work as hard as you possibly can. That's what I did --and I wound up getting a tremendous amount of responsibility very early in my career. There's no substitute for getting a fast start.

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

I was always intrigued by archeology! Who knows? When I retire you may hear about me volunteering on a dig. . .

What issue keeps you up at night?

The business model for journalism. It is constantly changing and I think about that a lot.