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Media Law Resource Center
MEDIA LAW LETTER

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Legal Frontiers

in

Digital Media

May 17-18, 2018

Mission Bay Conference Center
San Francisco

Keynote by Kara Swisher

**Hosting and Unhosting
Objectionable Content**

**Combatting Internet
Disinformation Campaigns**

**Women in Tech:
Is Climate Change Coming?**

**How Algorithms & Machine
Learning Work**

**Scraping By with
the Computer Fraud
& Abuse Act**

From the Executive Director's Desk

Setting the Record Straight on “The Post” at Home and Abroad

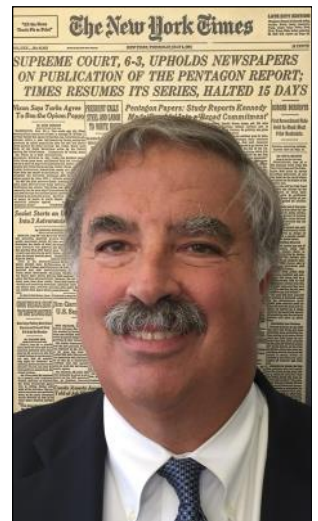
As a kid, I loved historical fictions: books about Civil War heroes played out against the background of Gettysburg or Chancellorsville tickled my youthful fancy. An American Studies major and a somewhat history buff, as an adult I enjoy docudramas. Learn some history, get some inside poop, see a Hollywood drama all at the same time – not bad. And I fully believe docudramas are entitled to full First Amendment protection. Whether they are considered a historical work or a creative work somewhat fictionalized about famous people, they certainly come well within the sphere of literature or film which informs the public and contributes to public dialogue on historical issues. Had Olivia de Havilland won her totally spurious right of publicity claim, an entire genre of historical works might well have been eliminated.

That said, docudramas are extremely frustrating. When they are done, the viewer simply does not know what actually happened. Was the transaction or conversation in the movie fact or fiction, loyal to the historical record or dramatized with broad Hollywood license?

Here's an extreme example that really bugs me: in the recent film “Snowden”, our hero supposedly gets the flash drive holding the millions of bits of information he is about to distribute through security in a most ingenious way – he puts it inside a Rubik's Cube, a toy he apparently is an expert in playing. As he approaches the security station on his way out of the very secure offices he works at, he is playing with the Cube. One of the security guards makes a comment about it, and he tosses the Cube to the guard. He then goes through the security checkpoint, his stuff goes through the security conveyor belt and as he is leaving, the guard tosses him back his Cube – totally unchecked. I assume that was wholly made up or just maybe, is it what really occurred? I had the opportunity to find out when I spoke to Snowden by phone in setting up his Skype appearance at our Annual Dinner a couple of years ago, but quizzing him about this at that time didn't seem appropriate.

Or take another Oliver Stone movie, “JFK”. It centers around a conspiracy theory for the assassination, even implying that LBJ was involved. While most of us of a certain age believe the Warren Commission's conclusion that Oswald acted alone, young people who watched that movie and had no other exposure to the facts behind JFK's assassination probably believe the version they saw.

Which brings me to the inaptly named “The Post”. First, in the event truth matters – and especially in this age of accusations of so-called “fake news”, it certainly does – there are quite a few falsities in what purports to be a relatively straightforward retelling of the Pentagon Papers saga. For example, there is no evidence at all that Ben Bradlee sent a young intern to infiltrate The Times to find out what Times reporter Neil Sheehan was up to.



**George Freeman
(with press plate of
the Times announcing
Pentagon Papers
victory)**



Times publisher Arthur Sulzberger, center, holding a press conference after the Supreme Court decision. To his left, managing editor A.M. Rosenthal; to his right, attorney James Goodale.

Second, the film shows Nixon's furious reaction to the Pentagon Papers' release; the truth is that he was happy about it since it blamed his mortal Democratic enemies, Kennedy and Johnson, for getting into the Vietnamese quagmire; he only became upset when Kissinger and Haig convinced him he looked weak by doing nothing while the Times was publishing classified documents. Third, while the record is somewhat hazy on this, it's doubtful that as the Post was about to run its first installment of the Papers (after the Times had been temporarily enjoined), McNamara tried to convince Ms. Graham not to publish. McNamara, for a long time skeptical about the War he once prosecuted, supported publication.

Fourth, in the movie, Ben Bagdikian, a Post editor, works the phones and finds Daniel Ellsberg, leading to Ellsberg's providing him and the Post with some of the Papers once the Times was restrained. In addition, there's a bogus scene where Bradlee triumphantly walks into Ms. Graham's office, opens a box and shows off about six different newspapers all of which ran the Papers after the Post was restrained. "They all followed your lead and published the papers," Bradlee sucks up to Graham. On the contrary, it was Ellsberg who orchestrated all of this. It was Ellsberg who went to the Post after the Times was restrained from publication after the first three days of the series, and it was Ellsberg who went to the Boston Globe, Christian Science Monitor, et. al., seriatim, after the Post was stopped. And, just as the Post followed the Times' lead, so did these other papers. The Post was just second of many to come.

Finally, the entire credibility of the movie to me gets somewhat undercut by the fantasy scene where Ms. Graham leaves the Supreme Court after the oral argument. While the Times' lawyers are answering questions from the press, she walks down the Supreme Court's steps surrounded by a huge throng of spectators and supporters – all women. Of course, this is illusion, but if it matters what in the movie is fact and what is not, such an unrealistic scene does little for the film's credibility.

Of course, these are but small nits. The real fault is in the movie's title – "The Post". For while the Times gets due credit during the substance of the film, for those who haven't seen the



Daniel Ellsberg, co-defendant in the Pentagon Papers case, talks to media in 1973

movie at all, or didn't really focus on its details, the obvious connection is that the Post was the brave hero which took on the Government and deserved credit for the Pentagon Papers being published. Yet, it was the Times' Neil Sheehan who first got the Papers from Ellsberg; it was the Times reporters and editors who were holed up in a hotel suite for three months authenticating, vetting and redacting the Papers; it was D.C. Bureau Chief Max Frankel and Executive Editor Abe Rosenthal who decided how they should be displayed; it was General Counsel Jim Goodale who, by himself, in the absence of the Times law firm of 60 years which refused to get involved in such traitorous activity, mapped out the legal support and strategy for the decision to publish; and, ultimately, it was Punch Sulzberger who made the courageous decision to publish. And, of course, all that took place before the Post even knew there was such a thing as the Pentagon Papers.

Given that the Post had but sloppy seconds – and that the Times won the Pulitzer Prize for its publication – why is the movie about the Post? First, the fact that the Post made its brave decision to publish within 36 hours, as opposed to the Times' three months, makes theirs a more compact and dramatic story more easily told on the big screen. Second, you have the subplot about a woman growing in her role and making the key decision, a nice sidebar in the era of #MeToo and something historically unique at the time. And, finally, and I think most important, Spielberg got Meryl Streep, by leaps and bounds the greatest actor of our generation, to play Ms. Graham, who along with Tom Hanks (who, however, gets overshadowed by Jason Robards' Bradlee in "All the Presidents Men") gives the movie huge box office appeal.

I should point out that Timesfolk, especially those who actually worked on the Pentagon Papers articles back in 1971, are totally irate at all of this. Many refuse to see the film; others' reaction is that while Abe Rosenthal would be cursing in his grave, Ben Bradlee would be laughing (or having a cocktail) in his; and almost all Timesmen have said that they imagine that Spielberg's next movie, about press coverage of Watergate, will be titled "The Times".



Punch Sulzberger made the courageous decision to publish before the Post even knew there was such a thing as the Pentagon Papers.

Over the last month, I was asked to speak twice after a showing of “The Post”. Once was in my hometown movie theater; the other was in Kingston, Jamaica, a country I had visited 10-15 times as a resort tourist, but was now traveling to professionally.

The theater at home suggested I speak about the movie and about the backstory of what really happened at the Times. I was thrilled to speak before a crowd of friends and neighbors, and told of some of the humorous vignettes of those days. (Just to set the record straight, I was graduating from College that month, and was six years before doing any legal work for the Times.) I told of what Abe’s first reaction was on being given the Papers by Sheehan: “I thought it might be a hoax perpetrated by some Harvard students,” he said.

I spoke of how, after his law firm abandoned him, Goodale decided to pick Yale professor Alexander Bickel to represent the Times, but with the Times due to be in court to answer the Government’s papers in 16 hours, he called Bickel at Yale and got no answer. He then made the cleverest move in the whole case: he went to the newsroom, and said it’s your job to ferret out the news; now find Prof. Bickel. Ten minutes later a reporter found him with his mother on the West Side. Bickel then advised Goodale that, as a law professor, he had never been in court. No matter, said Goodale, you’ll learn on the job. 12 hours later Bickel, Goodale and Floyd Abrams had put together a 17-page brief arguing against a prior restraint.





Freeman gives a talk to a group of Jamaican media lawyers.

In the meantime, I related, the next morning, the US Attorney for the Southern District, Whitney North Seymour, called one of his lawyers, Michael Hess, to go down to court to represent the Nixon Administration. Hess said he had been busy on another trial and hadn't even read the articles about the papers in the Times. No matter, said Seymour, you can read them on the subway on your way to court. (Actually, Hess wasn't able to read the real Pentagon

Papers he was trying to restrain till about a week into the case: he hadn't gotten the proper security clearance, so he wasn't allowed to read it.) And the judge drawn by lot was Murray Gurfein, a judge serving his first week on the federal bench. So in the greatest showdown between the government and the press in our history, you had a lawyer who had never argued a case representing the Times, a lawyer who knew nothing of the facts representing the Government and a brand new judge.

After telling a few more backstory vignettes, I opened the floor for questions. The first two were right on point. The first question was how the Supreme Court would decide such a case today. The next was whether, in general, and perhaps because of Trump's attacks on the media, is the press less protected today than it was in 1971. I answered the first in two ways. I said that if a similar case came up today, with the Pentagon Papers case as precedent, I think it would be decided similarly – after all, the Court would presumably follow the case's precedent that a prior restraint could only be sustained if publication would surely result in “direct, immediate and irreparable” damage to the nation. On the other hand, if a Pentagon Papers case would reach the Court today for the first time, all bets would be off. Although this is a pretty strong First Amendment Court, it is even more a pro-Government Court, and so I would be skeptical such a new case, hypothetically without the 1971 precedent, would be decided the same way.

I did opine that the press had just about the same protection in the courts today than it had 47 years ago. Even though, generally, public opinion does affect judges, and even though trust of the media is at a historic low, I believe the courts still believe in the First Amendment and will protect the press as much as ever. The real danger is if Trump is successful in appointing more and more like-minded judges to the federal bench; that could turn the tide against the media more than the effects of public opinion.

A third questioner asked whether while at the Times, I was involved in anything similar to the Pentagon Papers. I referred to the Times article about Bush 43's warrantless wiretapping protocol which tended to evade the FISA laws and resulted in wiretapping on Americans

without an appropriate warrant. I related that Pres. Bush asked the Times publisher Arthur Sulzberger and Executive Editor Bill Keller to the White House where he told them that they “would have the blood of Americans on their hands” if they ran the story and there was a subsequent terrorist attack. I also noted how, when Keller told me he was running the piece, but first, as a matter of

diplomacy, was going to give the White House a head’s-up, I suggested he put the article on the internet earlier than usual to decrease the chances that the Government could go into to court and move for a prior restraint.

And the final question was also a good one: while the Pentagon Papers might have been about historical information, didn’t the Wikileaks and Snowden disclosures lead to real damage. I parried the factual part of the question, but did allow that the internet has allowed anyone to put anything on the internet, and that that is a dangerous thing. The old model, where as a practical matter only the responsible mainstream media could distribute such information, was a far safer system. I also contrasted Assange, who I believe is essentially a nihilist, with Snowden. Assange, after first going through the Times, the Guardian and Der Spiegel, all of whom vetted the material, then decided to put his materials on his website, without regard for substantive dangers in the documents. On the other hand Snowden, while he didn’t vet the materials himself, did apparently instruct the newspapers to whom he disclosed his materials to go through them carefully and not publish materials which might cause real harm.

Though the main event of my visit to Jamaica, organized by Zahra Burton, a leading investigative reporter and founder of Global Reporters for the Caribbean, was a Q&A after a showing of the film to 150 of Kingston’s judicial and media elite, I also had a meeting with Jamaica’s media lawyers and media managers and another with journalism students.

The questions at all these sessions focused less on the movie and more on what this all means for the Jamaican press. I said it should resonate: the process the Times goes through with national security documents is the same as which the Jamaican press should follow on stories on crime and corruption. First, authenticate and verify. The presumption is always to publish, but get a response from the subject of the story and give them an opportunity to argue with specific facts, not just generalities about embarrassment and harm, why publication of specific information in your article could be damaging. Then it’s up to the independent press, not anyone else, to decide what and what not to publish.



Freeman with Sheena Stubbs, left, in-house counsel for Jamaica's main paper The Daily Gleaner, and Zahra Burton, founder of Global Reporters for the Caribbean and the investigative reporter who organized his lecture trip to Jamaica.

Jamaicans also stressed that because it is a small country, journalists have close relationships with government officials and advertisers, and that can put pressure on them to self-censor. I pointed to how Mrs. Graham talked down her “dear friend” Robert McNamara, but still decided to publish the Papers which made him look terrible. They, too, must withstand such pressure, political and financial, and not pull punches to aid their friends and supporters. Without that, they won’t have credibility as journalists; further, I said, running a newspaper or broadcast station is different than owning a used car dealership: while obviously one has to consider financial effects, you are a public trust and your loyalty to the news, the facts and to informing the public should be a first priority.

Finally, they asked about libel law; they fear having to spend huge amounts on lawyers to defend themselves from suits by rich public officials, and bemoan the fact that without Sullivan – which they all were familiar with – there’s a huge risk in publishing negative articles about public figures. I said they weren’t alone; most of the British Commonwealth nations have rejected media lawyers’ attempts to recognize Sullivan. But there has been progress: Jamaica has moved to accept the Reynolds factors and recently amended its law to rule out criminal defamation.

I advised to find libel cases with favorable facts to raise to the high courts; I suggested to establish a Defamation Reform Commission, as the Brits did, to tackle libel reform. And I said that establishing a media bar committee – of many of the impressive people who had met with me – to discuss strategies to implement the above would be very helpful.

A final highlight came when I was invited to the offices of The Gleaner, Jamaica’s leading newspaper since 1834, to meet with its publisher, COO and top editors. They were very engaging, and we discussed a broad range of issues – legal, such as attempts in the Caribbean to enact data privacy and right to be forgotten laws; business, similar issues as mid-sized papers in the States are facing, diminishing advertising revenues because of the internet and whether or not to have a paywall for its website (the Gleaner required payments for a while, but found it too drastically reduced its visibility); and journalistic, the costs and benefits of investing in serious investigative reporting, and what news really is in the public interest as opposed to gossip information the public is merely curious about.

All in all, a fascinating trip to a wonderful place – and serious journalists and lawyers struggling with similar issues than we are.

In any event, whatever its flaws, The Post is certainly thought provoking. More than that, it comes at a crucial time, when the press is being attacked by a President who is far out-Nixoning Nixon and whom we fear may well take steps to interfere with a free and independent press and its right to publish what it sees fit. As such, whatever its Hollywood diversions, we should all be very heartened that it was produced and released. And, at least in one person’s opinion, an Oscar nomination for Best Picture, but not the winning of an Oscar, seems just right.

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

Texas Court Grants Summary Judgment to Real Crime Show Producer in Negligent Publication Case

Plaintiff Alleged Show Almost Got Him Killed

By Laura Lee Prather, Catherine Robb, and Wesley Lewis

This April, a Dallas district court granted a television production company's motion for summary judgment in a negligence lawsuit arising from the broadcast of the popular documentary television series *The First 48*. *Jones v. Kirkstall Road Enterprises, Inc.*, No. DC-16-01794 (191st Dist. Apr. 23, 2018). This decision is the latest in a growing body of cases that refuse to impose liability against media defendants for the unlawful or violent acts of third parties in response to the defendants' speech.

Background

The plaintiff Arking Jones alleged that Kirkstall Road Enterprises ("Kirkstall") failed to adequately protect his identity when it broadcast video of him providing information to police during a custodial interview. Jones alleged that the use of the interrogation footage led others in the community to label him a "snitch" and ultimately resulted in him being shot in retaliation for his cooperation with the police.

Kirkstall produces the popular documentary television series *The First 48*, which focuses on the investigative work of homicide detectives in cities throughout the United States. One such episode, entitled "Safe House," focuses on the Dallas Police Department's investigation of the murder of Donovan Reid, a suspected Dallas-area drug dealer.

As part of that investigation, police interviewed Arking Jones, who was known to be familiar with the suspects in the murder case. Dallas police questioned Jones, and DPD provided the interview footage to Kirkstall for use in *The First 48*. A portion of the interview was later used in the "Safe House" episode, with Jones's physical appearance blurred and voice altered.

Jones alleged that, after the initial broadcast of "Safe House" in 2014, he was perceived in his neighborhood as a "snitch" and became the target of ongoing threats and violence. This allegedly culminated some fourteen months after the initial broadcast of the episode, when a man shot Jones four times in apparent retaliation for cooperating with law enforcement.

Jones survived the shooting but was seriously injured. He sued Kirkstall for negligence, arguing that it had a "duty to exercise care in the editing, production, and release" of the blurred interview footage on television in such a way that his identity was not discernible, and that it breached that duty by failing to adequately obscure his voice and appearance.

This decision is the latest in a growing body of cases that refuse to impose liability against media defendants for the unlawful or violent acts of third parties in response to that defendants' speech.

Defendant first moved to dismiss under the Texas Citizens Participation Act (TCPA), Texas's anti-SLAPP statute. However, Section 27.010 of the TCPA exempts "a legal action seeking recovery for bodily injury" from the application of the TCPA. *See* Tex. Civ. Prac. & Rem. Code 27.010(c). The district court denied Kirkstall's anti-SLAPP motion, finding that the bodily injury exemption applied here, since he was seeking to recover for the injuries he sustained when he was shot. The Fifth Court of Appeals affirmed, holding that, based on the plain language of the statute, the bodily injury exception prevented application of the TCPA in this case.

Summary Judgment Motion

After the Court of Appeals affirmed the denial of defendant's anti-SLAPP motion, Kirkstall moved for summary judgment, arguing that the Texas and United States Constitutions barred Jones's civil action arising out of constitutionally protected speech and that defendant had no duty to prevent third parties' unforeseeable criminal activity in response to its broadcast. Plaintiff countered by suggesting that defendant's speech was entitled to limited (if any) First Amendment protection.

Specifically, plaintiff argued that *The First 48* constituted incitement to imminent lawless action; he also claimed that the broadcast was entitled to lesser First Amendment protection because it was produced, at least in part, for entertainment and because Kirkstall had a profit motive in producing the episode.

In reply, Kirkstall relied on a well-established body of precedent to demonstrate that *The First 48* is entitled to full First Amendment protection and, as a result, summary judgment. Citing the recent California decision in *de Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 630 (Cal. App. Mar. 26, 2018) and several other decisions, Kirkstall refuted plaintiff's assertion that *The First 48*'s status as an entertainment program—as opposed to a pure news broadcast—alters the First Amendment analysis.

Next, Kirkstall was able to point to a clear line of precedent in media harm cases throughout the United States in which courts consistently declined to impose liability against the media for a viewer's criminal response to a defendant's publication. Finally, Kirkstall argued that the First Amendment bars negligence claims such as these, which are little more than an attempt to assert a tort claim based on speech under less stringent standards than traditional defamation claims or false light claims—a tort not recognized under Texas law.

The trial court heard oral argument on defendant's motion for summary judgment on April 19, 2018. Four days later, on April 23rd, Judge Gena Slaughter granted the motion in its entirety, dismissing plaintiff's lawsuit without an opinion.

The case marks a big victory for media and production companies like Kirkstall. Specifically, it serves as yet another example of a growing body of case law in which courts have held that, absent incitement, broadcasts fall within the bounds of speech protected by the First Amendment, even where they are alleged to have inspired third parties to engage in violent or illicit behavior. Plaintiff has not yet indicated whether he is appealing the decision.

Laura Lee Prather, Catherine Robb, and Wesley Lewis of Haynes and Boone, Austin, TX, represented Kirkstall Road Enterprises, Inc. Plaintiff was represented by Don Tittle, Dallas.

Truth Is Stranger Than Fiction (And It's A Nice Defense)

Court Grants Summary Judgment in Libel in Fiction Case

By Jack Greiner

The Court of Common Pleas for Hamilton County Ohio recently awarded summary judgment to the defendant in a libel in fiction case. A big part of the reason why was the truth of the allegedly defamatory material. [Dudee v. Philpot](#), (April 5, 2018).

Background

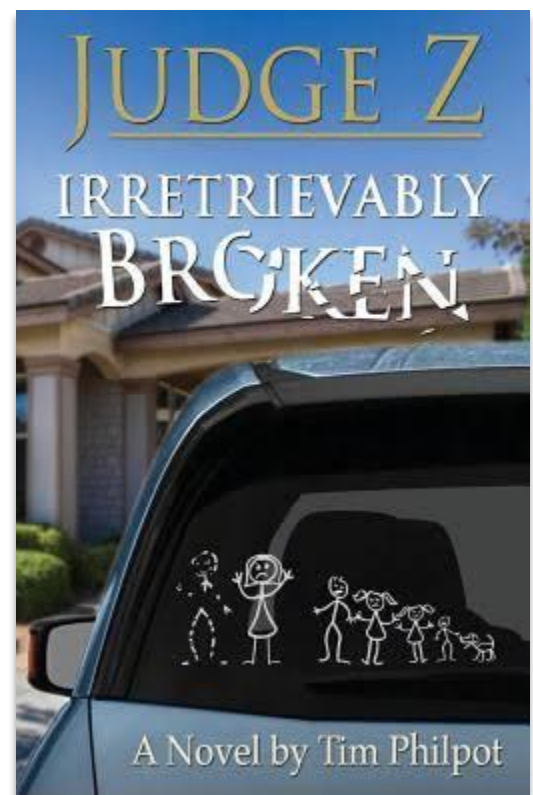
Timothy Philpot is a recently retired Family Court Judge in Fayette County Kentucky. In 2016, he published a novel entitled “Judge Z – Irretrievably Broken.” The novel’s lead character is Atticus Zenas, a family court judge in Fayette County, Kentucky.

Judge Zenas is disillusioned with his position and with his view of the current state of marriage. He feels he is a rubber stamp for divorces and the inevitable break up of families affected. Without spoiling the ending, he experiences a bit of an epiphany and the ending is upbeat.

The novel contained this disclaimer at the copyright page: “All of the characters in this book are creations of the author’s imagination. This is a work of fiction. Any resemblance to real individuals is purely coincidental.”

The novel is 253 pages long. Pages 7 – 13 contain a description of a typical “motion hour” in a Kentucky Family Court. Included in the passage is a description of a couple fighting over custody of their UK season basketball tickets, and another couple battling over the family dogs. Pages 11 and 12 describe the travails of Dr. Gupta Patel and his ex-wife Connie. We are introduced to Dr. Patel in the following passage:

Next, Dr. Gupta Patel was back making his annual cameo appearance to try to stop his six-thousand-dollar monthly maintenance payments to his ex-wife. Born in Mumbai, India, he had fallen madly in love with the cute American girl at the hospital where he did his residency in 1979. Rejecting his family’s marriage traditions, he married her and they had three little kids. But he was a typical workaholic doctor at the University hospital.



According to the novel:

Connie Patel put up with the doc because he made nearly a half-million a year. Interesting how thirty-five thousand a month can cover a lot of husbandly failure. But now the kids were teenagers. There was no longer any reason to tolerate his arrogance, affairs and silence.

The passage also recounts the two times Judge Zenas had jailed Patel for failing to pay alimony. As the novel notes, “[t]he first time, Judge Z put him into the jail holdover. And—surprise—he had the six-thousand dollars in his girlfriend’s purse in the back of the courtroom. When he said, “I have no money,” what he meant was, “My girlfriend has it.” The next time he stayed in jail the full sixty days, growing a mangy beard and claiming various religious convictions no one had heard of to set up a discrimination suit against the jail and maybe even the judge.”

And the novel explained why Patel was proceeding pro se on this visit: “But no lawyer would touch his lawsuit. And now he was “pro se,” meaning he represented himself and had a fool for a client. He still owed money to his past two lawyers, and word gets around.”

A real-life Lexington ophthalmologist named Jitander Dudee, who had an unpleasant experience as a litigant before Judge Philpot read the novel and concluded the Patel character was him. And he claimed the novel defamed him by implying the following:

[Dr. Patel/Dudee] is a workaholic;
[Dr. Patel/Dudee] had been an unfaithful husband;
[Dr. Patel’s/Dudee’s] kids hate(d) him;
[Dr. Patel/Dudee] had hidden money from the court;
[Dr. Patel/Dudee] was unwilling to pay his debts.

Summary Judgment

The summary judgment motion was based on several arguments. The first was that the Patel character was a composite of hundreds of husbands/fathers who had come before the judge during his tenure. The motion pointed out that while Patel and Dudee shared some characteristics, in key ways they were distinct. For example, while both were born in India, Patel was born in Mumbai, while Dudee was born in Delhi – 750 miles away. Patel’s children were teenagers at the time of the divorce. Dudee’s oldest child was 4. The Patel character had moved from Lexington to the small town of Corbin, Kentucky. Dudee had not even left the marital home.

Philpot argued that under the “innocent construction” rule, the court had to adopt a non-defamatory meaning if one was available. This negated the “question of fact” standard that would ordinarily doom a summary judgment motion. Here, Philpot argued, a dispute of fact was required to be resolved in favor of defendant. The court unfortunately did not adopt this argument.

But the news was better for Philpot on his other arguments. As to the statements about Patel/Dudee being a workaholic and hated by his kids, the court found these could not support a libel claim. They were non-verifiable hyperbole.

The remaining allegations concerning his infidelity, his “hiding assets (which was based on the passage about his girlfriend having the money) and his failure to pay debts were all borne out in the underlying domestic relations case. That is, even if Patel was Dudee, the description lined up with facts established in the lawsuit. Based on the truth of the statements, the court granted summary judgment.

In addition, the court found that Dudee had failed to establish any harm to his reputation. His deposition testimony established that fact beyond any doubt. And having found the libel claims legally deficient, the court had little trouble dismissing the false light and intentional infliction of emotional distress as well. Plaintiff intends to appeal the decision, so this is not the final word. But it is a first step in the right direction.

Jack Greiner, a partner at Graydon Head & Ritchey in Cincinnati, OH, represented defendant. Plaintiff was represented by Stephen E. Imm, Finney Law Firm, Cincinnati, OH.



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Barbara Wall, V.P., Gannett Co., Inc.

New York Court Dismisses Defamation Claim on Fair Report Grounds

By Abigail B. Everdell

On April 2, Justice David B. Cohen of New York Supreme Court dismissed libel claims brought by “Diva of Distressed” Lynn Tilton and her private equity firm Patriarch Partners (“Plaintiffs”) against Mergermarket U.S. Ltd, publishers of the financial news publication *Debtwire*, and reporter Kyle Younker. [Patriarch Partners v. Mergermarket](#), No. 160379/2016 (N.Y. Sup. April 2, 2018).

In its opinion, the court nicely underscored several principles relating to the fair report and opinion doctrines, confirming that: (1) assertions made in legal proceedings may be safely reported even if the underlying truth of the assertions is questionable; (2) the press should not be subjected to liability simply because an article’s subject issued a denial; and (3) statements speculating as to future consequences of reported facts are nonactionable opinion.

The claims at issue arose out of a December 2016 *Debtwire* article reporting on a privilege log and affirmations filed in an SEC enforcement proceeding against Plaintiffs, in which SEC attorneys characterized logged communications relating to Plaintiffs as concerning “ongoing” investigations by the Department of Justice and Department of Defense. Plaintiffs claimed four statements in the *Debtwire* article were defamatory:

1. “Tilton, Patriarch, subject of DOD, DOJ investigations - SEC” (the article’s headline);
2. “Lynn Tilton and her private equity fund Patriarch Partners have been subject to multi-year investigations conducted by the Department of Justice and Department of Defense”;
3. “Moreover, fallout from any government investigation could have implications for disputes over boardroom and executive control of these companies”; and
4. “A criminal case would potentially give oppositional Zohar [a set of funds managed by Patriarch] holders a stronger argument in favor of their management and board choices, and for removing Tilton as CEO of the many companies she still controls.”

The court nicely underscored several principles relating to the fair report and opinion doctrines.

Plaintiffs argued that the privilege log and accompanying documents could not reasonably be read as stating or implying that any cited investigation was “ongoing,” noting that the SEC filings were vague and oblique, and the documents cited as concerning investigations by the DOD and DOJ were from no later than 2015, over a year before the privilege log was filed. In particular, Plaintiffs emphasized that the judge presiding over the SEC proceeding subsequently found that the SEC had not submitted evidence sufficient to establish that there were, in fact, ongoing investigations.

In his opinion, Justice Cohen held that regardless of the underlying truth of the matter, the SEC's *assertion* that there were ongoing investigations, as set out in affirmations accompanying the privilege log, was sufficient for the article to constitute a privileged "fair and true report" under Section 74 of New York's Civil Rights Law. The court also noted that the article had linked to the underlying SEC filings and had cited all the information plaintiffs claimed undermined the SEC's claims, including the relevant portion of the SEC judge's ruling, and the entirety of a statement of denial from Plaintiffs' attorney. The court concluded:

The SEC's submissions could lead a reader to believe that the SEC's attorneys' position was that there were ongoing government investigations of plaintiffs, by the DOJ and the DOD, that carried on for more than a year. The article is a substantially accurate reflection of the SEC's position in the proceeding, and is therefore shielded by CRL [§] 74. . . . That plaintiffs' counsel and its public relations firm had informed Debtwire that there was no DOJ or DOD investigations, then, or ever, does not change this determination. ***While acknowledging that it can be extremely difficult for anyone to demonstrate the absence of something, including a government investigation, subjecting the press to defamation damages, based on a denial by the subject of the article, could potentially present an unwarranted deterrent to the flow of timely information to the public.*** (Emphasis added).

Finally, the court considered the latter two statements at issue, which speculated as to the potential "fallout" of an investigation and the effect a "criminal case" could have on existing disputes concerning Plaintiffs' Zohar funds. The court rejected Plaintiffs' argument that these statements falsely implied the existence of a criminal investigation, holding that "in context, both comments are opinions about unspecified, speculative and vague implications, and either hypothetical, or mere prediction about potential future events. . . . Such supposition, especially where, as here, the underlying basis upon which the statements are made is included, falls into the category of nonactionable opinion."

Defendants Mergermarket (U.S.) Ltd. and Kyle Younker were represented by Elizabeth A. McNamara and Abigail B. Everdell of Davis Wright Tremaine LLC. Plaintiffs Patriarch Partners LLC and Lynn Tilton were represented by Andrew T. Miltenberg and Tara J. Davis of Nesenoff & Miltenberg LLC, and Thomas A. Clare, Elizabeth M. Locke, and Andrew C. Phillips of Clare Locke LLP.

New from MLRC

2018 Report on Trials and Damages

Our latest report includes nine new cases from 2016 and 2017. Our trial database now includes trial and appellate results in 650 cases from 1980-2017.

Texas “Revenge Porn” Law Violates First Amendment

Law Does Not Require Intent to Cause Harm to Depicted Person

By Jim Hemphill

Texas’ crackdown on spurned lovers who share explicit photos or videos of their ex-inamoratas hit a roadblock when an appellate court held the state’s criminal “revenge porn” law unconstitutional in April.

The opinion does not directly address the core conduct prohibited by the law – the sharing of intimate material by a former partner without the depicted’s consent – but holds that the statute prohibits enough other constitutionally protected conduct to render it facially unconstitutional. [Ex parte Jones](#), 2018 WL 1835925 (Tex. App. – Tyler April 18, 2018, no pet. h.).

The case arises out of the attempted prosecution of one Jordan Bartlett Jones. Because the Court of Appeals addressed a facial challenge to the statute, Mr. Jones’ precise conduct is not described by the court.

With the advent of digital photography and electronic communications, the problem of “revenge porn” has received extensive attention (though the concept has been around for a while: see *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 10 Media L. Reporter 2113 (5th Cir. 1984), in which a woman successfully sued *Hustler* for invasion of privacy after it published a stolen Polaroid depicting her in an unclothed state). The Texas Legislature adopted a statute establishing that a person commits an offense if that person:

- (1) without the effective consent of the depicted person, the person intentionally discloses visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct;
- (2) the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;
- (3) the disclosure of the visual material causes harm to the depicted person; and
- (4) the disclosure of the visual material reveals the identity of the depicted person in any manner, including through:
 - (A) any accompanying or subsequent information or material related to the visual material; or
 - (B) information or material provided by a third party in response to the disclosure of the visual material.

Tex. Penal Code § 21.16(b). Violation of the statute is a state jail felony, generally punishable by 180 days to two years in a state jail, as opposed to a prison, and a fine of up to \$10,000, Tex. Penal Code § 12.35.

Jones challenged his prosecution via a pretrial writ of habeas corpus. The appellate court noted that the Texas Court of Criminal Appeals – the state’s high court in criminal matters – has held that the First Amendment protects the creation and communication of visual images. In that case, the Court of Criminal Appeals held unconstitutional the state’s statute purporting to criminalize certain “improper photography,” defined to include photography or video recording performed “with intent to arouse or gratify the sexual desire” of the photographer, without the consent of the subject. *Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014).

The *Jones* court reviewed the established law setting up strict-scrutiny review of content-based restrictions on speech, including the requirement that such restrictions be narrowly drawn by using the least restrictive means of achieving the asserted government interest. At oral argument, the State conceded that the statute was subject to strict scrutiny.

In light of that concession, the appellate court constructed a hypothetical scenario in which a person could be subject to criminal liability despite lacking knowledge that the image in question was distributed without consent. The hypothetical involves a person, “Adam,” distributing an image of his ex, “Barbara,” whom Adam knew did not consent to the image’s distribution. Adam distributes the image to Charlie, who in turn shows it to his friend Donna, who is a coworker of Barbara’s. Donna shows the image to Barbara’s boss, who fires Barbara.

The court noted that in the hypothetical, Charlie and Donna are both subject to prosecution, even if they “had no reason to know that the photograph was created under circumstances under which Barbara had a reasonable expectation that the photograph would remain private.” Charlie could be prosecuted, the court noted, even if he had no idea who Barbara was: for all he knew, she could be a professional model who consented to the photo’s creation and distribution. In a footnote, the court stated that “[t]he statute does not require that there be an intent to cause harm to the depicted person.”

The statute could be narrowed, the court noted, “by requiring that the disclosing person have knowledge of the circumstances giving rise to the depicted person’s privacy expectation.”

The statute could be narrowed, the court noted, “by requiring that the disclosing person have knowledge of the circumstances giving rise to the depicted person’s privacy expectation.” Absent such a requirement, the statute purports to criminalize conduct protected by the First Amendment – the sharing of photographs or videos, which are protected expressive materials – and thus was not sufficiently narrow. The court rejected the State’s argument that the material covered by the statute is “contextually obscene” and thus not constitutionally protected. Whether material is obscene is a fact question, the court noted, and because Texas already criminalizes the distribution of obscene material, the “revenge porn” statute is entirely redundant if it applies only to material found to be obscene.

The Tyler Court of Appeals is one of fourteen geographically-based intermediate courts of appeals in Texas, covering 17 counties (out of Texas’ 254 total) in East Texas. The decision is not binding outside that geographical area, but may be persuasive. The State may seek rehearing and/or file a petition for discretionary review with the Court of Criminal Appeals.

Jim Hemphill is a shareholder with MLRC member firm Graves Dougherty Heaton & Moody in Austin, Texas and is the co-chair of the MLRC DCS Litigation Committee. Neither he nor his firm were involved in Ex parte Jones.

North Carolina University Must Disclose Student Misconduct Records

Release Not Barred by FERPA

The University of North Carolina at Chapel Hill (“UNC”) must disclose to the media disciplinary records of students responsible for sexual misconduct. [DTH Media v. Folt](#), 2018 N.C. App. LEXIS 402 (N.C. App.) (April 17, 2018) (Tyson, Bryant, and Elmore, JJ). The court rejected UNC’s argument that the Family Educational Rights and Privacy Act (FERPA) preempts state public records laws.

The unanimous ruling reversed, in part, the lower court’s determination that UNC has absolute discretion over releasing such information. No. 16 CVS 14300 (May 9, 2017) (Baddour, J).

Background

Media organizations DTH Media Corporation, Capitol Broadcasting Company, Inc., The Charlotte Observer Publishing Company, and the Durham Herald Company (collectively, “plaintiffs”) sent a public records request to UNC in September of 2016 for public records regarding UNC students and employees whom the university had found responsible for rape, sexual assault, or related conduct. UNC denied the request on October 28, 2016, in a letter signed by Joel G. Curran, the Vice-Chancellor for Communications and Public Affairs. According to Curran, the records plaintiffs requested were “educational records” as defined by the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2017) (“FERPA”), and thus exempt from the disclosure under North Carolina’s Public Records Act, N.C. Gen. Stat. §§ 132-1 to -11 (2017) (the “Public Records Act”). Curran wrote that UNC denied the request because doing otherwise, he believed, would devastate victims and the campus community as a whole.

See Adam Owens, News Organizations File Suit Against UNC-CH For Access to Sexual Assault Records, WRAL.com (Nov. 21, 2016), available at <https://www.wral.com/news-organizations-file-suit-against-unc-ch-for-access-to-sexual-assault-records/16264431/>.

Plaintiffs filed suit on November 21, 2016, under the Public Records Act and the North Carolina Declaratory Judgments Act, N.C. Gen. Stat. §§ 1-253 to -267, against Carol Folt, in her official capacity as UNC Chancellor, and Gavin Young, in his official capacity as Senior Director of Public Records (together, “UNC” or “defendants”). Plaintiffs sought, in part, a preliminary order compelling UNC to produce the records at issue and an order declaring that the requested records are public records under the Public Records Act. After a state-mandated mediation, the plaintiffs narrowed the scope of their request to the following: (a) the name of any person who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser sexual misconduct by the relevant UNC committees; (b) the date and nature of each violation for which each such person was found responsible; and (c) the sanctions imposed on each person for each violation.

The trial court denied their request on May 9, 2017, as it related to UNC students. (The court granted the portion of the request pertaining to disciplined UNC employees, and UNC has since provided those records to the plaintiffs.) The court concluded, and neither party disputed on appeal, that the requested records are “public records” under the Public Records Act, which provides a broad right of access to records in possession of public agencies unless such records are specifically exempted from the Act’s mandate. According to the court, FERPA, which conditions federal funds for public or private educational institutions on their compliance with requirements relating to the safekeeping of student educational records, provides such an exception.

FERPA permits the release of certain student disciplinary records in particular situations, among them the release of “the final results of any disciplinary proceeding . . . if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution’s rules or policies with respect to such crime or offense.” 20 U.S.C. § 1232g(b)(6)(B). The defendants argued, and the court agreed, that this FERPA provision impliedly grants and requires educational institutions to exercise discretion in deciding to release or withhold student disciplinary records undoubtedly exempt from FERPA’s non-disclosure requirements. In this view, to the extent North Carolina’s Public Records Act conflicts with FERPA’s implied grant of discretion to UNC, it is preempted by federal law.

The Court of Appeals unanimously reversed the lower court judgment. Stressing that it failed to find any state or federal authority, including caselaw in other jurisdictions, that interpreted § 1232g(b)(6)(B), the FERPA provision cited by the lower court, as defendants suggested—namely, as providing an educational institution like UNC “an express absolute discretionary authority over” releasing FERPA-exempt student disciplinary records—the court rejected that construction, noted that the notion of absolute discretion was undercut by other FERPA provisions, and adopted instead the plain meaning of the provision, allowing disclosure. So interpreted, FERPA—which allows disclosure—and North Carolina’s Public Records Act—which mandates disclosure—are not in conflict.

The court, which also rejected UNC’s argument that FERPA pre-empts the Public Records Act with respect to the Act’s mandatory disclosure requirements, ruled that FERPA only authorized disclosing “the name of the student, the violation committed, and any sanction imposed by the institution on that student” from the general rule of non-disclosure of disciplinary records. 20 U.S.C. § 1232g(b)(6)(B). Because § 1232g(b)(6)(B) “otherwise specifically provide[s]” that only the information listed therein is subject to disclosure, the court ruled that the dates of student offenses, which plaintiffs had requested, are not subject to disclosure under the Public Records Act. The remaining information requested, however, must be disclosed.

The Court of Appeals reversed the portion of the lower court’s judgement contrary to its holding. The Court of Appeals’ opinion will be formalized as a mandate on May 7, 2018, at which point the case will be remanded to the trial court. UNC may, in the meantime, petition the North Carolina Supreme Court to accept the case for discretionary review.

Plaintiffs were represented by Hugh Stevens and Michael Tadych, Stevens Martin Vaughn & Tadych, Raleigh, NC.

Court Dismisses Copyright Claim over Chelsea Clinton Children's Book

Plaintiff's Use of Historical Figures and Quotations Not Protectable

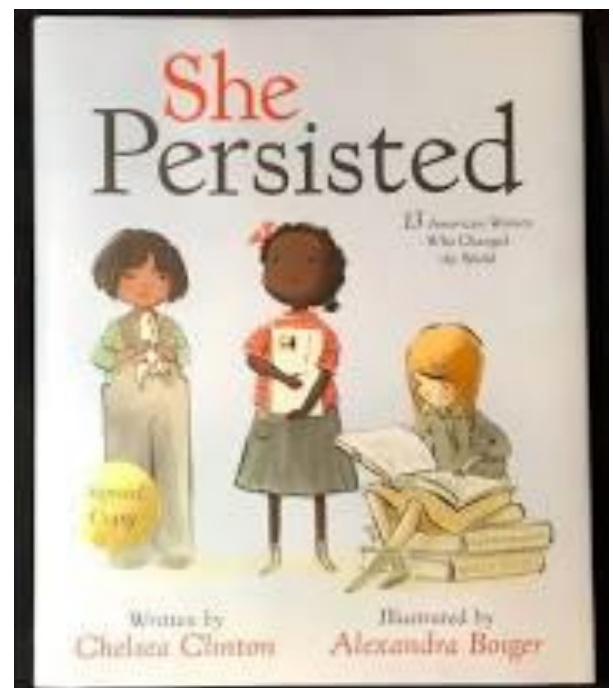
By Adam Lazier and Laura Handman

In dismissing a copyright claim against Chelsea Clinton's best-selling children's book, a court recently reaffirmed the important principle that copyright law does not give anyone a monopoly over history. [Kimberley v. Penguin Random House](#), 17-cv-5107, 2018 WL 1918614 (S.D.N.Y. Apr. 19, 2018).

Background

The case arose out of Clinton's children's book *She Persisted: 13 Women Who Changed the World*, which became an instant success when published last year. *She Persisted* presents short illustrated biographies of thirteen famous American women who overcame adversity to "change the world," including a notable quotation from each woman, and challenges readers to "remember these women" and to "persist" as they did. The *pro se* plaintiff, Christopher Kimberley, claims to be the author of an unpublished three-volume children's book called *A Heart is the Part That Makes Boys & Girls Smart*. That book includes a section called the "Quotable Questionnaire," a quiz which is comprised of sixteen quotations from a total of fourteen notable historical figures. The reader must turn to the end of the book to find another list identifying the source of each quotation.

Kimberley sued Clinton, her publisher, and a publishing executive in July 2017, claiming that *She Persisted* infringed his copyright in *A Heart is the Part* because the works include three of the same famous women – abolitionist Harriet Tubman, writer and activist Helen Keller, and pioneering journalist Nellie Bly – and both use the same quotation from Bly, "I have never written a word that did not come from the heart. I never shall." The defendants moved to dismiss, arguing that there was no substantial similarity between the two works. Any similarities, the defendants argued, related to elements of *A Heart is the Part* that are not protected by copyright.



In dismissing a copyright claim against Chelsea Clinton's best-selling children's book, a court recently reaffirmed the important principle that copyright law does not give anyone a monopoly over history.

Motion to Dismiss

Judge Swain of the Southern District of New York agreed, and dismissed the case on April 19. A plaintiff suing for copyright infringement must usually prove that “an ordinary observer” would see substantial similarities between the works. But, as Judge Swain noted, not all similarities count: where the works involve both protectable and unprotectable elements, the inquiry becomes “more discerning” and courts must ask “whether the protectable elements, standing alone, are substantially similar.”

This was fatal to Kimberley’s claim because, as Judge Swain wrote, he “has a valid copyright in neither the historical figures themselves nor in the quotations attributed to them.” He could not establish substantial similarity by pointing to the fact that three famous women from his Quotable Questionnaire also appeared in *She Persisted* because “[r]eferences to historical figures and events are not protectable elements, as ‘no claim of copyright protection can arise from the fact that plaintiff has written about such historical and factual items.’” Nor, according to Judge Swain, “is ‘verbatim reproduction of the statements of quotations of others’ entitled to copyright protection,” meaning that Kimberley could not fashion a viable claim from the appearance of the same Nellie Bly quotation in both works. In fact, Kimberley’s Certificate of Registration from the Copyright Office specifically said that his copyright did not cover “preexisting quotations from a variety of sources.”

Kimberley also claimed that the works shared more abstract similarities – that *She Persisted* took the “conceptual core” of *A Heart is the Part*. Although he never explained exactly what this “conceptual core” was, Judge Swain held that it did not matter because Kimberley could not copyright an idea. His rights therefore did not “extend to the idea of basing a children’s book upon historical figures and quotations attributed to them, but rather only to his expression of that idea.”

None of this is to suggest, of course, that a work of history – even a children’s book – is completely uncopyrightable. Elements such as a work’s selection and arrangement of historical facts or its total concept and feel may give a book about history at least “thin” copyright protection. But Judge Swain recognized that this did not help Kimberley because there was simply no similarity between those parts of his work and *She Persisted*. The works’ selection and arrangement of the historical figures, for instance, differed dramatically: The vast majority of the figures featured in each work did not appear in the other, and the three that did appear in both books were used in a different order. And their total concept and feel were also “entirely different.” Kimberley’s Quotable Questionnaire is a plain-text quiz that gives readers no additional information about its subjects. *She Persisted*, on the other hand, is much “more complex,” supplementing the quotations with detailed illustrations, biographical information, and a clear theme – encouraging “a new generation of girls” to “pursue dreams of their own.”

Laura Handman and Adam Lazier of Davis Wright Tremaine represented Chelsea Clinton, Penguin Random House and Jennifer Loja, with Carolyn Foley, Vice President and Associate General Counsel of Penguin Random House.

TVEyes Blinded By Second Circuit

By Judy Endejan

On February 27, 2018, the U.S. Court of Appeals for the Second Circuit ruled that the media monitoring service, TVEyes, Inc., infringed upon the Fox News Network's content. [Fox News Network, LLC v. TVEyes, Inc.](#), 883 F.3d 169 (2d Cir. 2018). For more than four years, Fox News Network has been claiming that the video service offered by TVEyes infringes upon Fox's copyrighted audiovisual content.

Background

TVEyes offers a for-profit service that continuously records vast quantities of television programming for more than 1,400 television and radio channels. By copying the closed-caption text that accompanies the recorded content, TVEyes created a text searchable transcript that allows a client to input a search term and retrieve a list of video clips that mention the term. TVEyes offers two core functions: the "search function" associated with its text searchable database and the "watch function" that allows TVEyes' clients to view up to ten minutes of unaltered video clips of copyrighted content. The only function challenged on appeal is the watch function.

Fair Use Analysis

The Second Circuit engaged in a classic fair use analysis under 17 U.S.C. § 107 concluding, on balance, that TVEyes' watch function service is not a justifiable fair use.

The court considered the first statutory factor – the "purpose and character of the secondary use." The court relied upon *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) as a starting point. In *Google Books*, a consortium of libraries collaborated to make digital copies of millions of books, many of them under copyright. Google pooled these copies into a text searchable database allowing the retrieval of "snippets" of a book when a user entered a search term. *Google Books* held that Google's text searchable database served a transformative purpose. The court found that TVEyes' watch function is at least somewhat transformative, like the service in *Google Books*, because it enhances efficiency by enabling TVEyes' clients to view all Fox programming and select a particular topic of interest without having to view all of the recorded programs. The court noted, however, that the commercial nature of TVEyes' service weighs against defining a fair use, but nonetheless concluded that the first statutory factor favored TVEyes "albeit slightly."

The court then dismissed the second statutory factor – the nature of the copyrighted work – which plays no significant role in the determination of fair use. The court rejected TVEyes' argument that the factual nature of Fox's content favors a finding of fair use because "it cannot seriously be argued that ... others may freely copy and re-disseminate news reports."

The fourth statutory factor – the effect upon the potential market for a value of the copyrighted work – favored Fox, finding that TVEyes deprives Fox of revenues to which Fox is entitled to as the copyright holder.

The court found that the third statutory factor – the amount and substantiality of the portion used in relation to the copyrighted work as a whole – favored Fox. TVEyes makes available virtually the entirety of the Fox programming that TVEyes users may want to see and hear. Unlike the snippet displayed in Google Books, TVEyes redistributes Fox’s news programming in 10-minute clips, which the court found to be “extensive.”

The fourth statutory factor – the effect upon the potential market for a value of the copyrighted work – favored Fox, finding that TVEyes deprives Fox of revenues to which Fox is entitled to as the copyright holder.

The court then weighed all of the four statutory factors together concluding that TVEyes’ watch function service is not justifiable as a fair use because TVEyes is “unlawfully profiting off the work of others by commercially re-distributing all of that work that a viewer wishes to use without payment or license.”

Because the District Court shaped an injunction under the mistaken assumption that the watch function had fair use protection, the Second Circuit remanded the case to the District Court to revise the injunction in accordance with the court’s opinion. This injunction should enjoin TVEyes from offering the infringing watch function and its subsidiary features (the ability to archive, download, email, and view clips after conducting a date/time search).

Judy Endejan is a partner at Garvey Schubert Barer in Seattle, WA, and is co-chair of MLRC’s Internet Law Committee. Fox News Network was represented by Dale Cendali, Kirkland & Ellis, New York. TVEyes was represented by Kathleen Sullivan, Quinn Emanuel Urquhart & Sullivan, New York.

Legal Frontiers

in

Digital Media

May 17-18, 2018

Mission Bay Conference Center
San Francisco

Keynote by Kara Swisher

**Hosting and Unhosting
Objectionable Content**

**Combatting Internet
Disinformation Campaigns**

**Women in Tech:
Is Climate Change Coming?**

**How Algorithms & Machine
Learning Work**

**Scraping By with
the Computer Fraud
& Abuse Act**

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

*Access to Parole Hearings, Serious Harm Standard,
Right to Be Forgotten, and More*

By David Hooper

The Sun Achieves Transparency in Parole Hearings

[Application of DSD, NBV, Mayor of London and News Group Newspapers v The Parole Board of England and Wales](#) (2018) EWHC 694 (admin)

In 2009 a London black cab taxi driver called Warboys had been given an indefinite sentence with a minimum period to be served in jail of eight years for 19 sexual offences including rape against 12 victims. The case was notorious because it was suspected that the cab driver who administered stupefying drugs to the women in his cab had probably committed over 100 offences. The case had also called into question the worldwide reputation of licensed London cabs for safety. After serving the minimum period of eight years the defendant Worboys had become a model prisoner and had decided to express remorse. He successfully pulled the wool over the eyes of the Parole Board and they scheduled his release.

The decision was challenged by way of judicial review by two of the victims and by the Mayor of London, although ultimately the court decided that the Mayor of London did not have sufficient standing to bring the proceedings.

On the merits of the decision the court felt that the Parole Board should have undertaken further enquiries into the circumstances of Warboys' offending and the genuineness of his remorse. They should also have obtained material from the Crown Prosecution Service to challenge the assertions made by Warboys. The court felt in other words that the whole decision-making process had been inept and the Chair of the Parole Board resigned shortly afterwards.

The importance of the case from a media perspective was the challenge made by the Sun newspaper against Rule 25 of the Parole Board Rules 2016 which provides that information about the proceedings under the Rules and the names of the persons concerned in the proceedings must not be made public. Rule 25 also provides that breach of the Rules would be actionable as a breach of statutory duty on the part of any person who suffered loss or damage as a result. The Sun claimed that Rule 25 was ultra vires and a breach of the principle of open justice in criminal-related proceedings on a matter of clear public interest.

The court agreed with the submissions of the Sun in respect of Rule 25 which had prevented any reasons for the controversial decision of the Parole Board being made public. The paper sought to speak for the public who wanted to know why this notorious rapist was being let out

There was no obvious reason why the open justice principle should not apply to the Parole Board in the context of providing information on a matter of public interest.

so early. The court considered that there was no obvious reason why the open justice principle should not apply to the Parole Board in the context of providing information on a matter of public interest. The court indicated that the Government might wish to revise the Parole rules and that it should be possible to do so while preserving legitimate Article 8 privacy rights of the parties. The Government fired the head of the Parole Board and has indicated that they will introduce rules which will provide transparency for Parole Board hearings. Worboys is unlikely to be anywhere near a London black cab for some time.

Supreme Court Appeal in *Lachaux v Independent and Evening Standard* on Proof of Serious Harm

Section 1 Defamation Act 2013 introduced a requirement in defamation cases that the claimant should have suffered or was likely to suffer serious harm in consequence of the published libel. Mr Justice Warby who heard the case at first instance ruled that the issue of whether or not there had been or was likely to be serious harm as a result of the publication of the libel was a matter upon which evidence could be heard. [Lachaux v Independent Print Ltd \[2015\] EWHC 2242 \(QB\) \(30 July 2015\)](#).

At that stage Lachaux was also taking action against the Huffington Post in respect of its considerably smaller publication in England. In fact, Mr Justice Warby was satisfied that there was evidence of serious harm in that the case involved accusations of domestic violence and kidnapping. The case was then heard by the [Court of Appeal \(2017\) EWCA Civ 1394](#).

The issue was whether it was incumbent on a claimant to produce evidence of serious harm, which could place a significant evidential burden on the claimant. The Court of Appeal was determined to avoid such preliminary hearings which could be very costly and could delay the determination of the case. They ruled that a preliminary hearing on the issue of serious harm would usually not be necessary and that if there was an issue of serious harm, it was best resolved at trial. Their approach was that if the words bore a serious defamatory meaning, an inference of serious reputational harm could normally be drawn without the need for evidence of actual harm.

Unusually the Independent and Evening Standard as a condition of being granted permission to appeal to the Supreme Court are not entitled to seek any order for costs against Lachaux, should they be successful on the appeal and they have been ordered to provide security for costs in the sum of £85,000 which might be some indication that the committee of the three Supreme Court judges deciding the issue of permission to appeal felt that the prospects of success of the newspapers were on the margin.

The defence argument is that the requirement of serious harm introduced by Section 1 Defamation Act 2013 has effectively been neutralised so that it was not a change in the law but effectively a restatement of the threshold indicated in *Thornton v Telegraph*. It is a case which the media industry in England will be following with great interest.

The defence argument is that the requirement of serious harm introduced by Section 1 Defamation Act 2013 has effectively been neutralised.

The Right to Be Forgotten

In April 2018 Mr Justice Warby decided two cases brought by businessmen seeking to have details of their convictions some years previously de-listed and de-indexed by Google. These were the cases suitably anonymised as [NT1 and NT2 v Google LLC](#). This was the first consideration by an English court of the European Court of Justice's 2014 [Google Spain decision](#).

The ruling of Mr Justice Warby showed that this was likely to be a fact specific exercise and he indicated the principles that were likely to govern such cases. Google had declined to de-list either case.

NT1 was a businessman who was convicted of a conspiracy to account falsely in the late 1990s and he had been sentenced to four years' imprisonment. At the time of his conviction that sentence would have been beyond the maximum of 2½ years which enabled a Defendant to take advantage of the provisions of the Rehabilitation of Offenders Act 1974 under which a convicted Defendant was entitled to treat himself as a rehabilitated person if he had passed a number of years without conviction. The 2½ year period had subsequently been extended so that NT1 retrospectively fell within the revised limits of the Rehabilitation of Offenders Act and so he had become a rehabilitated person.

NT2 was a businessman who had been targeted in respect of his business practices by environmental campaigners and he had responded by unlawfully hacking into their computers. He had been sentenced to six months' imprisonment some 10 years ago for conspiring to intercept communications. He was a rehabilitated person, not having been convicted of any crime in the interim.

The issue was whether the listing of these convictions - for the most part accurately in contemporaneous news reports but also in a book - was a justified interference with the privacy and data protection rights of NT1 and NT2. Mr Justice Warby felt that there was a legitimate interest in processing this data, which after all was no more than reporting the facts of the conviction of these businessmen which had led to sentences of imprisonment. He rejected the contention that Google's actions in listing the convictions fell within the journalistic exemption under Section 32 Data Protection Act which permits journalists to retain data required for journalistic purposes under the conditions set out in the section. Google were not in the judge's view acting as journalists in listing these reports.

The question which Mr Justice Warby had to decide was whether the continued listing of this material was necessary in pursuance of a legitimate interest or whether it was unwarranted on the grounds of unfairness and prejudice. The process was, he felt, similar to the Article 8 privacy and Article 10 freedom of speech balancing exercise. One looked at the personal data by reference to the data protection principles set out in the Act. The relevant principle here was that the personal data had to be adequate, relevant and not excessive. In this context the Judge used the criteria set out in the 13-point checklist contained in the EU Article 29 Working Party Committee. [NT1 and NT2 v Google LLC](#) at para. 36-40.

The Judge decided the case by an intense focus on the facts relating to each man. The Judge accepted that there could come a moment when a Defendant was entitled to a reasonable expectation of privacy in relation to court proceedings. There had earlier been a time where

with the passage of years it had actually been relatively difficult to obtain details of a person's previous convictions unless one had the requisite authority. Now, of course, one had a situation where these details would pop up on virtually any search against the Defendant's name. The listing was therefore potentially very damaging to their business lives. The Judge accepted that there could come a moment when a Defendant would have a reasonable expectation of privacy in relation to court proceedings in the past. On the other hand, even if a Defendant was rehabilitated within the terms of the Rehabilitation of Offenders Act, there might be a public interest in the public being lawfully entitled to know through such searches of the conviction particularly if it was a case of dishonesty or a sexual offence, which could be of legitimate interest to the public. There might also be a higher threshold of public interest if the Defendant remained a public figure. One would weigh up factors such as the behaviour of the Defendant subsequent to the conviction. Had he, for example, shown remorse and what area of business was he now operating in in the sense that the public might have a legitimate interest in knowing about his past and had for example the Defendant sought to give a false impression about his previous character?

The Judge applied these tests from the Article 29 checklist to his consideration of the facts. He declined to order the de-listing of the conviction of NT1 taking into account the fact that NT1 had refused to accept culpability and had published material online purporting to be of good character in relation to his current business activities.

NT2 however had not acted out of financial gain in regard to his conviction and had shown remorse. There was also a significant difference in the severity of the sentences imposed on the two men. The Judge did order the de-listing of the conviction of NT2.

The Judge declined to award damages under the Data Protection Act taking the view that there was a defence under Section 13(3) whereby it was a defence to show that the Defendant took such care as in all the circumstances was reasonably required to comply with the requirement concerned. Equally the Judge declined to award damages for misuse of private information.

It remains to be seen whether there is an appeal against the decision. However with the growth of the reputation management industry it is likely that there will be ever more applications for de-listing and these are likely to lead to further litigation and a further consideration of the criteria for de-listing. The information will still exist but it will be difficult to discover – as in the old days.

With the growth of the reputation management industry it is likely that there will be ever more applications for de-listing and these are likely to lead to further litigation.

Regulation of the Press in the UK: Application of News Media Association v Press Regulation Panel

Lord Justice Underhill gave the News Media Association permission to appeal against the rejection of their application that the decision of the Press Recognition Panel to recognise Impress as the press regulator should be set aside. Impress, it may be recollected, is notable in that it is a regulator with few if any media outlets of any significance to regulate. It also has the dubious distinction of being financed by a family trust of Max Mosley whose interest in

regulating the press seems to have grown when the News of the World exposed his Saturday afternoon frolics with some five female dominatrices, although he had successfully persuaded the trial judge that the use of prison uniforms was merely part of the fun and not in any way to be linked to the activities of his father Sir Oswald who had been leader of the British Fascists or concentration camps.

IPSO, the Independent Press Standards Organisation, on the other hand represents 1,500 print titles and 1,100 websites. Lord Justice Underhill had indicated that the grounds of appeal did not strike him as very compelling but that he could not say that there was no prospect of success.

In March 2018 the Government announced that it would not be proceeding with part two of the Leveson Inquiry. Part two was to inquire into general wrongdoing and criminal activity by the UK press and links between the police and the media. Leveson had produced his first report in 2012 and had made certain recommendations as to how the press should behave in future. The view appears to have been taken by the Government that the press is capable of putting its house in order and that another costly and ponderous report would not serve any useful purpose. That appears not to be the view of Sir Brian Leveson and there have been vociferous protests by the self-appointed pressure group Hacked Off. The Government has also announced that it will not implement section 40 of the Crime and Courts Act which provided for the press to be liable to pay the costs of libel claims against them, even if they were successful, if they failed to register with a recognised regulator. There have been various attempts in the House of Lords to re-introduce such a provision tacked onto data protection legislation but those are unlikely to be successful at present.

An application to judicially review a decision by the Independent Press Standards Organisation concerning a politically –charged complaint about the reporting of the celebration of the 100th anniversary of the Balfour Declaration (whereby the British government of the day indicated that it would look favourably on the creation of a Jewish homeland) failed in front of Mr Justice Warby on the basis that IPSO had not erred in law. Mr Justice Warby left open the question of whether decisions of IPSO could be the subject of judicial review given that it was a private body operating as a voluntary self-regulating scheme as opposed to a statutory body. Given the degree of public interest in the matter the judge thought that it was possible that such decisions could be judicially reviewed but that is a matter for consideration in a later case. A court would be unlikely to overturn such regulatory decisions in the absence of a clear error of law and certainly not simply because it might have reached a different decision on the facts.

Number of Defamation and Privacy Actions

The statistics appear to indicate a continuing decline in the number of libel actions brought in England. 49 libel actions were heard in the year ending June 2017 as opposed to 86 three years ago according to recently reported research by Thomson Reuters. The figures are low and make it that much more difficult to analyse in detail but the trend of fewer defamation actions is clearly apparent. Newspapers were defendants in 22% of all reported defamation cases as opposed to 50% 10 years ago. Only 6% of UK defamation claimants were celebrities as opposed to 32% 10 years ago. It appears that there has also been a decline in the number of

foreign celebrities bringing actions against UK media which is likely to be due in part to jurisdictional changes in the Defamation Act 2013 and the fact that the law of privacy provides a more effective remedy in terms of suppressing adverse publicity. Privacy actions are swift and are very much more likely to produce an interlocutory injunction and can where appropriate be brought anonymously. They are now the preferred weapon of choice.

Research carried out by Olivia O'Kane of Carson McDowell shows a similar decline in libel actions in Northern Ireland in that there were 12 such cases in January to December 2017 as opposed to 42 in the previous year. That is welcome news for defendants as there had grown up an industry of defamation forum shopping in the province. The Irish Republic remains a popular jurisdiction for forum shopping libel claimants and is additionally the jurisdiction where various social media companies are based in Europe.

[As reported in Inform](#), in England the Ministry of Justice has produced statistics indicating that there were 14 applications for interim privacy injunctions of which 11 were granted and three refused as opposed to three in 2016. One therefore gets an overall picture of claimants moving from bringing defamation claims to choosing to sue for misuse of private information or breach of the Data Protection Act and such claims are likely to increase with the implementation of the GDPR in May 2018.

Ride-Along Claims

Although there have been a number of cases where the press have been remarkably well-informed about impending police raids, the most notable of which was when the daughter-in-law of the disgraced tycoon Robert Maxwell was filmed at her Chelsea home during the arrest of her husband threatening to call the police to disperse the press, only to discover that the police were there hand in glove with the media, such behaviour has seldom led to litigation. A claim is now before Mr Justice Mann and final submissions are due in early May alleging misuse of private information and damages for breach of the Data Protection Act bought by the aging but ever youthful 77-year old pop-star Sir Cliff Richard.

Sir Cliff was falsely accused of sexual offences and no charges were ever brought against him. The South Yorkshire Police did however raid his home in a search for evidence but unwisely did so accompanied by a BBC helicopter. A reporter at the BBC had learnt about the police enquiries and some form of agreement was seemingly reached whereby in return for the BBC not disclosing that such an investigation was under way they would be permitted to film the search.

The media coverage was detailed and intrusive. South Yorkshire Police embarrassed by their cooperation with the BBC have admitted liability and paid very substantial damages to Sir Cliff. The BBC has disputed any liability on their part justifying their actions on the grounds of reporting a matter of great public interest. Judgment is likely to be reserved. The BBC may not be entirely sanguine in view of some of the claims about the intrusive nature of their coverage and they may feel that given his remarks in the various privacy claims in the cases of phone

Sir Cliff was falsely accused of sexual offences and no charges were ever brought against him. The South Yorkshire Police did however raid his home in a search for evidence but unwisely did so accompanied by a BBC helicopter.

hacking Mr Justice Mann may not have been the judge of first choice so far as a defendant in such a privacy claim is concerned. The case is likely to determine the limits on what the media can safely report in cases where a person has not been charged and is merely being investigated.

Privacy and Reality Television:

[Shakir Ali v Channel 5 Broadcasting Limited \(2018\) EWHC 298.](#)

This arose out of a series called *Can't Pay; We'll Take It Away* and showed the claimants being evicted from their apartment for non-payment of rent. The show was viewed by 9.5 million people. The claimants had agreed to be interviewed but the trial judge Mr Justice Arnold took the view that their consent was of a distinctly limited nature and that it had in any event been withdrawn before the programme was transmitted. The judge took the view that what was in the programme went beyond what was required for the legitimate public interest that would attach to such a programme.

The judge viewed some of the material as being voyeuristic and applying a balancing exercise he found that there had been a breach of the claimants' Article 8 rights and that they were entitled to damages for the misuse of their private information. The bulk of the coverage showed them being evicted from the house rather than entering into their private accommodation.

The judge appears to have been less than impressed by the evidence given by the claimants. He rejected their claim for aggravated damages and awarded each of the two claimants the fairly modest damages of £10,000 each. The case does show that the courts are increasingly sceptical about public interest claims in what are essentially reality entertainment shows. With more impressive claimants, damages are likely to be significantly higher.

The case does show that the courts are increasingly sceptical about public interest claims in what are essentially reality entertainment shows.

The Limits on English Injunctions: [AXB v BA \(2018\) EWHC 588](#)

Substantial damages were recently awarded in an English privacy case for fraud, harassment and misuse of private information. Given the nature of the allegations, the English Court anonymised the name of the case and ensured that the case was reported in terms which would not lead to the identification of the parties. The problem from the Claimant's point of view was that the Defendant declined to engage with and submit to the English jurisdiction in that she had left England and did not attend the court proceedings. Instead she commenced her own proceedings, which were not anonymised, in New York claiming relief on a number of grounds including emotional distress. The New York case, which it would be imprudent for me to name, given the English orders, was recently the subject of an article in this publication.

The factual background was very memorably summarised therein as being a claim about a jilted mistress whose rich married boyfriend promised her an ostrich farm in Uganda, but instead gave her a venereal disease. Whatever the truth of the matter, a Claimant such as this is

nearly always going to get an injunction in England where the case will be reported in anonymous terms and the identifying features will therefore be sealed from public view.

The problem that this case has identified once more is the territorial limits of injunctions and the risk that multi-national Claimants run, particularly if they have a reputation stretching to the United States, that their identity will be disclosed and in consequence available on the internet for those who are interested in tracking such matters. This had manifested itself in the case known in England, as PJS where a well-known celebrity had indeed managed to secure an injunction protecting his privacy and family life, but whose identity and link with the case had been widely publicised in the United States. The English Courts will give injunctions in such cases, even though they are not watertight and even if it is a case of stuffing the genie back in the bottle.

What was clear from this case was that the New York Court was not prepared to follow the practice adopted by the English Courts and to seal the proceedings so that the identity of the parties remained anonymised. Claimants in such cases are going to have to consider whether the English remedy that they almost certainly will obtain is sufficient for their purposes and worth the candle or whether it may generate, as appears to be the case in the instance of AXB, more publicity in foreign countries where a claimant does not have the benefit of anonymity. AXB's next step appears to be to seek to strike out the New York claim, but to do so he has to forfeit his hard-won anonymity obtained in the UK courts.

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Legal Frontiers

in

Digital Media

May 17-18, 2018

Mission Bay Conference Center
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Keynote by Kara Swisher

**Hosting and Unhosting
Objectionable Content**

**Combatting Internet
Disinformation Campaigns**

**Women in Tech:
Is Climate Change Coming?**

**How Algorithms & Machine
Learning Work**

**Scraping By with
the Computer Fraud
& Abuse Act**

Equustek Again: BC Supreme Court Upholds Injunction Despite US Refusal to Enforce

By Brent Arnold

The Supreme Court of British Columbia has refused a motion to overturn its own worldwide injunction requiring Google to de-list certain websites from its search results pending the outcome of an intellectual property dispute. [Equustek Solutions Inc. v. Jack](#), 2018 BCSC 610.

The decision, released April 14, 2018, is the latest step in a multi-year legal challenge that has taken the parties from the BC court to the Supreme Court of Canada and back again, and prompted motions in two countries.

The Worldwide Injunction

The issue arose from an intellectual property dispute in which an interim injunction was granted requiring Google to de-list the defendants' websites from Google search results pending the outcome of a trial on the issue of whether the defendants' technology (which was for sale on the internet despite efforts to shut down local sites) infringed on the plaintiff's intellectual property. The underlying case has only recently been brought to trial. The motion judge found in 2014 that the only practical way to protect the plaintiff's interests was to block the defendants' websites from Google search results worldwide. The BC Court of Appeal held on appeal that the lower court did indeed have jurisdiction to make an injunctive order of extraterritorial reach.

The Supreme Court of Canada upheld the injunction on further appeal, with the majority offering a pragmatic justification for the order:

The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates - globally. As [the trial judge] found, the majority of Datalink's sales take place outside Canada. If the injunction were restricted to Canada alone or to google.ca, as Google suggests it should have been, the remedy would be deprived of its intended ability to prevent irreparable harm.

The Supreme Court left the door open to revisit the issue if Google could demonstrate “that complying with such an injunction would require it to violate the laws of another jurisdiction, including interfering with freedom of expression.”

Companies challenging worldwide injunctions issued by Canadian courts will face a high bar in convincing those courts to reconsider their orders, even where those orders prove to have limited practical effect outside Canada.

It appeared as though Google might have succeeded in demonstrating this, following a successful challenge to enforcement of the injunction in the United States. The US District Court in San Jose found that the BC injunction has the effect of making Google a “publisher or speaker,” for the purposes of the United States Communications Decency Act, of content published online by the defendants in the ongoing BC action. The court found this contrary to section 230 of the Act, which provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” and, according to case law, “immunizes providers of interactive computer services against liability arising from content created by third parties.”

BC Court Refuses to Vary Injunction Despite US Decision

With this ruling in hand, Google applied to the Supreme Court of BC to set aside its 2014 injunction. The BC court declined to do so, reasoning that the US District Court decision did not amount to a finding that US enforcement of the injunction would — as it would have to, to satisfy the Supreme Court of Canada's precondition for setting aside the injunction — “[require] Google to violate American law” because “there is no suggestion that any U.S. law prohibits Google from de-indexing those websites, either in compliance with the injunction or for any other reason,” and “[a] party being restricted in its ability to exercise certain rights is not the same thing as that party being required to violate the law.” Moreover, the BC court noted, the US District Court had declined to find that the injunction violated the First Amendment (i.e. freedom of expression), so it could not be said that the injunction “violates core American values” including freedom of expression.

Finally, the BC court signaled the independence of its decision-making process from its reception abroad (even in respect of orders intended to have international effect), noting

The effect of the U.S. order is that no action can be taken against Google to enforce the injunction in U.S. courts. That does not restrict the ability of this Court to protect the integrity of its own process through orders directed to parties over whom it has personal jurisdiction.

Conclusion

This most recent decision confirms that companies challenging worldwide injunctions issued by Canadian courts will face a high bar in convincing those courts to reconsider their orders, even where those orders prove to have limited practical effect outside Canada.

Brent Arnold is a partner with Gowling WLG in Toronto, Canada.

From the Next Gen Committee Across the Pond

Martinez v Prick Me Baby One More Time: A “Prick” By Any Other Name...

By Adelaide Lopez

“This is a dispute between a tattoo artist and a retailer of cacti about the use of the trading name ‘PRICK.’” A [recent judgment](#) in a passing off claim, handed down by Clarke HHJ sitting in the Intellectual Property Enterprise Court, on 11 April 2018, involves an East London tattoo parlour called Prick, famous for the celebrity body art of Boy George, Alexander McQueen and (probably most famously) Amy Winehouse.

The owner, a famous tattoo and visual artist named Henry Martinez, has run the business in its current store – with its black painted store-front and neon “Tattoo” sign out front – since 2001. The defendants, who opened their store down the road from Mr Martinez in the middle of 2016, sells cacti and is also behind a black-painted store-front, with careful white lettering spelling “PRICK” on the window. The claimants brought this claim in passing off, alleging that the defendants' name is a material misrepresentation that is causing confusion to consumers.

UK Law on Passing Off

Clarke HHJ takes a very purposeful and clear trot through both the elements of the tort, as well as an analysis of the credibility of the evidence before her. The later proves to be key in her ultimate conclusion, as she appears unpersuaded by what is undeniably manufactured evidence by certain of the witnesses for the claimants.

The court begins by looking at the “classic trinity” of a passing off claim: (i) that the claimant's goods or services have acquired goodwill in the market and are known by some distinguishing name or mark; (ii) that there is a misrepresentation by the defendant that leads the public to believe that the defendant's goods or services are those of the claimant, or that the two are connected; and (iii) that the claimants have suffered or are likely to suffer damage as a result of the erroneous belief.

The court's analysis begins by considering how far the claimant's goodwill extends, particularly in consideration of Mr Martinez's other career as a visual artist featured at the Saatchi Gallery in London and in various commercial tie-ins with fashion designers who feature his art on their goods. Ultimately the court was not persuaded by the claimants' arguments that this additional activity increased the scope of the goodwill in the claimants' trading name and business; nor was it persuaded by the defendants' argument that the additional activities were unrelated to any goodwill in the tattoo parlour and its name.

Determinations of claims brought in passing off are fact specific and rely considerably on the evidence of consumers who were confused by the use of the claimant's mark or get-up.

Rather the court concludes that there is goodwill in the name “PRICK”, although that goodwill is limited to the immediate geographical area of the tattoo parlour, including Dalston, London, where the defendants' cactus shop can be found.

The court next considers whether the defendants' use was a material misrepresentation. As the court points out, to make his claim, Mr Martinez needed to make out that he had suffered or was likely to suffer damage to his goodwill by reason of the erroneous belief engendered by the defendants' misrepresentation: in other words, whether a material misrepresentation had been made. It was not (and should not have been according to well established case law) fatal to Mr Martinez's claim that the defendants' shop is an entirely different type of business to that of the claimants. However, it did make the claimants' burden of proof “a heavy one.”

In considering whether or not there has been a misrepresentation such that consumers would be confused, Clarke HHJ turns to the similarities in get-up of the parties' shops and online presence. Both shops have a black store-front, although the cactus shop window is filled with (surprise) cacti, while the tattoo parlour (fittingly) displays a tattoo sign. Once inside, the tattoo parlour has a dark and “eclectic” style, while the cactus shop is minimalist and bright. Turning to the website, as an initial point, the tattoo parlour's website does not even feature the name “PRICK” rather it is found at www.henryhate.com. The claimant's website is www.prickldn.com and it is plain upon first entering the site that it is for the purchase of cacti. These dissimilarities made it highly unlikely in the court's view that there was a likelihood for confusion.

In fact, what evidence of confusion was produced by the claimant was either discredited (on cross examination) or irrelevant (for not being evidence given by consumers), or evidence only of the confusion of a “moron in a hurry”. In the only instance that the court could point to of deception of a relevant consumer, there was no evidence of damage to the claimants, as it is evident that the witness would be and probably has relied on the claimant for her body art needs.

Determinations of claims brought in passing off are fact specific and rely considerably on the evidence of consumers who were confused by the use of the claimant's mark or get-up. Here, the claimants' customers – many of whom were now personal friends – clearly understood the weight of that evidence and (for all of the best intentions) worked hard to drive that point home: probably too hard. All of the other evidence in this case being equal, had the claimant produced more careful evidence in this regard the result likely would have been very different.

Adelaide Lopez is a solicitor with Wiggin LLP in London.

10 Questions to a Media Lawyer: Pia Sarma



Pia Sarma is Editorial Legal Director at the Times Newspapers, London.

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

I got into media law after 9 years working in corporate firms in the City of London. I started out at Slaughter and May in London, working some time also in their Paris office and qualifying into their litigation team. I then moved to White & Case working on International arbitration, investigations and litigation. I decided to specialise in media law after I started reading media law case reports to distract me from the boredom of loan note litigation and moved to Finers Stephens Innocent where I took on work for the WSJ, New York Times, Bloomberg and Reuters, cutting my teeth on media issues. I never thought I would go in house but was hooked when I was shown round the newsroom at *The Times* (of London) and joined in 2009, promoted to head the following year. I was appointed Deputy General Counsel for News UK in 2017 but remain in charge of *The Times* and *The Sunday Times* as Editorial Legal Director. They are entirely separate newspapers with different Editors, newsrooms and deadlines.

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

I love the constant, unpredictable news and also the in depth, complex investigations and the determination of the titles I advise to defend their work. You really can contribute to the journalism. The long investigation into FIFA by *The Sunday Times* culminated in four weeks' coverage with 11 pages in the first week. I was involved from the beginning, advising on source issues and whistleblowers, fending off prepublication threats, seeing through the copy to press and dealing with the fall out including evidence to government inquiries. There have been other great scoops too I've worked on: blood doping in international athletics, the Rotherham sex grooming gangs, Oxfam staff hiring prostitutes in Haiti. The UK press has also in recent years experienced a huge shakedown and I've had the opportunity to contribute to the changing regulatory framework as well as laws which affect journalism. The very long hours, however, play havoc with your days and nights. The newspaper might have been put to bed but there might still be something to settle for court or a submission to Parliament the next day. You end up working on several different and competing timetables.



In the Hunt case, reported above, *The Sunday Times* bravely took on the task of proving that he was the head of an organised criminal gang.

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

Not picking up that claimant lawyers were filming our undercover footage which they were allowed to view at our offices by the press regulator. They did it stealthily and then sued. If I had known, I would have stormed in and stopped them.

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

I have seen three cases through the Supreme Court for Times Newspapers, winning two, and taken two two to Strasbourg on article 10 arguments. As a solicitor I don't plead but I drive the strategy for the litigation. *The Times* won a leading case on public interest journalist in the Supreme Court in 2012 (Flood) and *The Sunday Times* won two at trial using that defence, in 2013 (Hunt) and 2014 (Yeo). It's brilliant being able to shape and move the law on. In the Hunt case *The Sunday Times* very bravely took on the task of proving that he was the head of an organised criminal gang, or mobster, as you might say in the States. The police tried to injunct us from using leaked documents

to defend the case and our bodyguards were scared off the job on day 1 of the trial. It was quite a battle. The burden of proof on the publisher raises the bar for defences and we publish what we can defend- but that's quite a commitment in the UK. Another highlight was being given the green light to sue Lance Armstrong for fraud when he finally admitted drug use. He settled the claim and *The Sunday Times* recovered the libel damages and costs it had paid out after David Walsh first exposed him.

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

A coconut from the Zulu krewe at Mardi Gras, New Orleans. The shoe shop below the desk is not so surprising.

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

I'm afraid it's *The Times*. (Followed shortly afterwards by Who, What, Wear.)

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

Go only if you really know it's what you want. There is a massive drop out rate and it's often because the early stages can involve punishing hours and boring work. That takes endurance rather than anything else. You either have to be passionate about what you want to do or just stick it out and look to the future. It's not a profession to fall casually into but if you find an area that you really care about it can be very rewarding.

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

Don't worry if you don't get into the area straight away, even if your heart is set on it. Getting good training and being a good litigator will make you a better media lawyer.

9. What issue keeps you up at night?

Around 4am I write the killer letter, word perfect, sharp, and bound to knock out any opponent. I have all the answers around that time. At 10am at my desk, after fighting through the tube and getting coffee, it's mostly gone and takes a lot longer.

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

I would have been a writer and photographer ... and cook. There's still time but not with the day job alongside!



Pia's "pin board."