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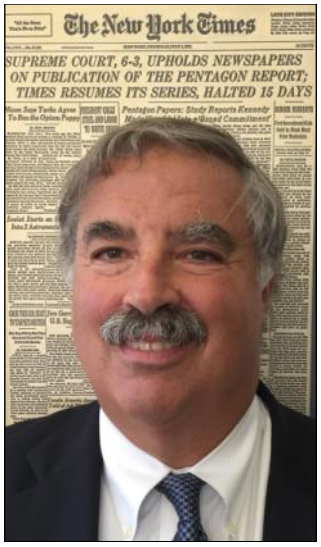
From the Executive Director's Desk

The MLRC Institute: Where Do We Go From Here?

It has been a difficult few months for the MLRC Institute. First, its grant money – a 3 year generous gift from the Dow Jones Foundation – is lapsing, and hence, it needs a new grant to continue to operate. Then, last month, Dorianne Van Dyke, its one woman leader and staff, announced that she was leaving for a full-time legal job.

Thus, the Institute finds itself, for the time being, unstaffed and without an ongoing income stream. But, in the short run, Dorianne has agreed to do some part-time work for the Institute during the months of transition. And in the long run, as discussed below, the Board of the Institute is in the process of turning these adversities into an advantage and opportunity.


The New York Times
SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS

George Freeman

Of course, the first questions you may have are what is the MLRC Institute, how is it different from the MLRC, and how will we remedy this situation going forward.

The MLRC Institute was created in 1988 as a 501(c)(3) charitable organization independent from the MLRC itself, which is a 501(c)(6) membership entity. The Institute has its own Board, currently headed by Mary Kate Tischler of CBS, and has been financed through the years by various charitable grantors, including the McCormick Foundation, Gannett and Dow Jones. The MLRC, on the other hand, runs on income derived from its membership fees, and revenues from its Annual Dinner and other events and services.

The Board of the Institute is in the process of turning these adversities into an advantage.

Over the past few years, the main activity of the Institute was to run its Speakers' Bureau. Dorianne created modules for speeches and programs on First Amendment issues, and then matched schools, universities, libraries and other organizations interested in hosting free speech programs with speakers, generally lawyers from MLRC member firms and companies. She also did a lot of outreach, enticing these institutions into holding First Amendment oriented programs. The result was hundreds of events throughout the country aimed at educating young and old alike of the value of free speech and the importance of the First Amendment. In addition, the Institute has also run a high school First Amendment video competition, calling on high school students to answer a question about First Amendment principles in video format. Dorianne has also partnered with other groups, such as the American

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Library Association and the organizers of Free Speech Week, to help provide speakers for their programs.

So without a staff and without funds, how will the Institute continue to fulfill its mission? The Board has decided that rather than just try to fill these gaps, the current circumstance provides an excellent opportunity to rethink the Institute's mission and activities. Maybe something other than the Speakers' Bureau would have more impact. Perhaps in this very competitive grant environment, money would be easier to raise if it had a somewhat different mission. To follow through on those questions, the Board is scheduling a half-day retreat in October. It will use that session to decide whether the Institute should try to continue its current activities, albeit with new leadership and hopefully a new grantor(s), or whether it should aim for different goals to be obtained by different means. To the extent, dear readers, you have ideas as to what the Institute should devote itself to, please feel free to contribute your ideas to us. (gfreeman@medialaw.org or marykate.tischler@cbs.com)

To the extent, dear readers, you have ideas as to what the Institute should devote itself to, please feel free to contribute your ideas to us.

Armed with whatever decision it makes regarding the Institute's mission, the Board then will seek a new leader and, even more important, new sources of funding. There is huge competition for grant monies in this space, but I can't help but think that with the help of all our member companies and firms, we should have a leg up in that race. If anyone reading this thinks his or her firm or company might be interested in making a charitable contribution toward First Amendment education, please pursue such avenues and let us know. And if any such grants might be linked to specific stipulations as to what should be done with the monies, we are all ears – the Institute's by laws are very broad in terms of its charitable and educational mission, essentially to sponsor and support First Amendment research and educational projects.

Armed with whatever decision it makes regarding the Institute's mission, the Board then will seek a new leader and, even more important, new sources of funding.

Finally, a massive thank you to Dorianne Van Dyke for her stewardship of the Institute for the past four years. Dorianne came to us in August 2011 after working in the Legal Department at Newsweek/The Daily Beast. She was hired as the Institute's fellow, but became so valuable she was promoted to a permanent position and eventually as the Institute's Staff Attorney. In the time I have been here, not only has Dorianne run the Institute successfully, but she has also chipped in and helped us here at mother MLRC when we needed assistance with our big events. She has been a delightful colleague to work with. We wish her well on her new legal position, and will miss her.

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(Continued from page 4)

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On another topic, we very much look forward to our Conference in London at the end of the month (Sept 27-29). As a former New York columnist and national TV star might have said, it will be a "really big shew." Some great programs are planned.

For example, our keynote session will feature Burt Neuborne discussing the origins and meaning of the First Amendment with British star lawyer Geoffrey Robertson who will respond with the significance of the Magna Carta on its 800th birthday. We then plan what looms to be a controversial Charlie Hebdo session on whether hate speech should be regulated; the European response is likely to be remarkably different from what we are accustomed to. Other programs will have a somewhat different and decidedly global bent: an international panel of judges discussing whether Sullivan actual malice should be adopted elsewhere than in the US; fledgling press freedom, and criminal defamation and internet censorship in Egypt, India and Turkey; what's happened to the attempts for libel reform and independent press regulation in the UK; a look at the virtues and vices of tabloid journalism in Britain; and vetting an article from comparative American, British and Continental European perspectives.

We are also going to have fun in London. The reception at the House of Lords should be a unique highlight, including drinks on the House of Lords' Terrace overlooking the Thames. As in previous years, there will be a reception at Bloomberg's in London on the Sunday night preceding the conference. And on Saturday, we will lead an expedition to northern London for a massive soccer (football) match (fixture) between one of the world's best teams (sides), Manchester City, and host Tottenham Hotspur (the 5th place finisher in the English Premier League last season). Because of the extraordinary demand in the first 24 hours after we announced this option, we were able to acquire 24 tickets for the game as a way for our attendees to get inculcated into British culture in advance of the Conference. Registration for the Conference is still available; our website gives all the details. I look forward to seeing you in London.

A shout-out in London to the first American who identifies the player kicking the ball and the two teams.

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

HBO Wins Libel Trial Over Real Sports With Bryant Gumbel Report

Plaintiff Does Not Appeal

By Tom Hentoff

After a litigation spanning 6½ years and three continents, and a trial that lasted four weeks, a Manhattan federal jury on May 8, 2015 returned a unanimous verdict for Home Box Office, Inc. on a defamation claim brought by Mitre Sports International Limited, a London-based international soccer ball brand. HBO's win in the first U.S. libel trial for a national television defendant in 10 1/2 years was cemented in mid-June when Mitre elected neither to move for a new trial nor to appeal.

Background

In September 2008, the long-running and award-winning HBO news-magazine program *Real Sports with Bryant Gumbel* aired a report on the use of child labor in the manufacture of soccer balls in India, titled "Children of Industry." In the 1990s, leaders of the international soccer ball industry had gathered to pledge to work to eradicate child labor in their industry, and *Real Sports* aimed to examine the situation in India in the decade since the pledge.

The *Real Sports* team spent two years researching the subject of child labor in the Indian soccer ball industry and made two trips to India to observe conditions in the villages where stitching occurred. On one trip they were accompanied for a day by Kailash Satyarthi, a leading children's rights advocate whose work would win him the Nobel Peace Prize in 2014 and whose analysis of the child labor problem was a principal element of the HBO report. The HBO team also enlisted the assistance of independent researchers and journalists in India, who located children engaged in stitching soccer balls and provided videotaped footage of them stitching Mitre and other brands of soccer balls.

"Children of Industry" focused on India's two soccer ball manufacturing regions. In the region of Jalandhar, HBO reported, children worked for little pay to stitch soccer balls for

(Continued on page 7)

(Continued from page 6)

contractors who supplied Indian manufacturers, including manufacturers that made balls for international brands. In the Jalandhar sections of its report, HBO showed children stitching Mitre-branded soccer balls, including balls with the same UPC code as balls that were available at Walmart stores in the United States.

In a second region of India, the deeply impoverished area around Meerut, conditions were even worse. There, HBO reported, under an age-old practice of debt bondage, which Kailash Satyarthi called "slave labor," some parents effectively sold their children to local soccer ball makers to try to pay off family debts that only grew larger over time. HBO did not mention Mitre in the Meerut portion of its report.

At the conclusion of HBO's report, host Bryant Gumbel and correspondent Bernard Goldberg engaged in an unscripted discussion in which Goldberg made clear that while some Indian subcontractors were directly involved in hiring children, it was hard for international companies like Mitre to know what was happening in the remote villages where stitching took place. Goldberg said: "I honestly believe that Mitre and all the other companies would like this to be wiped out once and for all. . . . I don't believe Mitre wants it to happen, but the [Indian] subcontractors are a different story altogether."

Before airing its report, HBO sought to interview Mitre and sent Mitre screen shots of children stitching Mitre soccer balls. Mitre declined to provide an on-camera interview but provided a written statement noting its support for the work of the Sports Goods Foundation of India ("SGFI"), an organization of Indian manufacturers charged with monitoring and remediating child labor in the industry. HBO reported that Mitre declined to be interviewed but told HBO that it regularly monitored its overseas suppliers to make sure that child labor was not being used.

Hours before "Children of Industry" was scheduled to premiere on September 16, 2008, lawyers for Mitre contacted HBO in an attempt to stop the scheduled airing of the report.

Hours before "Children of Industry" was scheduled to premiere on September 16, 2008, lawyers for Mitre contacted HBO in an attempt to stop the scheduled airing of the report. Mitre explained that two of the children in the screen shots provided to it by HBO had been located, and that in a video uploaded to YouTube those children and their parents denied any involvement in child labor. In the view of HBO officials, these denials could not be reconciled with the outtakes of the two girls stitching. But out of an abundance of caution and to avoid a dispute with Mitre, HBO deleted the scene featuring the two girls, while retaining scenes of other children stitching Mitre balls that had been filmed by a different crew.

Five weeks later, in October 2008, Mitre filed a one-count complaint against HBO in federal court in Manhattan, alleging that the depictions of children stitching Mitre-branded soccer balls

(Continued on page 8)

(Continued from page 7)

were false and defamatory and seeking to recover "tens of millions of dollars" in compensatory damages. The complaint also sought punitive damages.

Mitre's Claims

By the time of trial, Mitre claimed that HBO's report falsely implied that it had knowingly used child labor, or turned a blind eye to the use of child labor, in the manufacture of its soccer balls in India. Even worse, Mitre argued, HBO's report implied that it had used "slave labor" in the manufacture of its soccer balls in Meerut, where none of its balls are made. In support of those claims, Mitre argued that Indian camera crews operating without an HBO producer present had fabricated the footage of children stitching Mitre-branded soccer balls. Mitre also argued that HBO had unfairly singled out Mitre by not naming or showing other international soccer ball brands being stitched by children, and that HBO had failed to include a discussion of the efforts of the SGFI, which it supported, to monitor and remediate child labor.

By the time of trial, Mitre claimed that HBO's report falsely implied that it had knowingly used child labor, or turned a blind eye to the use of child labor, in the manufacture of its soccer balls in India.

Summary Judgment Ruling

The parties took more than 70 depositions on three continents, including more than two dozen depositions in India. The parties cross-moved for summary judgment. In May 2014 U.S. District Judge George B. Daniels denied the motions, with one exception. Although HBO presented evidence of the involvement of the plaintiff and its parent company in the late 1990s public pledge regarding child labor, the court ruled that Mitre was not a public figure for purposes of the case. *Mitre Sports Int'l Ltd. v. HBO, Inc.*, 22 F. Supp. 3d 240, 249-52 (S.D.N.Y. 2014).

This meant that, rather than actual malice, the standard of care element would be governed by New York's "gross irresponsibility" test for private figure/public concern cases: whether Mitre could prove that HBO published false and defamatory statements about it "in a grossly irresponsible manner without consideration for the standards of information gathering and dissemination followed by responsible journalists." HBO moved for reconsideration or appellate certification of the public-figure issue, supported by an amicus brief by major news organizations, but Judge Daniels denied both requests in August 2014.

(Continued on page 9)

(Continued from page 8)

Pre-Trial Motions

The parties filed a total of eighteen motions in limine, which Judge Daniels decided in the days leading up to the trial's April 13, 2015 start. The HBO motions that the court granted included the following:

- To exclude the expert testimony of Mitre's proffered journalism expert on the ground, among others, that her expert report focused on journalistic ethics rather than accepted journalistic standards for ensuring accuracy and would not assist the jury in assessing gross irresponsibility.
- To preclude undisclosed lay opinion testimony from Indian soccer industry participants that the children filmed stitching Mitre balls were not professional stitchers.
- To prohibit recovery of Mitre's attorneys' fees for the litigation, which had been sought as an item of "mitigation damages."
- To prohibit recovery of $3 million in economic damages that Mitre claimed it had suffered in the United Kingdom, on the ground that HBO had never authorized republication of "Children of Industry" in the U.K.

Although HBO presented evidence of the involvement of the plaintiff and its parent company in the late 1990s public pledge regarding child labor, the court ruled that Mitre was not a public figure for purposes of the case.

Although the court granted some of Mitre's motions in limine, it denied Mitre's motion to preclude HBO from presenting footage of four children stitching Mitre soccer balls in a Jalandhar area stitching center. The court rejected Mitre's argument that HBO's invocation of New York's shield law and pixilation of the children's faces when the videos were produced in discovery should prevent HBO from relying on the footage at trial.

Trial

Judge Daniels completed jury selection in the morning of the first day of trial and he seated 12 jurors, ten women and two men, from Manhattan, the Bronx, and nearby counties. Judge Daniels granted the parties' joint request to show "Children of Industry" uninterrupted prior to the parties' opening statements.

The plaintiff took less than two weeks to present its case, with HBO taking a little over a week. A significant portion of the plaintiff's case consisted of video deposition testimony,

(Continued on page 10)

(Continued from page 9)

approximately twenty depositions in all. Plaintiff presented nine live witnesses, including, among others, its Chairman and the Chairman of its parent corporation, who testified to the company's commitment to ending child labor; its parent's director of corporate responsibility (formerly the head of Slavery International), who testified to the company's role in developing the SGFI's program for combating child labor; and a former Undersecretary of Labor, who testified that her interview had been truncated and distorted by HBO. Child labor, in the view of Mitre's witnesses, was an isolated problem that was being effectively addressed by the SGFI.

On cross-examination of plaintiffs' witnesses, HBO's counsel sought to establish that Mitre had expended only a limited amount of its own resources to combat child labor; that the executives responsible for preventing child labor had holes in their knowledge of what was going on in the Indian villages where soccer ball stitching was done; and that the monitoring by SGFI was inadequate to address the problem.

Mitre did not call any HBO journalist as a hostile witness in its case in chief. It instead showed excerpts of their video depositions, including that of the producer of the segment, Joseph Perskie, who was present in the courtroom during trial as HBO's corporate representative.

Mitre sought to prove that HBO was grossly irresponsible at essentially every stage of the reporting and editorial process. According to Mitre, HBO had pursued a preconceived story line of abusive child labor; had failed to accompany and supervise Indian film crews, who in turn had fabricated the scenes of children stitching Mitre balls; ignored warnings from an Indian stringer that parents, not soccer ball manufacturers, gave soccer balls to children; unfairly singled Mitre out among all of the soccer ball brands whose balls are made in India; failed to include any mention of SGFI in its report; and failed to guard against the false implication that Mitre soccer balls were made with "slave labor" in Meerut.

HBO argued at trial that its report could not reasonably be construed to mean that Mitre had used "slave labor" in Meerut; that its report was substantially true; and that the care with which the report was produced was the antitheses of "gross irresponsibility."

In its own case, HBO called five live witnesses and seven witnesses by deposition, and relied heavily on more than 1.5 hours of outtakes showing eleven different children stitching Mitre balls with levels of proficiency that,HBO argued could not have been learned on the spot. Associate producer Zehra Mamdani walked the jury through her two years of meticulous research—her review of reports of NGOs and prior news reports; her extensive interviews with sources on the ground in India; the work of her Indian researchers and stringers; her own observations of child labor during her two trips to India; and her confidence in the Indian crew members who shot the disputed footage after she left.

Producer Joseph Perskie also explained to the jury in detail how the story came together and why only Mitre was mentioned by name in the piece—essentially, that HBO had more footage

(Continued on page 11)

(Continued from page 10)

of more children stitching Mitre balls than any other brand, and that HBO was able to trace the make and model of Mitre balls being stitched by children at a stitching center in Jalandhar to a Walmart in the United States. Perskie also testified to how he and correspondent Bernard Goldberg carefully wrote and edited the script to be fair to Mitre and to make clear that children were found stitching Mitre balls only in Jalandhar and not in Meerut, where debt-bondage was practiced.

Host Bryant Gumbel and correspondent Bernard Goldberg also testified live to defend their work, with Goldberg emphasizing that he was careful not only to make sure that the scripted report was fair to Mitre, but also to include statements in his unscripted discussion with Gumbel reflecting Mitre's point of view.

Indian cameraman Vijay Bedi, who had shot the challenged footage of children stitching Mitre balls, traveled from India to testify live at the trial. Bedi told the jury about his extensive credentials as an award-winning filmmaker and his work as a freelance cameraman for major international news organizations. Bedi testified that no one showed any of the children how to stitch and no one provided any of the materials to them. Bedi was an impressive witness who stood up well under cross-examination.

Over Mitre's objection, Judge Daniels instructed the jury that Mitre needed to prove that the report would be commonly understood by viewers of average intelligence as HBO intending the allegedly defamatory implications about it that Mitre had claimed.

The Verdict

Judge Daniels' jury instructions were drawn heavily from New York's pattern jury instructions. However, many of the legal issues that are so important in defamation cases do not have pattern instructions. This was essentially a libel by implication case, and HBO was able to point to a recent New York libel by implication decision, *Stepanov v. Dow Jones & Co.*, 987 N.Y.S.2d 37, 43 (2014), which post-dated the most recent pattern jury instructions. In reliance on that decision and over Mitre's objection, Judge Daniels instructed the jury that Mitre needed to prove that the report would be commonly understood by viewers of average intelligence as HBO intending the allegedly defamatory implications about it that Mitre had claimed.

The parties also disagreed over the verdict form. Mitre submitted a proposed verdict form with ten questions. Mitre sought to present two sets of questions directed separately to its allegations that HBO had defamed it by (1) depicting it as having used or turned a blind eye to the use of child labor in Jalandhar and (2) depicting it as having used or turned a blind eye to the use of child slave labor in Meerut. HBO requested a single set of questions aimed at the allegation that Mitre was accused of using or turning a blind eye to the use of child labor in

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India. The judge ruled that there was essentially one libel claim that should be presented to the jury. And rather than present the elements of that libel claim in separate questions, the judge submitted a single question that incorporated all of the elements of a libel claim: "Did HBO broadcast in a grossly irresponsible manner false defamatory statements portraying Mitre as using, or turning a blind eye to others using, child labor or child bonded labor in the manufacture of Mitre soccer balls?" The Court also submitted the issues of compensatory and punitive damages to the jury with a single question each.

Upon beginning its deliberations, the jury asked to watch "Children of Industry" again and to hear again portions of the testimony of several witnesses. It also asked to review associate producer Mamdani's notes among other exhibits. After roughly three hours of actual deliberation, the jury reached a verdict in favor of HBO, answering the one liability question in the negative.

When the jury was dismissed, two jurors traversed the courtroom to shake the hand of *Real Sports* producer Perskie, who had served as HBO's corporate representative at trial. As reported by *Women's Wear Daily*: "Approaching the segment's producer Perskie, one female juror, who declined to be identified, called out, 'Nice job, Mr. Perskie.'"

Mitre elected not to file a new-trial motion or notice of appeal, and HBO was awarded approximately $120,000 in court costs.

HBO's trial team was led by partners Dane Butswinkas, Kevin Baine, and Tom Hentoff, who were assisted by associates Allison Jones, Josh Podoll, Nick Gamse, Masha Hansford, and Isia Jasiewicz of Williams & Connolly LLP, and overseen by HBO's Senior Vice President and Chief Counsel, Litigation, Stephanie Abrutyn. Mitre's trial team was led by Lloyd Constantine, assisted by other lawyers at Constantine Cannon LLP.

Arizona Court of Appeals Affirms Dismissal Of Emotional Distress Claims

Fox News Network Prevails in Suit Over "Live" Telecast of Car Chase Ending in Suspect's Suicide

By David J. Bodney and Heather Horrocks

The Arizona Court of Appeals recently issued an opinion that protects a network's "live" on-air coverage of a car chase from tort liability, even when events turn suddenly violent. In *Rodriguez v. Fox News Network, L.L.C.*, 718 Ariz. Adv. Rep. 14 (Ct. App. 2015), the court barred negligent and intentional infliction of emotional distress claims against Fox News Network, L.L.C. ("Fox") for airing a high-speed chase that ended in the suspect's suicide.

Background

To trigger the 80-mile pursuit, JoDon Romero carjacked a vehicle at gunpoint in Phoenix, Arizona, and led police on a chase along Interstate 10 at speeds exceeding 100 miles an hour. Nearing the California border, Romero turned off the freeway, stopped and got out of his car. With a Fox helicopter covering the action from above, the suspect pulled out a handgun, fired at himself and crumpled to the ground. Fox viewers observed the car chase and suicide during the national broadcast of *Studio B with Shepard Smith*. Immediately, Fox anchor Shepard Smith apologized to viewers for showing the suicide.

Siding with Fox, the court concluded that the car chase was clearly a matter of public concern, involving an armed suspect who fired at officers and posed "an immediate and ongoing threat to public safety."

Two teenage boys, upon learning of the suicide video at school, allegedly came home and searched for the clip on YouTube. When they saw the video, the boys realized that the suicide victim was their father. Their mother, Angela Rodriguez, sued Fox on their behalf, and on behalf of their younger brother, alleging that the video had "severely traumatized" her three sons. *Rodriguez*, 718 Ariz. Adv. Rep. at 14, ¶4. Fox moved to dismiss the complaint, arguing that the First Amendment barred recovery. The superior court granted Fox's motion, and Rodriguez appealed.

Appeals Court Decision

The question on appeal was whether the First Amendment insulated Fox from liability for negligent and intentional infliction of emotional distress.

(Continued on page 14)

(Continued from page 13)

To answer that question, the Court of Appeals examined whether the car chase was about a matter of public concern – that is, speech that addresses "a subject of legitimate news interest," or matters "of value and concern to the public." *Rodriguez*, 718 Ariz. Adv. Rep. at 15, ¶11 (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). As the court noted, speech "on matters of public concern 'occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" *Rodriguez*, 718 Ariz. Adv. Rep. at 15, ¶10 (quoting *Snyder*, 562 U.S. at 452). Siding with Fox, the court concluded that the car chase was clearly a matter of public concern, involving an armed suspect who fired at officers and posed "an immediate and ongoing threat to public safety." *Id* at ¶10.

Despite conceding that the *car chase* was newsworthy, Rodriguez argued that the *suicide* concerned a private matter, that Fox should have used a tape delay to shield its depiction, and that the network's airing of the suicide merited no First Amendment protection. In response, the court emphasized the importance of viewing the suicide in its full context to determine whether "'the overall thrust and dominant theme' of the coverage addressed important matters of public concern." *Rodriguez*, 718 Ariz. Adv. Rep. at 16, ¶14 (quoting *Snyder*, 562 U.S. at 453). Because the suicide was but one small portion of the high-speed chase, the court concluded on balance that the entire broadcast addressed a matter of public concern. Moreover, the Court of Appeals declined to hold Fox responsible for using a tape delay: "[r]equiring a broadcaster covering a matter of public concern to cut away whenever a violent or disturbing sight may be caught on camera . . . would chill the broadcaster's news coverage to a degree the First Amendment does not permit." *Rodriguez*, 718 Ariz. Adv. Rep. at 16, ¶16.

The question on appeal was whether the First Amendment insulated Fox from liability for negligent and intentional infliction of emotional distress.

Rodriguez also argued that prohibitions on public access to government photographs of death scenes, and limitations on media access to government proceedings, support liability for intentional and negligent infliction of emotional distress. The court rejected both arguments, noting that Fox already possessed the information at issue lawfully. Although "the First amendment does not guarantee the press special access to information that is not generally available to the public," that principle does "not apply when the press has gained access to information through lawful means, as in this case." *Rodriguez*, 718 Ariz. Adv. Rep. at 16, ¶18.

Finally, Rodriguez cited an Illinois case that allowed tort claims to proceed against a newspaper that allegedly published photographs of a hospital patient taken during emergency surgery (and a mother's last words to her dying son) without consent. The court found the case inapposite because its underlying events "occurred in the privacy of a hospital room, not, as here, in public view." *Rodriguez*, 718 Ariz. Adv. Rep. at 16, ¶19. Accordingly, and specifically

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because the telecast addressed a matter of public concern, the court held that the First Amendment barred Rodriguez's claims for emotional distress.

Rodriguez's counsel has said publicly they would file a petition for review in the Arizona Supreme Court. As of this writing, no petition has been filed. The Supreme Court has given them until October 5, 2015, to file one.

David J. Bodney and Heather Horrocks are lawyers in the Phoenix office of Ballard Spahr LLP. Mr. Bodney argued the case for Fox News Network, LLC. Plaintiff was represented by Joel B. Robbins, Anne E. Findling, Robbins & Curtin, PLLC, Phoenix; and David Abney, Knapp & Roberts, PC, Scottsdale, AZ.

From the Next Gen Committee:

Rights of Publicity in Actor-Created Fictional Characters

Whose Mask Is It Anyways?

By Patrick Kabat

As A-list actors digitally map their faces for future exploitation in feature films (Cruise), and the holographic arts permit us to re-animate dead rappers (Tupac) and live fugitives (Snowden) alike, we might be forgiven for thinking that the right of publicity will be most significantly tested by increasingly exacting depictions of celebrity likenesses. A recent case involving an actor's publicity claim in a character he portrayed, rather than his precise likeness, provides an important reminder that the claims for the misappropriation of "likeness" can also extend to the "personality" of a distinctive role the actor has created.

Background

Frank Sivero, the plaintiff in *Sivero v. Fox Television Studios et al.*, (Cal. Super.) is an actor who played assorted Mafiosi in some of the best films of that genre, including Coppola's *The Godfather Part II* and Scorcese's *Goodfellas*, in which he played Frankie Carbone. Sivero brought right-of-publicity and related state-law claims against Twentieth Century Fox, alleging that he based the Frankie Carbone character "on his own personality," and that writers for *The Simpsons*, who lived in the same apartment building with him when he was working on *Goodfellas*, based the recurring *Simpsons* character "Louie" on his portrayal of Frankie Carbone.

Louie from the Simpsons, left; Frank Sivero as Frankie Carbone from Goodfellas.

At a hearing on August 6, the California Superior Court granted Fox's anti-SLAPP motion and dismissed the action in its entirety. Sivero's common-law and statutory publicity claims fell to a straightforward application of California's "transformative use" test: the court

(Continued on page 17)

(Continued from page 16)

followed the *Winter* case, in which the country musician plaintiffs' likenesses were sufficiently transformed by depictions as half-man, half-worm cartoons to warrant judgment as a matter of law, and ruled that a yellow, eyebrowless cartoon version of Sivero, even if based on him or his role as Frankie Carbone, was sufficiently distorted (and parodic, though under *Winter* "the distinction between parody and other forms of literary expression is irrelevant," *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003)), to "transform" the appropriated likeness and require dismissal of the publicity claims.

The court did not, however, resolve the threshold question of whether Sivero had a valid publicity interest in the character of Frankie Carbone and similar roles, accepting for the purposes of the anti-SLAPP motion that Sivero very well might be able to show a right-of-publicity interest in the "personality" that Sivero "brings to the roles in which he is cast."

Publicity Rights in Fictional Characters?

Though the court did not analyze the issue, *Sivero* reminds us that fictional characters developed and portrayed by actors who infuse a significant amount of their own personality into the role may, under certain circumstances, give actors a valid right-of-publicity interest in future depictions of that character, and implicate fact questions that may preclude early adjudication. As the Ninth Circuit observed in a case brought by the actors who played Bob and Norm on the hit show *Cheers*, alleging misappropriation-by-robot, "an actor or actress does not lose the right to control the commercial exploitation of his or her likeness by portraying a fictional character." *Wendt v. Host Int'l, Inc*., 125 F.3d 806, 811 (9th Cir. 1997). To the contrary, as California Supreme Court Justice Mosk explained in an oft-cited concurrence, addressing Bela Lugosi's publicity claims arising from the actor's (allegedly) inimitable Count Dracula, "[a]n original creation of a fictional figure played exclusively by its creator may well be protectable." *Lugosi v. Universal Pictures*, 603 P.2d 425, 432 (Cal. 1979) (Mosk, J., concurring).

Sivero's common-law and statutory publicity claims fell to a straightforward application of California's "transformative use" test.

The circumstances in which an actor will prevail on a right of publicity claim, however, are limited. This is particularly so where the character's "personality" is not of the actor's own devise, but derive instead from underlying literary material (in *Lugosi*, Bram Stoker's), instructions from screenwriters, directors, and other participants in the production process, or prior portrayals by actors who added texture to the character (Max Schreck's earlier vampire). *Lugosi*, 603 P.2d at 432 (Lugosi's "performance gave him no more claim on Dracula than that of countless actors on Hamlet who have portrayed the Dane in a unique manner.").

(Continued on page 18)

(Continued from page 17)

Actors who claim publicity interests in their portrayals of historical figures, such as hypothetical claims of "George C. Scott to General Patton, James Whitmore to Will Rogers and Harry Truman, or Charlton Heston to Moses," are particularly likely to irritate courts. *Lugosi,* 603 P.2d at 432. Had the issue been joined in *Sivero,* the plaintiff would not have been helped by Mario Puzo's underlying authorship of the *Godfather* novels, or the pled fact that the role of Frankie Carbone in Goodfellas was "based on Angelo Sepe" (a real-life member of the Lucchese crime family).

Likewise, courts accept that the character must be so closely associated with the actor that depicting the character necessarily evokes the actor himself. As the California Supreme Court acknowledged when it articulated the transformative use test, it is a "relatively small group of actors" who fit this bill. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 805 (Cal. 2001). As under the law of copyright, where the Seventh Circuit recently reminded Sir Arthur Conan Doyle's estate that "[t]he more vague, the less 'complete,' a character, the less likely it is to qualify for copyright protection," *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 502-03 (7th Cir. 2014), an actor's right-of-publicity interest in protecting the personalities he may have created for his roles depends on the degree to which a particular role is indelibly associated in the minds of audiences with the actor *qua* himself.

The circumstances in which an actor will prevail on a right of publicity claim, however, are limited. This is particularly so where the character's "personality" is not of the actor's own devise, but derive instead from underlying literary material.

In a well-reasoned opinion arising from publicity claims of the actor who played "Spanky" in *The Little Rascals*, the Third Circuit held that the identities of the actor and his character must be "inextricably intertwined" for the actor's claim to be viable. *McFarland v. Miller*, 14 F.3d 912, 921 (3d Cir. 1994). Likewise, when the Sixth Circuit engaged this question in a case brought by a "fringe actor" in the action film *Predator*, it required a showing that "the two personalities are inseparable in the public's mind" and affirmed summary judgment for the defendants because the plaintiff failed to show that the challenged toy "invoke[d] his own persona, as distinct from that of the fictional character" he played. *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 625 (6th Cir. 2000).

Though *Sivero* underscores the difficulty of defending the alleged appropriation of an actor's character on a preliminary motion, genre actors in supporting roles can be expected to have difficulty making any of the showings necessary to assert a right-of-publicity interest in their roles.

Patrick Kabat is an associate with Levine, Sullivan, Koch & Schulz in New York. Frank Sivero was represented by Alex Herrera of Hess, Hess & Herrera, Beverly Hills, CA. Defendants were represented by Robert Rotstein of Mitchell Silberberg & Knupp, Los Angeles, CA.

News Organizations Not Liable for Reporting Wrongful Arrest

District of New Jersey Dismisses Libel Lawsuit Under Fair Report Privilege

By Patrick Kabat

Rejecting defamation and tag-along emotional distress claims against several media outlets, the District of New Jersey affirmed that news organizations cannot be held responsible for a prosecutorial error that resulted in the mistaken arrest of an innocent New Jersey woman. The court dismissed the lawsuit under New Jersey's robust fair-report privilege, rejecting the wrongfully-arrested plaintiff's argument that articles about a press conference held by the New York Attorney General, in which she and numerous others were described (and depicted in photographs) as suspects in a drugs-and-prostitution ring, falsely accused her of participating in the ring. *Lee v. TMZ et al.*, No. 2:15–00234 (D.N.J. Aug. 10, 2015).

Background

In late January 2014, New York Attorney General Eric Schneiderman (the "AG") held a press conference announcing that an undercover investigation into crime rings intent on taking advantage of the influx of out-of-town Super Bowl fans had culminated in a sting operation against a particularly sophisticated outfit. At the press conference, the Attorney General described the unique business model of one ring, a one-stop drugs-and-prostitution provider that accepted payments by credit card and made extensive use of social media to attract patrons, and displayed an investigation chart depicting the alleged conspirators and identifying them by name.

As a result of mistaken identity, however, Plaintiff Janice Lee was included on the investigation chart, and in a press release that the AG distributed to media outlets and posted online. She was arrested, but charges against her were later dropped.

Before Ms. Lee was exonerated, however, a number of news organizations reported on the arrests and press conference. She sued, alleging that they falsely reported that she was involved in the crime ring. She also sued the AG in a separate action, alleging that the false arrest and associated reports caused the dissemination of defamatory publications.

Accordingly, the news organizations relied principally on the fair report privilege in their motions to dismiss, arguing that the plaintiff effectively pled the elements of the privilege in her suit against the AG, that all of the challenged articles self-evidently and accurately reported on the official statements of the AG at the press conference and through its press release. The

(Continued on page 20)

(Continued from page 19)

plaintiff moved to strike all of the defendants' evidentiary support for this defense, including copies of the challenged articles, the press release, the order dismissing all charges against her, and proffered translations of those of the challenged publications that were in Korean. The district court, however, took judicial notice of all of these, and with respect to the translations ruled that "it would be unjust for Lee to rely on the Korean-language article in her complaint and then prevent [defendant Korean Time New York] from explaining the article's contents in a Rule 12(b)(6) motion to dismiss."

The court granted the motions, ruling that all four challenged publications fairly and accurately reported the AG's press conference and release. The court rejected the plaintiff's argument that the articles made independent, affirmative accusations of guilt because they were not suffused with the word "allegedly" or other attributors, because the context of the articles made plain that they reported the AG's allegations at a press conference.

The Korea Times New York and its reporter Jeehun Chun were represented by Jay Ward Brown and Patrick Kabat of Levine Sullivan Koch & Schulz, LLP's New York office. All Things Crime was represented by Jared Geist of Garces and Grabler, P.C. in Newark. Daily News L.P. was represented by in-house counsel Matthew A. Leish and Bruce S. Rosen of McKusker Anselmi in Florham Park. Your Daily Media was represented by Jeff Ifrah of Washington, D.C. Plaintiffs were represented by Michael S. Kimm of the Kimm Law Firm in Englewood Cliffs.

6th Circuit Rules in Favor of Reporter David Ashenfelter

12 Year Fight to Protect Source May Give Rise to New Defenses

By Herschel P. Fink

Former Detroit Free Press reporter David Ashenfelter's battle to protect his confidential source for an important national security story has spanned parts of two decades, occupied the time of two federal district and two circuit courts of appeals, and involved two newspaper owners, and two Constitutional amendments. It even outlasted Ashenfelter's own retirement in 2012.

But, in the end, when the Sixth Circuit U.S. Court of Appeals ruled in his favor on July 31, 2015, agreeing that he could claim Fifth Amendment protection to keep from naming an anonymous source for his January 14, 2004 story, headlined "Terror Case Prosecutor Probed on Conduct," his case may have established an additional weapon for embattled journalists in the fight to protect the identity of confidential sources, particularly when reporting on national security and governmental secrecy matters. *Convertino v. Dept. of Justice*.

The Sixth Circuit unanimously affirmed Ashenfelter's right to invoke Fifth Amendment privilege in language that could easily be applied to many government leak investigations.

Background

The case began under the newspaper's ownership by Knight-Ridder, which was purchased by McClatchy in 2005, and immediately resold to Gannett. Gannett, which took over as owner 10 years ago this month, carried on Ashenfelter's vigorous defense. The background of the case was artfully described in a March 24, 2011 summary judgment opinion, since reversed, by D.C. District Court Judge Royce Lamberth, who presides over the continuing merits federal Privacy Act lawsuit by former Assistant U.S. Attorney Richard Convertino, of Detroit, against the U.S. Department of Justice.

His suit alleges that damaging (but, true) information about an Office of Professional Responsibility Investigation of Convertino was leaked to Ashenfelter, a Pulitzer Prize winner, by an unknown DOJ employee, allegedly in violation of the Privacy Act. Judge Lamberth wrote:

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> "Information about the particulars of Convertino's OPR referral found its way into the hands of David Ashenfelter – a reporter for the Detroit Free Press – who wasted no time in translating it into a shocking news story. Ashenfelter's story turned the tables on Convertino, shining a burning spotlight directly on the terrorism prosecutor's alleged misdeeds. In the end, the suspected Detroit terrorists' convictions were overturned for prosecutorial misconduct. [Convertino was also prosecuted by the DOJ for obstruction of justice, but was found not guilty by a Detroit federal court jury.] Tales of this high-stakes terrorism case gone wrong filled headlines, leaving a broken reputation and this Privacy Act case in their wake. *** As the above introduction shows, the facts of this case could occupy the imagination of a good fiction writer for some time, but very few of the salacious details are actually relevant to the issues before the Court or to its analysis. Pared down to essentials, this case is the simple story of Richard G. Convertino's unsuccessful quest to unmask the leaker of his private information. Seven years of litigation [now almost 12] have sapped the resources of more than one United States District Court, yet Convertino is no closer to answering the most basic question of all: Who done it."

Former Detroit Free Press reporter David Ashenfelter's battle to protect his confidential source for an important national security story has spanned parts of two decades.

Judge Lamberth, concluding that all litigation must eventually come to an end, granted the government's dismissal motion based on futility. That might have ended the matter in 2011. But, Convertino appealed to the D.C. U.S. Court of Appeals, which decided that seven years of failed discovery was not enough, and ruled that Convertino should be allowed additional time and discovery to try to learn, "*Who done it.*"

Judge Robert Cleland back in the Eastern District of Michigan, who had jurisdiction over the subpoena enforcement action against Ashenfelter and his employer, Detroit Free Press, had already ruled years earlier that Ashenfelter, while not entitled to First Amendment protection, because the Sixth Circuit had not recognized such a protection for reporters, none-the-less was entitled to invoke Fifth Amendment protection, since Convertino had alleged in his Privacy Act suit, as well as in public comments, that Ashenfelter had been in a "criminal conspiracy" with the leaker, his source.

Now that the D.C. Circuit had allowed additional discovery, Convertino asked the Michigan federal court to allow him to open discovery against the Free Press itself, having struck out in his efforts against Ashenfelter individually. Judge Cleland, in a January 15, 2013 order,

(Continued on page 23)

(Continued from page 22)

allowed discovery against the newspaper regarding the identity of Ashenfelter's source. Convertino had argued that Ashenfelter's editors might know the identity of the reporter's source.

Despite a deposition of the Free Press publisher, and the production of thousands of pages of documents, Convertino still came up short in the quest to discover "who done it," and so he returned once more to Judge Cleland, asking him to reconsider his 2009 decision granting Ashenfelter Fifth Amendment protection. In an order and opinion on November 25, 2013, Judge Cleland rebuffed Convertino's attempt, stating that, "Plaintiff (Convertino) filed his motion more than three years late."

Judge Cleland also rejected Convertino's argument that there was now no chance of criminal prosecution of a journalist for doing his job, because then Attorney General Eric Holder had recently so declared in a Congressional hearing. But, the Free Press and Ashenfelter pointed out in response that, despite that pledge, Holder had been involved in another government leak investigation earlier in 2013 involving a search warrant affidavit for emails of Fox News reporter James Rosen, in which Rosen was described as a prosecution target, as well as in search warrants for Associated Press emails. Expressing skepticism, Judge Cleland wrote:

> "General Holder's testimony offers Ashenfelter no protection from future prosecution. Intervening changes in the law rarely constitute extraordinary circumstances for relief under Rule 60(b)(6). *** A statement by a beleaguered political appointee at a congressional subcommittee hearing may be many things, but it is not a change in the law."

On April 30, 2014, after a further lengthy period of inactivity, Judge Cleland issued an administrative "Order Closing the Case in Lieu of Judgment." Convertino then appealed to the Sixth Circuit, arguing in his appeal that Judge Cleland had erred in extending Fifth Amendment protection to Ashenfelter.

Sixth Circuit Opinion

In its 16 page Opinion and Judgment on July 31, the Sixth Circuit unanimously affirmed Ashenfelter's right to invoke Fifth Amendment privilege in language that could easily be applied to many government leak investigations, particularly those involving leaks to journalists of alleged national security information or government secrets. The Court wrote:

(Continued on page 24)

(Continued from page 23)

> "We affirm the validity of Ashenfelter's invocation as controlled by and naturally flowing from Hoffman [v. United States, 341 U.S. 479 (1951)] and its progeny. The context of this discovery proceeding demonstrates a precise, and even acute, risk of incrimination. Convertino's complaint in his merits suit against the DOJ alleges facts that if proven could implicate Ashenfelter in the commission of one or more crimes, including the allegation that federal officials illegally provided Ashenfelter with two confidential OPR documents. If proven, this allegation would appear to establish that Ashenfelter 'receive[d]' a 'record … of the United States or of [an] agency or department thereof,' raising a risk of prosecution under 18 U.S.C. Sec. 641. In this setting, it requires very little 'judicial imagination,' if any, to comprehend that Ashenfelter could have reasonably cause to fear that answering questions regarding the source of the leak would risk injurious disclosure. See Hoffman, 341 U.S. at 486-87; Morganroth, 718 F.2d at 169. Similarly, an answer to Convertino's question about Ashenfelter's search for documents responsive to the subpoena may be comprehended to pose a risk of incrimination where the documents, or evidence that Ashenfelter possessed or controlled such documents, could constitute direct evidence of the actus reus for the illegal receipt of agency records, punishable under Sec. 641. Curcio, 354 U.S. at 121; see also Hubbell, 530 U.S. at 43."

The Court further emphasized that, "The validity of an asserted Fifth Amendment privilege … turns not on the probability or likelihood of prosecution, but rather on the possibility of prosecution."

Given the long and tortuous history of the last almost dozen years, the possibility of one last "Hail Mary" attempt by Convertino for further review cannot be ruled out. But, the Sixth Circuit's ruling, given its strength and unanimity, suggests that the end, if not here, is very near. The decision, moreover, is likely to prompt an additional decision in the D.C. merits case, where the government's long pending second summary judgment motion is awaiting resolution by Judge Lamberth, this time based upon Convertino's admitted lack of pecuniary damages, a more recent Privacy Act requirement established by the Supreme Court.

Herschel P. Fink, Detroit Free Press legal counsel, has represented David Ashenfelter throughout the case, and Richard E. Zuckerman of Honigman Miller Schwartz and Cohn, Detroit, who heads that firm's white collar criminal practice, has represented Ashenfelter on his Fifth Amendment defense, along with Brian Wassom, also of Honigman.

NJ Appeals Court Vacates Orders Prohibiting Daily News From Reporting On Its Motion to Unseal

But Then Seals Its Own Order Until Being Asked To Reconsider

By Bruce S. Rosen and Matthew Leish

It was Alice through the looking glass in New Jersey when a trial court not only denied a motion to unseal a proceeding relating to a paternity claim against rap star Sean Carter a/k/a Jay -Z, but prohibited the New York Daily News from reporting that its motion had been denied or disclosing any information from the hearing.

The N.J. Appellate Division then granted an emergent appeal but inexplicably sealed its own order upholding the News' constitutional rights to report on its own motion. The appellate court finally relented after the News moved for reconsideration by reissuing the same decision with a caption redrafted to show only initials. *L.C. v. S.C. and L.F.*, A-4793-14 (Motion No. M-0007423-14) (August 11, 2015).

Judge Carmen Messano, writing for a two-member appeals panel, vacated those parts of two orders by a Camden County trial judge prohibiting the News from reporting on its own motion, calling those provisions a prior restraint that was neither necessary nor effective at achieving the government's goals and was overly broad. The Court said that despite the fact the trial court granted the News intervenor status, the News "was not seeking relief in the litigation; it was merely attempting to vindicate its right to collect and report the news," and thus could not be held to the sealing orders that existed for the parties.

It was Alice through the looking glass in New Jersey when a trial court not only denied a motion to unseal a proceeding, but prohibited the New York Daily News from reporting that its motion had been denied or disclosing any information from the hearing.

Background

The News had moved to intervene and unseal an action in the Superior Court Law Division involving Rymir Satterthwaite, a now 21 -year old aspiring rapper from Philadelphia who has publicly proclaimed Carter to be his father from an early '90s romance between the hugely successful Brooklyn lyricist and a teenage Philadelphia girl. As publicly reported prior to the entry of the sealing order, Rymir's then-guardian alleged in a complaint that Carter and his lawyer had misrepresented Carter's residency and other facts to avoid jurisdiction in the New Jersey courts in a prior paternity case.

(Continued on page 26)

(Continued from page 25)

In New Jersey, paternity issues are heard in the Family Part where secrecy rules are in place although not absolute. However, besides Rymir's public declarations, there had been considerable publicity concerning the paternity actions, and a separate paternity action in Pennsylvania denying that state's jurisdiction was previously published and remains available.

After a hearing in a sealed courtroom where the News' papers and arguments were entirely based upon public information, the trial judge granted the motion to intervene but denied the motion to unseal, ruling that the Law Division matter was completely intertwined with the preexisting Parentage Act case. The judge rejected the News' arguments that the facts involved with the case were already widely publicized and that the Parentage Act's secrecy provisions sealing courtrooms should not apply to a non-Parentage Act case.

The judge then puzzlingly ruled that the News' motion to unseal was itself part of the sealed case under the Parentage Act and thus the motion itself should be subject to the statutory seal, refusing to provide unsealed transcripts of the argument and barring the News from disclosing or reporting the outcome of its own motion. While the judge agreed to allow further briefing and even held additional argument on this issue, he again prohibited the News from reporting even that its motion was denied.

Prior Restraint Analysis

The News then filed for and won an emergent appeal as to the prior restraint. The Appellate Division heard emergent argument in Trenton and issued an order vacating those parts of the trial court order restricting the News' reporting, as well as ordering that transcripts of the argument must be released with minimal redaction. The appellate order chastised the trial court for its "overly broad" ruling and for issuing a gag order before attempting to institute "other protective devices." Moreover the panel reiterated a theme in New Jersey and Third Circuit law to the effect that limits on access to court proceedings cannot deprive the press or public of information that has already been widely disseminated.

The appellate order chastised the trial court for its "overly broad" ruling and for issuing a gag order before attempting to institute "other protective devices."

However, the Appellate Division inexplicably sealed its own order (after an earlier version that was not sealed was recalled), even as it ordered the unsealing of transcripts and the order below, and even though it agreed with the News' legal arguments. The News then had to engage in a fourth series of briefing by filing a motion to reconsider the sealed status of the order. While the panel declined to do exactly that, it issued an unsealed version of the order using initials instead of the parties' names in the caption.

(Continued on page 27)

(Continued from page 26)

The trial court has also now issued unsealed versions of its amended orders and of the hearing transcripts, albeit with heavy redactions and with the parties' names removed. And, of course, the underlying case remains sealed in its entirety.

Matthew Leish is Vice President and Assistant General Counsel for The Daily News L.P., while Bruce S. Rosen, a partner atMcCusker, Anselmi, Rosen & Carvelli, P.C. in Florham Park, N.J. and New York City, a DCS member, represented the Daily News along with associate Sarah L. Fehm.

Events During Annual Dinner Week in New York

Wednesday, November 11

Open MLRC Board Meeting
2:30 p.m. | Grand Hyatt

MLRC Forum:
Hate Speech, Threats, and Terror:
In the News and On Your Site
3:45 p.m. | Grand Hyatt

Annual Dinner & Reception
6:00 p.m. | Grand Hyatt

Thursday, November 12

Defense Counsel Section Lunch & Meeting
12:15 p.m. | Proskauer

Open Planning Meeting for
MLRC Virginia Media Law Conference 2016
5:30 p.m. | Davis Wright Tremaine

Court Permanently Enjoins Release of Erotic Dancers' Names

By Judy Endejan

On August 10, 2015, Federal Judge Ronald Leighton in Tacoma, Washington issued a permanent injunction preventing the release of personal information regarding adult entertainment dancers. *Roe v. Anderson,* No. 3:14-CV-05810.

Background

Local law requires erotic dancers to be licensed. In order to obtain a license the dancers need to provide their true names, birth dates, and photographs to Pierce County. A citizen, David Van Vleet submitted a Public Records Act ("PRA") request for this information to the Pierce County Auditor who said that no exemption in the PRA prevented this disclosure so she was going to release the information to Van Vleet. Before doing so, the Auditor notified the erotic dancers and managers at Dream Girls at Foxes, a Parkland, Washington adult entertainment club.

They sought, and obtained, a preliminary injunction to prevent the release of this information to Van Vleet. In arguing against the preliminary injunction Van Vleet told Judge Leighton last fall that he had a first amendment right to access this information so that he could pray for the Dream Girls dancers by name. Judge Leighton didn't buy that argument then and he rejected it in granting the preliminary injunction on August 10.

Disclosure of the dancers' personal information would have an unconstitutional chilling effect.

Ironically, Van Vleet who sought personal information for the Dream Girls dancers refused to provide his email address, phone number, or physical address to the court and failed to appear at the hearing on the dancers' request for as permanent injunction.

Public Records Act Analysis

The dancers argued that the PRA was unconstitutional as applied to them because disclosure of their personal information could violate their First Amendment rights. Judge Leighton's ruling did not follow that reasoning but found that *because* the First Amendment protects the plaintiff's information it is exempt from disclosure under the PRA. Judge Leighton noted that plaintiffs, as workers in an erotic dance studio, are engaging in a form of protected First Amendment expression as recognized by the Ninth Circuit in *Dream Palace v. County of Maricopa*, 384 F.3d 990 (9th Cir. 2004).

(Continued on page 29)

(Continued from page 28)

Disclosure of the dancers' personal information would have an unconstitutional chilling effect because: "As erotic dance studio employees, plaintiffs are uniquely vulnerable to harassment, shaming, stalking, or worse. Plaintiffs have expressed concern regarding the enhanced risk that disclosure of their real names and other licensing information might bring. They plausibly claimed that they would not have engaged in their profession had they known that their erotic license information could be so easily disclosed to any member of the public."

The judge ruled that the PRA exempted disclosure of this personal information under its "catchall" "other statutes" exemption, RCW 42.56.070. While the court did not explicitly say so it incorporated the First Amendment into the PRA's catchall, as a way of sustaining the constitutionality of the PRA. The dancers had requested an injunction against release of the information to anyone, but Judge Leighton limited his ruling to the Van Vleet request.

Judy Endejan is a partner at Garvey Schubert Barer in Seattle, WA.

D.C. Circuit Debates Reach of Zauderer on Compelled Corporate Speech

Case Involved Mandatory Disclosures Regarding Use of "Conflict Minerals" in Manufacturing

By Jeff Hermes

In *Nat'l Ass'n of Mfrs. v. SEC*, No. 13-5252 (D.C. Cir. August 18, 2015), a panel of the U.S. Court of Appeals for the D.C. Circuit reaffirmed after rehearing that the First Amendment protects U.S. manufacturers against being compelled to declare publicly that their products were not "DRC conflict free" – i.e., that these products contained mined minerals from which armed groups fighting in the Democratic Republic of the Congo might derive revenue. The decision arises out of a debate within the D.C. Circuit regarding the reach of the U.S. Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), which adopted a relaxed standard for First Amendment review of compelled corporate disclosures in at least some circumstances.

Background

In 2010, Congress attempted to respond to the humanitarian costs of the Congo war through measures targeting one source of funding for that war – namely, the mining of certain metals commonly used in the manufacture of consumer goods. 15 U.S.C. § 78m(p) directs the SEC to promulgate regulations requiring companies using these metals, termed "conflict minerals," to investigate and disclose the origin of those minerals.

The First Amendment protects U.S. manufacturers against being compelled to declare publicly that their products were not "DRC conflict free."

The National Association of Manufacturers (NAM) challenged the validity of several provisions of the SEC regulations as arbitrary and capricious. In addition, NAM asserted a First Amendment challenge to portions of the statute itself. NAM objected to 15 U.S.C. § 78m(p)(1)(A)(ii) & (E), which require that manufacturers who determine that certain products contain "conflict minerals" originating in listed countries must describe those products as not "DRC Conflict Free" in reports required to be posted on the company's website and filed with the SEC (hereafter, the "DRC Disclosures").

(Continued on page 31)

(Continued from page 30)

Prior Panel Ruling

The district court rejected NAM's First Amendment claim, and the D.C. Circuit reviewed the issue *de novo* in 2014. While the entire panel found that the SEC's regulations were not arbitrary and capricious, a majority of the appellate court held that the compelled disclosure provisions violated manufacturers' First Amendment rights to control what they chose to say about their products. *Nat'l Ass'n of Mfrs. v. SEC,* 748 F.3d 359 (D.C. Cir. 2014) ("*NAM I*"). In doing so, the D.C. Circuit applied a restrictive reading of the ruling in *Zauderer*, which addressed the First Amendment standard of review appropriate for compelled disclosures in attorney advertising.

The Supreme Court held in *Zauderer* that, instead of the standard *Central Hudson* test for restrictions on commercial speech, rational basis review would apply to the compelled disclosure of "purely factual and uncontroversial information" in attorney advertising. 471 U.S. at 651. However, *Zauderer* did not discuss whether this relaxed standard would apply outside of circumstances in which disclosure is "reasonably related to the State's interest in preventing deception of consumers." *Id.* Accordingly, it was not clear whether rational basis scrutiny would apply to the DRC Disclosures, which the government admitted were not intended to remedy consumer deception.

In its 2014 decision, the D.C. Circuit panel ruled that *Zauderer* was limited to its context, i.e., compelled disclosures to prevent deception. *NAM I*, 748 F.3d at 370-71. It also found that even if *Zauderer* was not thus limited, the disclosures at issue would likely not fall within the category of disclosures of "purely factual and uncontroversial information" to which rational basis scrutiny applied:

> it is far from clear that .. whether a product is "conflict free" ... is factual and non -ideological. Products and minerals do not fight conflicts. The label "conflict free" is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. And it may convey that "message" through "silence."... By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.

(Continued on page 32)

(Continued from page 31)

Id. at 371.

While noting that strict scrutiny might in fact be the appropriate standard (presumably because the disclosures might not be considered commercial speech), the panel then found that the disclosure requirements would not survive even under *Central Hudson*'s less rigorous standard. *Id.* at 372. Specifically, the panel held that the government had failed to show that the requirements were narrowly tailored, because similar results could have been achieved by the government compiling "its own list of products that it believes are affiliated with the Congo war, based on information the issuers submit to the Commission." *Id.* It also rejected the SEC's argument that companies could minimize the impact by explaining the meaning of "conflict free" in their own terms: "[T]he right to explain compelled speech is present in almost every such case and is inadequate to cure a First Amendment violation. ... Even if the option to explain minimizes the First Amendment harm, it does not eliminate it completely." *Id.* at 373.

Judge Sri Srinivasan joined the court's opinion with respect to whether the SEC regulations were arbitrary and capricious, but not its holding on the First Amendment question, noting the pendency of an en banc case in the D.C. Circuit that could affect that issue. Accordingly, he would have waited to decide that question. *Id.* at 373-75.

Intervening En Banc Ruling

As Judge Srinivasan predicted, the D.C. Circuit soon issued an en banc opinion in another case raising the issue of the scope of *Zauderer*, entitled *Am. Meat Inst. v. U.S. Dep't of Agriculture*, 760 F.3d 18 (2014) ("*AMI*"). That case involved compelled disclosures in the form of country-of-origin labels on product packaging. As in *NAM I*, the en banc court recognized that *Zauderer* was unclear about the scope of its holding: "The language [regarding customer deception] could have been simply descriptive of the circumstances to which the Court applied its new rule, or it could have aimed to preclude any application beyond those circumstances." *AMI*, 760 F.3d at 22.

The en banc court, however, reached a different result, finding that *Zauderer*'s rule was based not on the context of preventing deception, but on the limited interest that commercial speakers have in withholding factual information about their products:

> After noting that the disclosure took the form of "purely factual and uncontroversial information about the terms under which [the] services will be available," the [Supreme] Court characterized the speaker's interest as

(Continued on page 33)

(Continued from page 32)

> "minimal": "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal." ... All told, *Zauderer*'s characterization of the speaker's interest in opposing forced disclosure of such information as "minimal" seems inherently applicable beyond the problem of deception, as other circuits have found.

Id. at 22. Accordingly, the en banc court explicitly overruled any earlier cases in the D.C. Circuit to the extent that they held *Zauderer* to be limited to government interests in correcting deception, including *NAM I*. *Id.* at 22-23.

Applying *Zauderer*, the en banc court first held that consumer interest in the country of origin of commercial products was a sufficient basis for the disclosure requirements. *Id.* at 24-25. Turning to the question of the fit between the disclosures and the government interest to be served, the court found that the *Zauderer* standard and the *Central Hudson* standard were substantially the same when dealing with disclosure requirements:

> *Zauderer*'s method of evaluating fit differs in wording, though perhaps not significantly in substance, at least on these facts. ... When the Supreme Court has analyzed *Central Hudson*'s "directly advance" requirement, it has commonly required evidence of a measure's effectiveness. But as the Court recognized in *Zauderer*, such evidentiary parsing is hardly necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait[.] ... The self-evident tendency of a disclosure mandate to assure that recipients get the mandated information may in part explain why, where that is the goal, many such mandates have persisted for decades without anyone questioning their constitutionality.

Id. at 25-26. The court similarly found that disclosure obligations would almost automatically satisfy *Central Hudson*'s "narrow tailoring" requirement:

> To the extent that the government's interest is in assuring that consumers receive particular information ..., the means-end fit is self-evidently satisfied when the government acts only through a reasonably crafted mandate to disclose "purely

(Continued on page 34)

(Continued from page 33)

> factual and uncontroversial information" about attributes of the product or service being offered ... absent a showing that the disclosure is "unduly burdensome" in a way that "chill[s] protected commercial speech[.]" ... [O]ne could think of *Zauderer* largely as "an application of *Central Hudson*, where several of *Central Hudson*'s elements have already been established."

Id. at 26-27.

While the en banc court did recognize that *Zauderer* was limited to compelled disclosures of "purely factual and uncontroversial information," it found that the country of origin requirements fit into that category. Notably, the court did not state a specific definition of "controversial" information, but found that the disclosures at issue were uncontroversial in both the sense that their accuracy was not disputed and the sense that country of origin statements by themselves do not communicate a controversial message. *Id.* at 27.

Opinion on Rehearing

The *NAM* panel granted a petition for rehearing to determine the impact of en banc ruling in *AMI* on the DRC Disclosures, but ultimately reached the same result in the more recent decision. *Nat'l Ass'n of Mfrs. v. SEC,* No. 13-5252 (D.C. Cir. August 18, 2015) ("*NAM II*").

In *NAM II*, a majority of the court held that notwithstanding the holding in *AMI*, *Zauderer* still did not apply to the DRC Disclosures. But instead of resting that holding on the fact that *Zauderer* related to consumer deception, *NAM II* based its holding on the fact that the disclosures at issue related neither to voluntary advertising (as in *Zauderer*) or point-of-sale disclosures (as in *AMI*):

> [T]he SEC acknowledged that the statute – and its regulations – were "directed at achieving overall social benefits," [and] that the law was not "intended to generate measurable, direct economic benefits to investors or issuers[.]" ... The SEC thus recognized that this case does not deal with advertising or with point of sale disclosures. Yet the Supreme Court's opinion in *Zauderer* is confined to advertising, emphatically and, one may infer, intentionally.
>
> ...

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> [T]he Supreme Court has refused to apply *Zauderer* when the case before it did not involve voluntary commercial advertising. ... In *Hurley* [*v. Irish-American Lesbian and Bisexual Group of Boston*, the Court] went on to stress that "outside that context" (commercial advertising) the "general rule" is "that the speaker has the right to tailor the speech" and that this First Amendment right "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." ... The Court added that this constitutional rule was "enjoyed by business corporations generally."

NAM II, slip op. at 8-10. Because it held again that *Zauderer* was inapplicable, albeit for a different reason, the court referred back to its holding in *NAM I* that the DRC Disclosures failed to satisfy *Central Hudson*. *Id.*, slip op. at 12.

Due to the dispute about the reach of *Zauderer*, however, the *NAM II* court also analyzed how the DRC Disclosures would fare under the more relaxed standard. Again, it found that the disclosure requirements would be unconstitutional.

The court first examined whether the DRC Disclosures would be effective in achieving Congress' intent, which it characterized as "ameliorating the humanitarian crisis in the DRC"; it found that any such effect was "entirely unproven and rests on pure speculation." *Id.*, slip op. at 15. In the total absence of evidence of effectiveness beyond "speculation and conjecture," the court held that the measures selected by Congress violated the First Amendment. *Id.*, slip op. at 15-18.

Ultimately, the court reiterated its finding in NAM I that "whether a product is 'conflict free' or 'not conflict free' – [is] hardly 'factual and non-ideological.'"

The court also reaffirmed its original finding that the DRC Disclosures did not consist of "purely factual and uncontroversial information." *Id.*, slip op. at 18-25. Noting that the en banc decision in *AMI* did not define "controversial" information, the court rejected the idea that "controversy" related to the factual accuracy of compelled speech or whether it embodied statements of opinion; it found that the former issue was already covered by the requirement that the disclosures be "purely factual" and the latter standard to be vague and unworkable. *Id.*, slip op. at 20-21. The court also found that compelling companies to use evocative terms such as "conflict free" could not be saved by providing neutral and factual statutory definitions of those terms. *Id.*, slip op. at 23. Ultimately, the court reiterated its finding in *NAM I* that "whether a product is 'conflict free' or 'not conflict free' – [is] hardly 'factual and non-ideological.'" *Id.*, slip op. at 24.

(Continued on page 36)

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Dissenting Opinion

Judge Srinivasan filed a lengthy and strenuous dissent to the majority opinion, finding that *Zauderer* clearly applied to the DRC Disclosures and that the First Amendment posed no obstacle to their requirements.

As a starting point, he found that the DRC Disclosures were commercial speech, noting that the D.C. Circuit had extended that category to include not only statements in advertising, but "material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose of persuading the public to purchase (or, given the corrective disclosures at issue, not to purchase) the product." *Id.* (Srinivasan, J., dissenting), slip op. at 8. Moreover, in his view *Zauderer* should apply to all compelled disclosures constituting commercial speech:

> In [the majority's] view, the permissive review normally afforded to commercial disclosure mandates under *Zauderer* extends only to a sub-category of commercial speech: advertisements and product labels. ... No other court has ever identified such a limit under *Zauderer* (or for any other purpose under commercial-speech law). ... It would be strange, though, if the same compelled commercial disclosure—providing the same information about the same product—commanded more demanding First Amendment scrutiny if it appeared in a single yearly report on the seller's website instead of on every product label.

Dissent, slip op. at 9. He further criticized the majority's reliance on *Hurley* and other cases that "had nothing to with commercial speech." *Id.*, slip op. at 11.

Applying *Zauderer*, Judge Srinivasan next objected to the majority's finding that the DRC Disclosures were "controversial." *Id.*, slip op. at 11. He found that the question of whether compelled speech was "purely factual" related to whether the statement constituted fact rather than opinion, and that "controversy" related to whether the truth of the factual statements was in doubt. *Id.* He rejected the suggestion that "controversy" related to broader social questions, finding that inconsistent with the ruling in *AMI*. *Id.*, slip op. at 15.

He further found that the factual nature of the DRC Disclosures was guaranteed by the statutory definitions of the required language. *Id.*, slip op. at 16. Moreover, he said, the statutory definition of the term "conflict free" was not misleading, as if Congress had required the use of the word "peace" but contradictorily defined it to mean "war," or the use of a term such as "environmentally sustainable" that clearly expressed an opinion but applied a statutory

(Continued on page 37)

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definition couched in factual language. *Id.*, slip op. at 20. And any doubt about the meaning of the disclosures, he found, would be cured by the company's ability to elaborate on the disclosures in any way it chose. *Id.*, slip op. at 18.

Judge Srinivasan also disagreed with the majority's characterization of the purpose of the DRC Disclosures, and whether they would be effective. Rather than aiming broadly to "promote peace and security in the DRC in some highly general sense," he found that Congress had specifically intended to "reduc[e] funding to armed groups in the DRC region from trade in conflict minerals." *Id.*, slip op. at 22. With that narrower focus, he found that the DRC Disclosures were a proper fit for that goal:

> "[E]videntiary parsing," we recognized in *AMI*, "is hardly necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait." ... By requiring issuers to perform due diligence on their product supply chains and to disclose the results of that examination to investors and consumers, the Rule encourages manufacturers voluntarily to reduce their reliance on conflict minerals from the DRC and adjoining countries. And by making information about mineral sourcing readily available to investors and consumers, the disclosure regime enables them to exert pressure on manufacturers to minimize the use of conflict minerals from the DRC region.

Id., slip op. at 24. Accordingly, he would have rejected NAM's First Amendment claims.

Jeff Hermes is a deputy director at MLRC.

Recently MLRC Publications

Model Policy on Police Body-Worn Camera Footage
Several federal, state, and local bodies are presently considering policies regarding public access to police body camera recordings. The MLRC has developed and adopted a Model Policy on this topic, which states that such tapes should generally be available for public inspection, subject to exemptions in existing public records laws. A set of principles is also offered as a guide for legislators and policy-makers.

Practically Pocket-Sized Guide to Internet Law: 2015 Update
23 concise articles on a wide-range of Internet law questions that come up in day-to-day media law practice.

MLRC Bulletin 2015 Issue 1: Legal Frontiers in Digital Media
Closing The Frontier – The FCC's "Open Internet" Order; Emerging Themes In Data Breach Litigation: What In-House Counsel Need To Know; 2015 MLRC International Roundtable; Emerging Legal Issues In The Internet Of Things; Did Police Officers Violate The First Amendment By Editing Wikipedia?

ECHR: Privacy Rights Trump Media Rights to Publish (Extensive Amounts of) Truthful Information from Public Records

By Lyrissa Barnett Lidsky

On July 21, 2015, the European Court of Human Rights struck a balance between a vaguely defined right to privacy and press freedom strongly in favor of the former in *Satakunnan Markkinapörssi Oy and Stamedia Oy v. Finland* (Application No. 931/13). The decision, which is binding on the 47 Council of Europe member states, held that the constitutional protection for privacy found in Article 8 of the European Convention of Human Rights allowed Finland to bar Finnish media companies from publishing 1.2 million lawfully obtained public tax records. In doing so, the European Court of Human Rights endorsed a narrow definition of what types of publication serve the "public interest," holding that publication of an entire database of public record information cannot be regarded as "journalistic activity," even if publication of individual records might be.

Background

The *Satamedia* case involved two media companies under common ownership. One, the publisher of *Veropörssi*, had been publishing information about the taxable income and assets of Finnish citizens since 1994. Finnish law designates this information as public, and the magazine obtained the data it published from Finnish tax authorities. In 2003 Satamedia began a text message service that provided individualized tax information about Finnish citizens upon request and payment of a two-euro fee. The SMS service relied on the data already gathered and published in *Veropörssi*.

The European Court of Human Rights endorsed a narrow definition of what types of publication serve the "public interest."

The *Satamedia* case has a complex procedural history. Finland's Data Protection Ombudsman (DPO) objected that the media companies' creation of "personal data registers" did not qualify as journalism, and it initiated proceedings. Finland's Data Protection Board, however, found that the media companies were engaged in journalism and were thus qualified for derogation from the Act. A derogation allows a member state to carve out an exception to an EU law or delay implementation based on its national values.

Not content with this ruling, the DPO appealed. The case ultimately reaching the highest court in the Finnish administrative court system, which requested a preliminary ruling from the Court

(Continued on page 39)

(Continued from page 38)

of Justice of the European Union (CJEU) concerning the permissible balance between privacy and press freedom under European Union data protection law.

The CJEU, sitting in Grand Chamber, held that the media companies were involved in processing personal data. The court then proceeded to set forth principles relevant to the determination of whether any derogation from EU Data Protection law for "journalistic purposes" might apply to the activities of the Finnish media companies. The CJEU gave guidelines to member states about the scope of derogations for journalistic purposes:
First, one need not be a "media undertaking" to qualify for derogation; "every person engaged in journalism" may qualify.

Second, derogations may apply even where publication is for profit-making purposes.

Third, the medium used does not determine whether an activity is for journalistic purposes.

Therefore, the court concluded, gathering and publishing large amounts of data from the public record may be exempt by national legislation from EU Data Protection law "if the sole object of those activities is the disclosure to the public of information, opinions or ideas." The CJEU remanded the case back to the Finnish courts for determination of whether Satamedia's activities met this standard.

Finland's highest court, applying the guidelines provided by the CJEU, determined that Satamedia's publication of the tax information database did not constitute journalistic activity, because, in the court's view, the public interest did not require publication of personal information about millions of people. The court found that when balanced against privacy rights, any derogation from data privacy legislation should be "kept only to what was strictly necessary." The court further held that "the decisive factor" in balancing privacy against freedom of expression was "whether a publication contributed to a public debate or was solely intended to satisfy the curiosity of readers." Applying this reasoning, Finland's high court the court held that the manner in which the tax information was published as well as the extent of information published meant that the media companies before it were not engaged in journalistic activity. In essence, the court did not find any journalistic purpose was served by publication of so many records or by making the records available by text message on a case-by -case basis. The media companies appealed the decision, arguing it constituted an interference with their right of free expression under the European Convention on Human Rights.

ECHR Decision

The European Court of Human Rights affirmed that the Finnish high court's decision represented an acceptable balance between privacy and press freedom. The ECHR found that the case involved information of minimal public interest. The court conceded that "the general

(Continued on page 40)

(Continued from page 39)

subject-matter"—the taxation data—was "a matter of public record" and thus by definition a matter of public interest. The court further conceded that the information published was accurate and published in good faith. Nonetheless, the ECHR found that the Finnish court properly determined that the publication ceased being journalistic activity because of the extent of publication, by which the ECHR meant the sheer number of individual taxpayer records. In fact, the court stated that *Veropörssi* could continue publishing the information "but only to a certain extent."

However, the ECHR never specified how many records *Veropörssi* could publish without violating constitutional privacy rights. Indeed, the court failed to specify the nature or weight of privacy interests at stake in the case, a point emphasize by the single dissenting judge. Instead, it merely assumed the publication of tax records implicated privacy—even though the Finnish legislature apparently thought otherwise. The court therefore concluded that the Finnish courts' interference with press freedom in the case were "necessary in a democratic society."

The *Satamedia* decision continues a trend among European courts to give broad scope to individual privacy rights even when pitted against press freedom. What is remarkable is the fact that the court condemned the media companies for repackaging (and selling) publicly available data supplied to them by government authorities. Although the court was careful not to condemn the media for selling the public records for profit, the court was unable to conceive how repackaging public records to supply to individual requestors could be characterized as journalism. Presumably, the court might have been able to discern a public interest in publication of the tax data had the media companies analyzed it in some fashion, but it is unclear how much analysis might be required for the activity to qualify as journalism. Likewise, it is not clear how many public records a newspaper might publish before publishing "too many."

The Satamedia decision continues a trend among European courts to give broad scope to individual privacy rights even when pitted against press freedom.

What is certain is that, when compared to decisions of U.S. courts, the numerous courts involved in resolving the *Satamedia* case expressed little reticence about giving normative content to the concept of "public interest" and drawing the boundaries of what a court considers "legitimate" journalistic activity.

Lyrissa Barnett Lidsky is Stephen C. O'Connell Professor of Law and Associate Dean of International Programs at the University of Florida Levin College of Law, where she teaches Mass Media Law, Torts, and Cyberlaw. Many of her publications are available at http://ssrn.com/author=247860.

Backpage.com Loses TRO, Preliminary Injunction in Case Against Sheriff

Lack of Causation, No Irreparable Harm from Sheriff's Threats to Visa, MasterCard

By Jeff Hermes

Last month, Judge John J. Tharp, Jr., of the Northern District of Illinois entered a temporary restraining order against Cook County Sheriff Thomas J. Dart, barring him from interfering with payment processing for classified advertisement website Backpage.com. *Backpage.com LLC v. Dart*, No. 15-cv-06340 (N.D. Ill. Jul. 24, 2015). But after expedited discovery and an evidentiary hearing, Judge Tharp has reversed course, vacated the temporary restraining order, and denied a preliminary injunction in a disturbing ruling that gives cause for substantial concern about the ability of government officials to use informal methods to chill speech.

Background

The case arose out of Sheriff Dart's belief that Backpage.com played a key role in facilitating sex trafficking through the publication of advertisements for prostitution. Frustrated by his inability to pursue Backpage.com on his own authority due to Section 230 of the Communications Decency Act and Backpage.com's resistance to public pressure to remove these advertisements, in June 2015 Sheriff Dart sent letters on official letterhead to Visa and MasterCard demanding that they "defund" sex trafficking and "compelling" them to sever ties with Backpage.com.

Judge Tharp has reversed course, vacated the TRO, and denied a preliminary injunction in a ruling that gives cause for substantial concern about the ability of government officials to use informal methods to chill speech.

Both companies cut off ties with Backpage.com by the morning of July 1, placing Backpage.com in a severe financial crisis. Backpage.com filed suit against Dart, alleging that the letters constituted an informal prior restraint in violation of the site's First Amendment rights.

For a more extensive discussion of the lengthy factual prelude to this case, please see MLRC's coverage of the earlier TRO decision in last month's issue of the MediaLawLetter.

Threats or Persuasion?

In the court's latest order, *Backpage.com LLC v. Dart*, No. 15-cv-06340 (N.D. Ill. Aug. 24, 2015), Judge Tharp again analyzed the issue as whether

(Continued on page 42)

(Continued from page 41)

> Dart's actions amount to informal censorship in violation of the *Bantam Books*[, *Inc. v. Sullivan*, 372 U.S. 58 (1963)] line of cases. The answer turns primarily on the issue of whether Dart can be said to have implicitly threatened the credit card with official action if they did not terminate their relationships with Backpage, and if so, whether the threat caused the intended result.

Slip op. at 12. With respect to the first question, whether there was an implicit threat, Judge Tharp cautioned that

> [G]overnment officials, including law enforcement officials, retain their own First Amendment rights to speak on matters of public concern. They may permissibly advocate for particular results, criticize conduct, and even threaten others with public embarrassment. … The doctrine of prior restraints is implicated only where threats of official action are present. … In short, attempts to convince must be distinguished from attempts to coerce; the former are perfectly legal.

Id., slip op. at 13. Nevertheless, the court reaffirmed its earlier finding that Dart's letters could constitute threats:

> Dart did not directly threaten the companies with an investigation or prosecution, and he admits that his department had no authority to take any official action with respect to Visa and MasterCard. But by writing in his official capacity, requesting a "cease and desist," invoking the legal obligations of financial institutions to cooperate with law enforcement, and requiring ongoing contact with the companies, among other things, Dart could reasonably be seen as implying that the companies would face some government sanction—specifically, investigation and prosecution—if they did not comply with his "request."

Id., slip op. at 14. The court also noted that "Dart's pre- and post-letter statements are consistent with (though not conclusive proof of) an attempt at official coercion," including references to appealing to the card companies' interest in avoiding liability and referring to the letters as "demands." *Id.*, slip op. at 14-15.

Judge Tharp did state that a jury would not be *required* to find that Dart's letters were threats, noting that "[c]ompared to the language of the threats, often coupled with police action,

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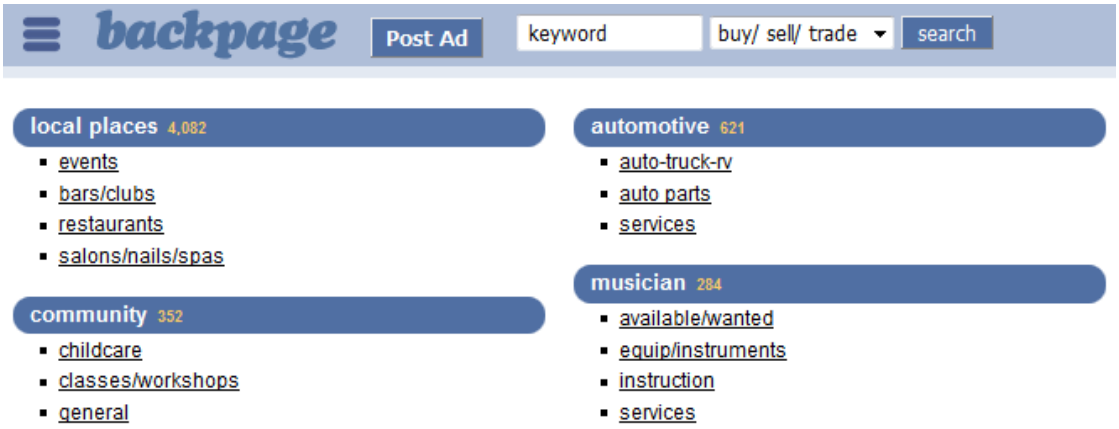

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in *Bantam Books* itself and other cases where an informal prior restraint was found, Dart's oblique, footnoted, references to irrelevant statutes and clunky statements about legal duties seem unlikely to inspire fear of legal reprisals — particularly on the part of large, sophisticated corporations[.]" *Id.*, slip op. at 15. But as a matter of law, Judge Tharp held that at the present stage he could not hold that the letters were *not* threatening. *Id.*

This is the right result, but Judge Tharp's concern for Sheriff Dart's First Amendment rights gives cause for concern (which turns out to be justified given the remainder of the opinion). Admittedly, the Supreme Court has recognized that the First Amendment protects participation by both citizens and legislators in debate on public issues. *See Bond v. Floyd*, 385 U.S. 116, 136 (1966) ("The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators."); *but see Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection *on* the Government."). But it is a far cry from stating that the First Amendment ensures that both legislators and the public have a role in public debate to hold that the Constitution guarantees government officials the right to quell another's speech entirely because pressure placed on third parties itself takes the form of speech.

Those opinions the district court cites (*see* slip op. at 13) for the principle that public officials' First Amendment rights bear on the *Bantam Books* analysis either do not involve suppression of another's speech through third party pressure in the *Bantam Books* sense, *see McLaughlin v. Watson*, 271 F.3d 566 (3rd Cir. 2001) (employment retaliation case); *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56 (2nd Cir. 1999) (lawsuit over denial of contract for security services allegedly based on religious discrimination), or do not discuss the officials' First Amendment rights at all, *see Am. Family Ass'n, Inc. v. City and Cty. of San Francisco*, 277 F.3d 1114, 1125 (9th Cir. 2002); *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1016 (D.C. Cir. 1991); *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 87-89 (3rd Cir. 1984).

(Continued on page 44)

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To be fair to Judge Tharp, federal appellate courts have not always been clear about this distinction, with courts in non-*Bantam Books* settings sometimes referencing *Bantam Books* cases. *See McLaughlin* at 573; *X-Men* at 70. But this is nevertheless a distinction worth enforcing. Otherwise, the *Bantam Books* rule is likely to devolve from whether government clout is used to suppress speech to a determination of whether an official's own speech falls into an unprotected category.

This is particularly important in the online context, where many intermediaries and vendors might be involved who have little investment in protecting an end user's freedom of expression. Courts must be able to recognize that even a slight, subtle, vague, or clumsy threat may be enough in these circumstances to convince a mostly disinterested party that supporting someone's speech is not worth the trouble.

Influenced by the Letters, But Not the Threat?

Having ruled that Dart's letter might constitute a threat, the court next considered whether it was those threats that compelled Visa and MasterCard to terminate their relationships with Backpage.com. Judge Tharp now found that while the letters might have triggered withdrawal it was not the threats contained in those letters which had that effect:

> [W]hile the Court does not quarrel with the premise that ***the letter*** precipitated the companies' actions—the Court has made the preliminary finding, consistent with the evidence, that the companies responded to Dart's letter—it is far from clear that any ***threat*** the letter may have contained caused the companies' action.

Backpage.com, No. 15-cv-06340, slip op. at 16 (N.D. Ill. Aug. 24, 2015) (emphasis in original). The court based this apparently paradoxical result on additional evidence obtained in discovery that the credit card companies did not feel threatened, or at least were influenced by considerations other than the possibility of legal action:

> Visa's affidavit states that it was not influenced by any threat. And MasterCard had reason to terminate … Backpage before hearing anything from Dart because of its concerns about negative media attention; its acquirer merely advanced the termination date. Indeed, American Express needed no communication from Dart to abandon Backpage; this makes it even more plausible that for business reasons Visa and MasterCard simply did not want to be associated [with] online sex trafficking.

(Continued on page 45)

(Continued from page 44)

Id., slip op. at 16-17. If the companies were influenced by the letters but not the threats, the court reasoned, it must have been something else about the letters that influenced the companies' action:

> Recall that Dart is permitted, and indeed, constitutionally entitled, to speak out on matters of public concern such as the online trafficking of women and children on Backpage.com. If his use of the bully pulpit to educate and even shame the companies persuaded them to act, then there has been no prior restraint of speech by the government.

Id., slip op. at 16.

The judge's separation of the letters' effect as clumsy threats from their effect as skilled advocacy is problematic. The effect of such mixed communications is rarely so easily parsed. This analysis of the letters' impact also runs the risk of undermining the *Bantam Books* rule, because it will be rare that attempts to coerce the suppression of speech through informal means will not include some assertion as to the moral propriety of the government's desired action. A government official would always be able to assert that it was their silver tongue rather than their iron fist that caused a third party's compliance, and a threatened party might understandably not wish to contradict that claim. In this case, for example, it is entirely possible that Visa and MasterCard, large and powerful companies that they are, simply did not want to admit that the sheriff's pseudo-legal blustering affected their decisions (even if only to the extent that they wanted to avoid dealing with trouble that he might cause in the future).

Having found that Backpage.com had no likelihood of success on the merits because of a lack of evidence of causation, the district court also found that a preliminary injunction was unlikely to remedy any harm suffered.

Also problematically, the court found that "[t]here is no basis to infer that the response of the credit card companies would have been any different had they not contained the language to which Backpage points as carrying coercive import." *Id.*, slip op. at 21. Of course, there is no way to know when or if credit card processing would have been terminated had Sheriff Dart not intervened in Visa and MasterCard's decision-making; that alternative universe does not exist thanks to Dart. Faulting Backpage.com for a lack of evidence as to what did not happen places an unfair burden on the subject of government pressure.

(Continued on page 46)

(Continued from page 45)

Redressability and Irreparability of Harm

Having found that Backpage.com had no likelihood of success on the merits because of a lack of evidence of causation, the district court also found that a preliminary injunction was unlikely to remedy any harm suffered. Again, the court considered the fact that MasterCard was already considering action with respect to Backpage.com:

> Even though Dart's letters precipitated their speedy action, there is evidence that the credit card companies ceased doing business with Backpage.com because they did not want their products to be associated with the content posted there. Therefore, the Court's preliminary statement in the TRO order that the credit card companies might reprise the relationship if they knew Dart could not legally coerce them to stay away from Backpage now appears to be unwarranted. At the very least, Backpage has provided no evidence in support of the proposition.
>
> Indeed, there is no way to know how the credit card companies would proceed if informed that Dart had acted unlawfully in threatening them. And that alone is enough to defeat the claim for injunctive relief[.]

Id., slip op. at 23. The district court is might be correct that the damage had been done, and the clock unable to be turned back; however, it discounts the fact that an injunction would at least allow Backpage.com to approach the credit card companies to negotiate a resolution without further interference from Dart's office. By requiring a showing that an injunction would fully cure Sheriff Dart's actions, the court foreclosed the possibility that it could potentially ameliorate those harms.

The district court then held that Backpage.com had not yet established irreparable harm, given that it was still in business, and had not introduced evidence of the success of alternative methods of payment for its customers or that its shutdown was inevitable without an injunction. *Id.*, slip op. at 24-25.

The court found relevant that Backpage.com had previously stated that it did not require the revenue from its "adult services" section. Similarly, it pointed to Craigslist.com's survival after termination of its adult advertising in 2010 (which, it should be noted, occurred only after Craigslist succumbed to extended and heavy-handed government pressure) in support of the concept that these revenues were unnecessary. *Id.*, slip op. at 25. This is bizarre, given that Visa and MasterCard cut off services to Backpage.com entirely, not just for the adult section. The

(Continued on page 47)

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court's thinly veiled suggestion is that Backpage.com could bring back MasterCard and Visa simply by dropping its adult services and their profits, but that suggestion is both speculative and improper. Those whose First Amendment rights have been infringed cannot be denied injunctive relief simply because the harm they are suffering would cease if they censored themselves.

An Imbalanced View of the Balance of Harms

Finally, Judge Tharp stated that he would deny Backpage.com an injunction even had he ruled in its favor on the above issues, because he found that Backpage.com had failed "to demonstrate that the balance of harms falls decisively in its favor." *Id.*, slip op. at 28.

On Backpage.com's side of the scale, Judge Tharp found that a "large percentage of the ads in the adult services portion ... are ads for prostitution and further, that these prostitution ads are connected to human trafficking. There is no First Amendment interest in that material." *Id.*, slip op. at 26-27. Nevertheless, the judge rather grudgingly acknowledged that some protected speech might have been affected:

> Backpage argues only that it cannot be assumed, *a priori*, that all ads in the adult services are for unlawful activity. That is true enough, and the Court is willing to assume that some portion of the ads appearing in that section at a given time offer lawful services. ... It is undisputed that much of the content posted outside the "adult" section is lawful, and therefore protected, speech. Official action that results in the elimination of a forum for that lawful speech (assuming, contrary to the Court's conclusion, that a case had been made in that regard) would therefore inflict harm upon the public.

This is an atrocious decision, plainly influenced by the negative impression of Backpage.com conveyed to the court between the TRO and preliminary injunction rulings.

Id., slip op. at 27. The district court largely discounted the impact of Backpage.com's loss of revenue on the company itself. *Id.*

On Sheriff Dart's side of the scale, Judge Tharp placed Dart's own First Amendment right "to publicly criticize the credit card companies for any connection to illegal activity, as long as he stops short of threats. Therefore, the Court must also account for the risk of improperly curtailing Dart's ability to engage in lawful advocacy." *Id.*, slip op. at 28. That right, the court found, implicated not only Dart's own interests but "the profound interests of the victims of the

(Continued on page 48)

(Continued from page 47)

human trafficking that Backpage's advertising facilitates, including their safety, their dignity, and their very lives." *Id.* The court rejected as unsupported allegations regarding Backpage.com's role as a tool for law enforcement officials. *Id.*, slip op. at 28 n.12.

Once again, the chimera of Sheriff Dart's First Amendment rights creeps into the district court's reasoning. As discussed above, this reasoning is dangerous; by virtue of his role as a public official, the sheriff does not have a right to take actions foreclosed by the Supreme Court in *Bantam Books*. Denying an injunction that would enforce the *Bantam Books* rule because such an order could chill a government official's First Amendment rights is nonsensical.

Nor is it proper to weigh the noble intentions of unconstitutional government activity against a First Amendment plaintiff's right to relief; this, perhaps more than anything else in the court's ruling, is problematic. Most censorious activity is intended to remedy some perceived social ill, including ills as severe as those caused by human trafficking. The district court's logic would permit government officials to inflict irreparable harm on First Amendment rights any time that the net social benefit of a prior restraint balances its perceived effect on the speaker. But the First Amendment does not permit censorship based on an ad hoc balancing of interests, as the Supreme Court emphatically held in *U.S. v. Stevens* with respect to legislative measures:

> The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." ...
>
> As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

130 S.Ct. 1577, 1585 (2010). What is true of legislative attempts to penalize speech is equally true of law enforcement attempts to take action against particular speakers.

The decision reads like a poorly reasoned attempt to justify Sheriff Dart's actions and indeed bless them with the status of constitutionally protected speech.

(Continued on page 49)

(Continued from page 48)

Conclusion

This is an atrocious decision, plainly influenced by the negative impression of Backpage.com conveyed to the court between the TRO and preliminary injunction rulings. Judge Tharp's discussion of Backpage.com in the factual background section of the order focuses entirely on the site's asserted involvement with illegal activity, *Backpage.com*, No. 15-cv-06340, slip op. at 3-4 (N.D. Ill. Aug. 24, 2015), and that view persists throughout the court's analysis. At one point, the district court even drops a footnote to justify a reference to "Backpage's seedy offerings." *Id.*, slip op. at 21 & n.9.

It is perhaps therefore not a surprise that the decision reads like a poorly reasoned attempt to justify Sheriff Dart's actions and indeed bless them with the status of constitutionally protected speech. Maybe this was also driven by the court's chagrin at having ruled in favor of such a "seedy" company at the TRO stage. But whatever the district court's opinion of Backpage.com, its ruling is troubling and is likely to give rise to substantial confusion about the power of government officials to censor speech.

Jeff Hermes is a deputy director at MLRC.