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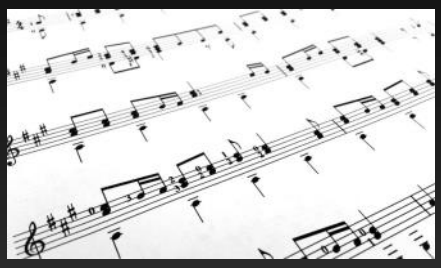


MLRC / Southwestern
Entertainment and Media Law Conference

Keeping the Beat in a Crazy Year: Blurred Lines and Border Crossings

January 19, 2017 | LA Times Building

- Does the Song Remain the Same? Stairway to Heaven and Other Recent Music Copyright Battles
- China and Hollywood: Distribution and Censorship in a Cross-Pacific Partnership
- Hollywood and the Web: An Internet Update
- The Final Frontier of Fandom: Dealing with Fan-Produced Works

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From the Executive Director's Desk

Santa's Gift List for Media Players Naughty & Nice

Happy Holidays and Best Wishes for the New Year from MLRC

To Donald Trump: a copy of the Constitution, autographed by Khizr Khan

To Hulk Hogan: with all the unjustifiable money he won, a relationship with a woman more appropriate than his friend Bubba the Love Sponge's wife

To Kellyanne Conway: A top or dreidel, so that in retirement, she can still spin

To President Obama: a rocking chair and a con law book to read it in

To Donald Trump: as a stocking stuffer, the First Amendment: it is very short and well within the range of his attention span

To Mike Pence: a transcript of his remarks at the 2005 MLRC Annual Dinner, where he spoke strongly in favor of a Federal Shield Law

George Freeman

To FOIA: a happy 50th birthday, with the hope you won't get eviscerated in the new Administration

To Judge Merrick Garland: a vote

To Donald Trump: the MLRC 50-State Survey on Libel, so that he will have some idea what he is talking about when he says he wants to "open up" the libel laws

To Melania Trump: a withdrawal or settlement of her libel case against the Daily Mail which called her an escort, so that she won't be litigating after Jan. 20 when she becomes FLOTUS

To Hillary Clinton: a bowling party with her good friends in the press

To Matt Lauer: Chris Wallace's playbook

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To Donald Trump: a Twitter filter, so that his tweets are at least somewhat Presidential

To Daniel Ellsberg and Edward Snowden: two golden faucets, to commemorate two great leakers and thank them for appearing at our Annual Dinner

To Rolling Stone: an appellate panel which wants to incentivize retractions, not deter them

To the FAA: a drone, which will propel them to issue positive regulations permitting the use of drones over people by professional photographers

To Donald Trump: a visit to the JFK Library, so he can see tapes showing that Presidential press conferences can be informative, witty and politically winning

To Melania Trump: a non-plagiarizing speechwriter

To Richard Dawson and Steve Harvey: contestants as smart and knowledgeable as the ones I had when we played Journalistic Family Feud at our Virginia Conference in September

To Led Zeppelin: a Stairway to a Heavenly affirmance on appeal

To Donald Trump: a truth serum, so he can distinguish truth from falsity and reality from fake news

To Edward Snowden: an airplane ticket home from Moscow, so public opinion and/or an American jury can decide whether he is hero or villain

To Rolling Stone: Satisfaction, on appeal

To Journalists in Danger Spots around the World: Good health and safety

To the MLRC Staff: my heartfelt thanks for all your work, effort and loyalty in producing Daily Reports, Legal Letters, Bulletins, 50-State Surveys, Conferences and Committee work every day, and without which we would not be able to give the benefits we do – professional, intellectual, social and fun - to our members

And, finally, I wish all our loyal readers and members a very happy and healthy new year.

Jury Finds Rolling Stone Defamed UVA Dean in "Rape on Campus" Article

Magazine's Correction Was a Republication Made With Actual Malice

By Ed Karis and Alexia Bedat

On November 4, 2016, a Charlottesville, Virginia federal jury found *Rolling Stone* magazine liable for defaming Nicole Eramo, the former Associate Dean of the University of Virginia ("UVA"), in its now infamous article "A Rape on Campus."

Eramo sued *Rolling Stone* and the author of the story, Sabrina Erdely, for $7.5 million in reputational damages. The jurors handed down their verdict after 16 days of testimony from 12 witnesses, 11 hours of video statements and more than 180 exhibits of evidence.

Following a damages hearing on November 7th, the jury awarded Eramo $3 million ($2 million from Erdely and $1 million from Rolling Stone). The award is notable because the jury found that the original article was published without actual malice, but a subsequent editor's note to the article constituted a republication published with actual malice.

Background

In November 2014, *Rolling Stone* published Erdely's article, relaying the account of the alleged brutal gang rape of Jackie, a UVA student, by members of Phi Kappa Psi, a campus fraternity house. Shortly after its publication, the article began to unravel.

On December 5, 2014, the Washington Post and other news outlets reported a number of discrepancies in the article. The Post relayed the fraternity's denial that any event took place on the night of the alleged attack. It also revealed that a photo Jackie had shared of her alleged attacker had actually been of someone Jackie knew from high school and who had never attended UVA.

The truth of the story became the subject of national controversy. That same day, *Rolling Stone* published a note to its readers, addressing the many discrepancies that were being reported. The article was officially retracted in April 2015, following a report on the article by the Columbia University School of Journalism. The report, commissioned by *Rolling Stone*,

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called the article an "avoidable" story of journalistic failure. It examined failures in reporting, editing, editorial supervision and fact-checking.

Eramo sued *Rolling*, citing in her complaint that the article defamed her by claiming that she had intentionally tried to coddle Jackie to persuade her not to report her rape; that she was indifferent to Jackie's allegations; that she discouraged Jackie from sharing her story with others; that she did "nothing" in response to Jackie's allegations and that she claimed UVA withheld its rape statistics because "*nobody wants to send their daughter to the rape school.*" Eramo categorically denied ever making such statements.

Being a resident of the State of Virginia, Eramo brought suit in federal court in Charlottesville, VA, where UVA is located. Virginia state law applied. Rolling Stone would have preferred to be in media-friendly New York with New York law applying.

Virginia defamation law applies two different standards depending on whether the claimant is a public or private figure. While private figures need only meet the standard of negligence, public figures must meet the higher standard of "actual malice", i.e. show by clear and convincing evidence that the publisher either subjectively knew the allegations to be false or acted with reckless disregarded as to their falsity. Eramo was found by the judge to be a public figure. As such, she had the burden of proving that *Rolling Stone* had acted with actual malice.

The award is notable because the jury found that the original article was published without actual malice, but a subsequent editor's note to the article constituted a republication published with actual malice.

Trial Themes

The attorneys for Eramo argued *Rolling Stone* cast the former associate dean as a villain, portraying her as indifferent to rape victims. Relying on Erdely's notes, Eramo's lawyers maintained Erdely had preconceived ideas about indifference to sexual assault on campus and recklessly ignored conflicting accounts and facts that did not fit her story. They also argued that Erdely had failed to give weight to Jackie's changing account, failed to press Jackie to give the name of her alleged attackers and failed to verify Jackie's account with her friends.

The attorneys for *Rolling Stone* recognized that a number of mistakes had been made but maintained that these fell short of meeting the exacting actual malice standard (see e.g. *Jordan v. Kollman*, 269 Va. 569, 581 (Va.2005) holding that actual malice was not established where defendant's belief in the truth of the statements made was an honest conviction grounded in good faith). They argued Erdely had no reason to doubt Jackie's account until December 2014, after the story had been published. Scott Sexton, an attorney for *Rolling Stone*, told the jurors in his closing statement: "*This woman* [Jackie] *was very good at telling this story. Dean Eramo believed her… Yet we are the ones being tried, in a sense, for having believed her.*"

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The jury found that Eramo had established by clear and convincing evidence that Erdely acted with actual malice in making most of the allegedly defamatory statements. It found no actual malice however in Erdely's reporting that the University's policies in effect affirmed its internal choices not to report complaints to the police or her quoting Eramo as having said "*Because nobody wants to send their daughter to the rape school.*"

Rolling Stone still faces a $25 million lawsuit filed by the Phi Kappa Psi fraternity, set for trial next year.

Reaction from Rolling Stone

In its statement after the verdict, *Rolling Stone* admitted to having "overlooked reporting paths and made journalistic mistakes that we [*Rolling Stone*] are committed to never making again." The magazine expressed its hope that its failings would not deflect from the pervasive issues discussed in the article and that reporting on sexual assault cases would ultimately result in better campus policies. *Rolling Stone*'s managing editor described the failed article as both an "individual" and "institutional failure" and concluded that "[e]very single person at every level of this thing had opportunities to pull the string a little harder, to question things a little more deeply."

The attorneys for Eramo argued Rolling Stone cast the former associate dean as a villain, portraying her as indifferent to rape victims.

The verdict is a chilling message to newsrooms, where the actual malice defense is often viewed as an impenetrable shield. Journalists entrusted with the already difficult task of interviewing victims of alleged sexual assault are reminded of the fine line between respecting a source and exposing a publication to liability. The verdict, moreover, comes in the chilling wake of the Gawker privacy case, in which former pro wrestler Hulk Hogan won a $140 million verdict against Gawker, forcing the online media company to file for bankruptcy and close its doors this summer for good (the initial verdict was settled in November for $31 million).

For our European and British counterparts following these developments from their more claimant-friendly defamation and privacy jurisdictions, these decisions perhaps come as little surprise. They sit uneasily, however, in the land where the First Amendment is sovereign. It remains to be seen whether publishers will heed to the Columbia School of Journalism's call for a revitalized consensus in newsrooms "old and new" about what best journalistic practices entail.

Media Coalition Files Brief in Support of JNOV

Eight media companies have intervened to raise the important issue of whether a correction constitutes republication for purposes of libel. A meaningful question for practitioners and journalists alike.

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On December 5, 2016, Rolling Stone filed a motion asking the judge to overrule the jury verdict. The magazine also argues that the jury was wrong to find, as a matter of law, that "republication" of the underlying facts of the article occurred when *Rolling Stone* published a correction acknowledging the weaknesses of the original article. The verdict has been stayed until the trial court decides the motion.

The decision sent a chilling message to newsrooms, where the actual malice defense—clear and convincing evidence of subjective knowledge of falsity or reckless disregard of the truth—is often viewed as an impenetrable shield.

The media has not, however, been frozen to the point of inaction. On December 8, 2016, the Reporters Committee for Freedom of the Press and eight media companies (American Society of News Editors, The Associated Press, Gannett Co., Inc., Landmark Media Enterprises, LLC, Online News Association, Radio Television News Association, Society of Professional Journalists, and The Washington Post) submitted an *amici curia* brief ("the Brief") in support of *Rolling Stone*'s December 5th motion.

The Brief exclusively addresses the question of republication and does not raise the other issues that will be on appeal, namely, whether there was adequate evidence that Erdely acted with actual malice. The Brief urges the Court to conclude publishers should not be penalized for informing the public of developing information and explaining their newsgathering decisions when inaccuracies are discovered (Brief at iv). Instead, the Court should encourage appending letters from the editors and notes to readers that set the record straight and avoid chilling debate on matters of public concern (Brief at iv).

The attorneys for Rolling Stone recognized that a number of mistakes had been made but maintained that these fell short of meeting the exacting actual malice standard.

The Brief makes a number of arguments:

- **Public policy concerns favor corrections and clarifications to news stories:** It is a fundamental principle of First Amendment jurisprudence that debate on public issues should be uninhibited, robust and wide-open. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 270 (1964). Journalists are held accountable in this uninhibited debate by correcting their errors, especially in the era of digital publishing where journalists can "pull back the curtain" more easily to enable readers to understand what has happened.
- **The pragmatic prism of social reality**. People increasingly (if not exclusively) rely on online publications for news. Links to the original article are distributed across social media platforms. To be accurate and relevant, journalists must be able to make modifications promptly to the original URL.
- **Benefit to defamed individuals**. The Brief rightly points out that corrections and clarifications actually enable defamed individuals to vindicate their reputation in a

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speedy, cost effective manner and far less chilling way than litigation. Interestingly, this notion was recognized in legislation drafted by the National Conference of Commissioners on Uniform State Laws in 1994: the Uniform Correction or Clarification of Defamation Act ("UCCDA"). The UCCDA was adopted only in three states.

- **Rebutting allegations of actual malice**. The Brief cites to a number of courts that have accepted evidence of a publisher's willingness to retract challenged information as a way of rebutting allegations of actual malice (Brief at 8–10). A correction supports the assumption that the author of the article did not act with awareness of probable falsity of his or her statements or with utter disregard of whether they were false or not. See e.g. *Hoffman v. The Washington Post Co.,* 433 F. Supp 600, 605 (D.D.C. 1977).

What Happens if Rolling Stone Fails in its Appeal?

An obvious consequence is that publishers will undoubtedly think twice before correcting an article. Accuracy, as a result, may suffer. Or, as the Brief points out, publishers might choose to completely remove a story when issues of credibility are raised, harming archive integrity in the process.

Practically, the consequence of the *Rolling Stone* decision will be that the one-year statute of limitations that applies to defamation claims will be triggered anew upon publication of a correction. Republication by way of correction would thereby become an exception to the single publication rule, under which an entire edition of a newspaper, magazine or book is treated as only one publication, and the plaintiff is permitted to plead and prove merely a general distribution of the libel and show the extent of the circulation as evidence bearing on the damages—see e.g. *Rinaldi v. Viking Penguin*, Inc., 101 Misc. 2d 928, 929 (N.Y. Sup. Ct. 1979) (the bringing out of paperbacks by publisher constituted a republication sufficient to start the applicable one-year statute of limitations running anew).

Plaintiffs would get one year to sue a publisher not from the date of the original publication but from the date of the correction. Defendant media companies seeking to do the right thing and correct inaccurate information may, therefore, be less inclined to do so post *Rolling Stone*.

Publishers concerned with the effect of the *Rolling Stone* decision should issue corrections as soon as possible, so that the limitations clock does not reset more than a short amount of time beyond the initial publication date. Speedy corrections will also increase the chance of publishers being able to successfully rebut allegations of actual malice.

Ed Klaris is the founding partner, and Alexia Bedat an associate, at Klaris Law PLLC in New York. Plaintiff is represented by Tom Clare and Elizabeth Locke, Clare Locke LLP, Alexandria, VA. Rolling Stone and Sabrina Erdely are represented by Elizabeth McNamara, Alison B. Schary, Sam Bayard, Davis Wright Tremaine; and W. David Paxton and Scott Sexton, Gentry Locke, Roanoke, VA.

Wisconsin Court Of Appeals Snuffs Out Firefighter's Defamation Suit

By Steven Mandell and Natalie Harris

The Wisconsin Court of Appeals affirmed dismissal of former Milwaukee firefighter Aaron Marjala's defamation suit against Fox News, host Megyn Kelly and guest panelist Lee Armstrong arising from a *Kelly's Court* segment debating Marjala's decision to collect disability benefits while he was fit enough to compete as an Ironman triathlete. *Marjala v. Fox News Network LLC, Lee Armstrong, Megyn Kelly and Robert C. Whitaker*, No. 2015AP1831, 2016 Wisc. App. LEXIS 805 (Wis. Ct. App. Dec. 20, 2016). (Marjala also named Milwaukee fire chief Robert Whitaker as a defendant based on statements Whitaker made in the separate story aired by a local Milwaukee TV station.)

Background

As a young firefighter in 2008, Marjala banged his funny bone on the kitchen counter at the firehouse causing permanent—but admittedly minor—nerve damage. His injury qualified him to receive state duty-disability benefits, tax-free, for life. Marjala applied for—and began collecting—disability benefits in lieu of seeking light duty work outside the fire department.

The program [was] simply a collection of opinion statements based on fully disclosed true or substantially true facts, making the opinions nonactionable."

Despite his injury, Marjala continued to participate in strenuous physical activities, including at least seven marathons and an Ironman triathlon, which involves biking, swimming, and running. Local Milwaukee Fox 6 reporter Bryan Polcyn interviewed Marjala in 2011 at an Ironman finish line during which Marjala admitted his injury was minor, but insisted he could no longer work as a firefighter.

Fox News' Megyn Kelly selected Marjala's story as a featured "case" on her mock-courtroom segment *Kelly's Court* during the America Live program. Panelist Lee Armstrong argued that Marjala was exploiting his minor injury and should no longer receive duty disability money at the tax-payers' expense. Co-panelist Lis Wiehl defended Marjala, urging viewers to blame the state of Wisconsin—not Marjala—for failing to fix a flawed disability system. Marjala filed suit alleging that Kelly and Armstrong's comments in the *Kelly's Court* segment defamed him—suggesting that he was not truly disabled and was fraudulently collecting disability benefits.

In June 2015, the Milwaukee County Circuit Court granted the Fox News defendants' motion to dismiss Marjala's complaint, noting that Wisconsin's duty disability system is an issue of public importance and holding that in the context of the entire broadcast, "the

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Kelly selected Marjala's story as a featured "case" on her mock-courtroom segment Kelly's Court. Click to view.

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statements do not imply that Mr. Marjala lied about his injury or that he has committed a crime, rather the defendants' comments called into question Mr. Marjala's moral decision to accept benefits which he's legally entitled [to] even though he's capable of performing coun[tless] other jobs." Marjala appealed the dismissal.

Court of Appeals Decision

On December 20, 2016 the Wisconsin Court of Appeals affirmed dismissal of Marjala's complaint. The court noted the "mock trial or judicial debate" format of the *Kelly's Court* segment and described the piece as a debate in which "Armstrong opposed Marjala's collecting disability benefits while Wiehl spoke in support of Marjala" with Kelly rendering her legal "opinion" at the conclusion of the debate. The court was "satisfied that the program [was] simply a collection of opinion statements based on fully disclosed true or substantially true facts, making the opinions nonactionable." Furthermore, the court held Marjala could not meet his burden of demonstrating the falsity of statements implying that he (1) claimed total disability because of hitting his funny bone and (2) was living off tax-free duty disability benefits to participate in marathons and triathlons.

Steven P. Mandell and Natalie A. Harris of Mandell Menkes LLC, Chicago, IL, represented Fox News Network LLC, Lee Armstrong and Megyn Kelly. Aaron Marjala was represented by Michael Hart and Craig Powell of Kohler& Hart, S.C., Milwaukee, WI. Fire Chief Robert Whitaker was represented by Bradley Matthiesen and Timothy Pagel of Matthiesen, Wickert & Lehrer, S.C., Hartford, WI and Peter Farb of Law Offices of Thomas P. Stilp, Milwaukee,, WI.

Kentucky Court Affirms Dismissal of Defamation Claim Against TV Station

Reporting Was Protected By Fair Reporting Privilege

By Adrianna C. Rodriguez

The Kentucky Court of Appeals affirmed a Fayette County, Kentucky, Circuit Court decision dismissing a single-count complaint for defamation brought by Glenn Rahan Doneghy against Gray Television Group, Inc., and its local television station WKYT-TV for its accurate reporting of statements he made during his parole board hearing. Doneghy v. WKYT 27 News First, No. 2014-CI-001850-MR (Ky. Ct. App. December 2, 2016).

The court affirmed that "[t]he clip of Doneghy was accurate and true, and not edited as to alter his meaning; therefore, it cannot be defamatory." The court further held that the case was properly dismissed on the additional ground that Doneghy had not sought a correction from the station, or, in the alternative plead special damages, as required by KRS 411.061.

The Court of Appeals affirmed the dismissal holding that WKYT had fairly and accurately reported on Doneghy's statement to the parole board. The station had not edited the video shown.

Background

Doneghy has an extensive history of violent crimes in Fayette County spanning his entire adult life. He is serving a 20-year prison sentence for the hit-and-run death of Officer Bryan Durman. In April 2010, a vehicle driven by Doneghy struck and killed the officer while he was investigating a noise complaint. Doneghy fled the scene and barricaded himself in his apartment. After the officers forced him out of the apartment, he fought with them in a failed escape attempt.

Doneghy was tried and a jury convicted him of second-degree manslaughter, leaving the scene of an accident, second-degree assault, fourth-degree assault, first-degree possession of a controlled substance, possession of marijuana and possession of drug paraphernalia.

WKYT was present at Doneghy's parole board hearing on February 25, 2014 and recorded portions of it. In its news report, the station included a clip of the hearing where Doneghy says "As far as my case or anything like that there is always sympathy."

Doneghy sued the station for defamation claiming that WKYT altered his words, instead depicting him as saying "in regards unto my case, I have sympathy." He alleged that as result of this purportedly false statement he had been "marred, and possibly scarred beyond possible hopes of future employment in the city of Lexington Kentucky." He further alleged that as

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result of WKYT's news report his "family, friends, and associates look at him in an unsavory light."

WKYT moved to dismiss the complaint for failure to state a claim upon which relief could be granted arguing, *inter alia*, that 1) the statement shown on the newscast was true; 2) the station's reporting was protected by the fair reporting privilege, codified at KRS 411.060; 3) Doneghy was libel proof given his extensive criminal history; and 4) Doneghy failed to seek a retraction or plead special damages as required under KRS 411.061. The station included a copy of the full parole board hearing with its motion. The circuit court granted the motion and dismissed the case with prejudice in October 2014. Doneghy appealed.

Court of Appeal's Decision

The Court of Appeals affirmed the dismissal holding that WKYT had fairly and accurately reported on Doneghy's statement to the parole board. The station had not edited the video shown. The Court held that "the circuit court correctly determined that as a matter of law, WKYT's report on Doneghy's parole board hearing was privileged" under KRS 411.060.

The Court of Appeals further held that the complaint could be dismissed on the additional ground that Doneghy failed to plead that he had sought a correction before filing his defamation action or plead special damages, as required by KRS 411.061.

The Court declined to consider whether Doneghy was libel proof—the additional ground upon which the circuit court had dismissed the case. It further declined to hear several new claims Doneghy raised on appeal, and held that the circuit court did not err in denying Doneghy's request for additional time to take discovery before ruling on the motion to dismiss.

Charles D. Tobin and Adrianna C. Rodriguez with Holland & Knight LLP's Washington, D.C. office, and Mark Flores, with Frost Brown Todd LLC in Lexington, Kentucky, represented Gray Television Group Inc., owner of WKYT-TV, in both cases.

Pennsylvania Court Applies Fair Report Privilege to "Colorful" Report"

Corporations Can't Sue for False Light

By Adam Lazier

If the fair report privilege protected only verbatim reports of official proceedings, the media would have to cover important public affairs in the often-dry and bureaucratic language of government, leaving important stories inaccessible to viewers and readers. A Pennsylvania state court, however, recently reaffirmed the right of the media to report on government activities in a "colorful" and even "flippant" way when it granted a Harrisburg television station's motion for judgment on the pleadings in a defamation and false light case arising out of a report about a local restaurant's failed food safety inspection. *Menites, Inc. d/b/a Theo's Bar and Grille v. WHTM ABC27 News*, 2016 WL 7381782 (Cumberland Cty. C.C.P. Dec. 14, 2016). The three-judge panel's opinion also recognizes a significant limit on Pennsylvania's false light tort, holding that it is not available to corporations.

Background

The case began when Theo's Bar and Grille, a restaurant located in Camp Hill, Pennsylvania, failed a December 2015 state government inspection. The inspection report described eleven separate code violations, including residue around the inside guard of a mixer, soda nozzle, and ice machine. The inspector also found "a can of gasoline stored on the same shelf as food, and Round-up weed killer stored next to food in the kitchen area."

A Pennsylvania state court recently reaffirmed the right of the media to report on government activities in a "colorful" and even "flippant" way.

Soon after, WHTM, a Harrisburg-based ABC affiliate, reported on the inspection results as part of its regular "Restaurant Report" feature, along with results for several other area restaurants. Less than two weeks later, the restaurant and its two individual owners sued the station's corporate owner, one of its anchors, and a reporter in the Cumberland County Court of Common Pleas for defamation and false light, attaching the inspection report as an exhibit.

Although the plaintiffs claimed that the television segment mischaracterized the inspection report in a number of ways, the plaintiffs took particular exception to the report's introduction, which started by asking viewers whether they liked "dinner with a side of weed killer?" and continued, "We didn't think so. Neither do restaurant inspectors from the Department of Agriculture."

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Because Pennsylvania law characterizes the fair report privilege as an affirmative defense for which a defendant bears the burden of showing that the privilege applies, defendants generally are limited in their ability to raise the defense through Pennsylvania's equivalent of a motion to dismiss, known as "preliminary objections." Rather than proceed to discovery on what they saw as a groundless claim, the defendants answered the complaint and then moved for judgment on the pleadings. The motion was referred to a three-judge *en banc* panel of the trial court, which heard oral argument and then rendered a unanimous decision dismissing the complaint.

The Court's Opinion

Citing the established rule that the fair report privilege applies to "all press reports about 'the acts of the executive or administrative officials of government,'" the court began by holding that it applied to defendants' report "on the results of a health inspection conducted by the Commonwealth of Pennsylvania, Department of Agriculture."

As is often the case, then, the applicability of the privilege turned on whether the defendants had abused it by summarizing the inspection report in an inaccurate way. The court began by noting that the defendants' addition of colorful phrases like "built up" and "caked on" to the inspection report's allegations of food residue did not deprive it of the privilege.

None of the alleged differences in the news report "produce a greater sting than what was in the health inspection report."

As the decision explained, the plaintiffs were essentially asking the court to require "almost verbatim statements in order for the fair report privilege to apply." Yet, the court emphasized, this is not the law – the privilege requires "merely a summary of substantial accuracy." And, none of the alleged differences in the news report "produce a greater sting than what was in the health inspection report."

Most of the plaintiffs' argument focused on the news report's introduction and its reference to "dinner with a side of weed killer." They contended that the inspection report did not state that the restaurant served food mixed with weed killer.

But, as the court noted, the inspection report *did* say the inspector saw "weed killer stored next to food," and the restaurant was out of compliance with code provisions intended to protect against contamination of food. The court concluded that the fair report privilege allows the media to cover public affairs in a way that is "flippant and smart alecky" and uses "colorful language." "Despite its flippant tone," it held, "the news report did not state anything contrary to what the health inspection report stated. It added 'color' for the audience but that did not

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create a greater sting than was already contained in the health inspection report." The fair report privilege therefore applied.

Although this ruling was enough to dispose of the case, the court went further and accepted two other arguments raised by the defendants. The first dealt with the scope of the false light tort. Two federal courts had predicted that Pennsylvania law would not allow a corporation to sue for false light, but the issue does not appear to have been addressed in a reported state court opinion. Nevertheless, relying on the *Restatement*'s view that the tort protects "the interest *of the individual* in not being made to appear before the public in a false light," the court here confirmed that "a corporation cannot bring a false light claim." (Emphasis added).

The court also dealt with another question rarely addressed in Pennsylvania law – whether, in a defamation case, statements about a closely-held corporation are "of and concerning" the people who own or operate it. Although the longstanding rule in Pennsylvania is that, "without more," an individual plaintiff cannot sue for statements about a corporation, here the individual plaintiffs argued that they were so well known as owners of the restaurant that any defamation of the restaurant implicitly defamed them as well.

This exception would have swallowed the rule, and the court wisely rejected it, holding the restaurant is "a business, which is separate from the owners of that business." Viewed that way, it wrote, "[a] reasonable person would not have a basis for concluding that the statements implicate the owners, even by inference."

Gayle Sproul and Michael Berry of the Philadelphia office of Levine Sullivan Koch & Schulz, LLP and Gregg D. Thomas of Thomas and LoCicero PL represented defendants. Adam Lazier, an attorney in LSKS's New York office, also worked on behalf of the defendants. Plaintiff was represented by William C. Felker of Camp Hill, PA.

Maryland High Court Adopts Less Demanding Standard to Prove Malice in Purely Private Defamation Cases

By Cindy Gierhart

The Maryland Court of Appeals held for the first time that the standard of proof for overcoming a common law conditional privilege in purely private defamation cases is preponderance of the evidence. *Seley-Radtke v. Hosmane*, No. 19 (Md. Nov. 22, 2016).

In Maryland, a common law conditional privilege includes, as in this case, speech between members of an identifiable community who share a common interest. Speech made in this setting can be a defense to defamation, and the plaintiff can overcome it only by proving the speaker acted with malice. The court considered whether the plaintiff had to prove malice by a preponderance of the evidence – as 10 other states have found – or by clear and convincing evidence – as 8 other states have found.

Background

A less-demanding preponderance-of-the-evidence standard was more appropriate to overcome a common law privilege.

The parties in this case were colleagues in the Department of Chemistry at the University of Maryland. The plaintiff, Ramachandra Hosmane, was a professor accused of sexually assaulting a student. After an administrative investigation, he chose to retire without making public the results of the investigation. He later sued the university in relation to his resignation.

Hosmane submitted a public records request from the university and received communications that his coworker, Defendant Katherine Seley-Radtke, had sent to the chemistry department chair and general counsel for the university. Seley-Radtke stated in those communications that Hosmane was "unbalanced" and "given the shootings in Alabama, I worry for my safety and for that of anyone around me." Seley-Radtke allegedly stated that Hosmane had stolen documents and sold them for money.

Hosmane sued Seley-Radtke for defamation, and a jury found in favor of Seley-Radtke. The Maryland Court of Special Appeals found error in the trial court's jury instructions and remanded for a new trial. The Maryland Court of Appeals then granted cert on May 20, 2016.

Court of Appeals Decision

Because the coworkers are both private individuals and the speech was on a private matter not of general or public concern, this was a purely private defamation case. Typically, to prove

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defamation under these circumstances, the plaintiff need only show negligence on the part of the speaker.

However, Maryland recognizes a defense to purely private defamation when members of an identifiable group who share a common interest are speaking amongst themselves. The purpose of the "common interest conditional privilege" is to encourage the free exchange of information and to promote consultations among members without fear of suit.

To overcome this privilege, the plaintiff must show that the speaker acted with malice, which, under Maryland law, follows the *New York Times v. Sullivan* standard, requiring a showing of the speaker's "knowledge of falsity or reckless disregard for the truth."

In First Amendment jurisprudence, when speech targets a public figure, the plaintiff must prove actual malice by clear and convincing evidence. Seley-Radtke argued the same standard of proof should be adopted for showing malice to overcome the common interest privilege in Maryland.

The Court, however, felt that while the clear-and convincing standard was appropriate for the weightier constitutional requirements under the First Amendment, a less-demanding preponderance-of-the-evidence standard was more appropriate to overcome a common law privilege. In so deciding, the Court said it sought a balance between the private individual's rights against the speaker's.

Cindy Gierhart is an associate with the Washington, D.C., office of Holland & Knight LLP.

Michigan Court of Appeals Takes Another Encouraging Look at Anonymous Speech

By James Stewart

In its December 6, 2016 decision in *Sarkar v John and Jane Doe and PubPeer Foundation*, (No. 326667), the Michigan Court of Appeals prevented a cancer researcher from learning the identity of anonymous scientists who had posted criticisms of his research on pubpeer.com.

In doing so, the Court of Appeals continued to strengthen Michigan's protection of anonymous speech that it began in its 2013 decision in *Thomas M. Cooley Law School v Doe*, No. 307426 (Mich. Ct. App. 2013), and continued in its 2014 decision in *Ghanam v Doe*, 204 Mich. App. LEXIS 26. Michigan still has not adopted the so called Dendrite standard, but seems to be getting to the same result.

The Underlying Controversy

Dr. Fazul Sarkar was a fairly prominent Ph.D. cancer researcher at the Karmanos Cancer Center, Wayne State University Medical School in Detroit. He had had over 35 years' experience. He was a tenured faculty member of the Wayne State University Medical School and "well accomplished in the cancer research community."

The Court of Appeals continued to strengthen Michigan's protection of anonymous speech.

His troubles began in 2014 with what appeared to be a very excellent opportunity to relocate to the University of Mississippi Medical School as a tenured professor and with a very lucrative financial package. The University of Mississippi offered him the position in March of 2014. He accepted, gave his notice to Wayne State. relocated to Oxford, Mississippi and was prepared to begin his new position on July 1, 2014.

Then on June 19th, the University of Mississippi rescinded its offer based on public but anonymous comments that had been posted on pubpeer.com and were supplied to University of Mississippi personnel by an anonymous source. When Dr. Sarkar asked Wayne State to take him back the University responded with an offer of a non-tenured position. When he accepted this offer and returned an anonymous person distribute a flyer within the Medical School that was a screen shot from pubpeer.com criticizing his research.

According to Dr. Sarkar's complaint, pubpeer.com describes itself as "an online community that uses the publication of scientific results as an opening for fruitful discussion among scientists." It was apparently created by anonymous scientists and scientists are permitted to post anonymously.

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Dr. Sarkar Sues

Suffice it to say that the anonymous postings on pubpeer.com about Dr. Sarkar's research were not complimentary. In the fall of 2014, Dr. Sarkar brought a 5 count complaint against John and Jane Doe alleging that the pubpeer.com posts and the sending of those to both the University of Mississippi and to Wayne State constituted defamation, interference with contractual relations, intentional infliction of emotional distress, and invasion of privacy. He subpoenaed the PubPeer Foundation which operates pubpeer.com for the identities of the anonymous posters. PubPeer objected and moved to quash the subpoena on First Amendment grounds and the anonymous speech fight was on.

One of the anonymous John Doe Defendants has filed an appearance but did not actively oppose the subpoena. PubPeer argued for the adoption of the Dendrite standards requiring that the plaintiff put forth evidence of a defamation claim that would survive summary judgment. PubPeer specifically argued that Dr. Sarkar had not pled the complained of statements with specificity as required and that the statements he did identify were not capable of a defamatory interpretation. The trial court granted PubPeer's notion to quash except as to one subparagraph of the complaint.

The Michigan Court of Appeals granted Dr. Sarkar's application for leave to appeal and PubPeer then filed a cross appeal as to the one subparagraph that the trial court had allowed to proceed.

First Amendment Protection for Anonymous Speech

In its decision the Court of Appeals described the issue presented as "one simple question: are the identities of anonymous scientists who comment on other scientists' research online protected by the First Amendment?" In a lengthy opinion the Court of Appeals answered "Yes."

The panel conducted a detailed review the previous decisions by other panels in *Cooley* and *Ghanam*. In *Cooley* the anonymous poster had actually been disclosed inadvertently and had appeared in the trial court, the panel in that case rejected the trial court's adoption of Dendrite on the grounds that any expansion beyond the Michigan Rules of Civil Procedure was a matter

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for the legislature and that the existing Michigan rules governing protective orders and summary judgment provided sufficient protection in the circumstances presented.

In *Ghanam,* the panel spoke approvingly of the Dendrite standard but felt required to follow the *Cooley* panel's refusal to incorporate it into Michigan procedure. However unlike *Cooley*, in *Ghanam* none of the anonymous speakers had appeared in the case and were thus unable to protect their First Amendment rights. Accordingly the *Ghanam* panel declined to adopt *Dendrite*, but adopted *Cooley* with two additional requirements.

Specifically, the panel found that in considering a motion to obtain the identity of anonymous speakers in that context the court must follow *Cooley* and in addition must evaluate what efforts the requestor had made to advise the anonymous speakers that he/she was seeking to obtain their identity and must consider whether the claims against Doe are sufficient to survive a motion to dismiss on the grounds that the complaint fails to state a claim for defamation. The court emphasized that this analysis must be made by the trial court even if no party had actually filed a motion to dismiss.

Are the identities of anonymous scientists who comment on other scientists' research online protected by the First Amendment?" In a lengthy opinion the Court of Appeals answered "Yes."

Having set the standard the Court of Appeals conducted an exhaustive analysis of each of the statements claimed by Dr. Sarkar as a grounds for this defamation claim. It found that one group of statements did not identify the complained of statements with the requisite specificity and that another block of statements reflected the speakers' opinion based on underlying facts that are available to readers of PubPeer. The panel described these as "precisely the type of opinion that state and federal courts have consistently held was protected by the First Amendment."

Turning to the allegations of the complaint that the trial court had found to be not protected by the First Amendment., the panel reversed and found that those statements would not survive a motion to dismiss because they were not capable of defamatory interpretation. The panel then addressed the flyer that had been circulated at Wayne State and found that the flyer was capable of being construed as stating that he was under senatorial investigation in connection with some of his grants. This was not true and the panel found that this allegation could survive a motion to dismiss. However the panel ruled that this conclusion did not permit Dr. Sarkar to unmask the identities of any of the anonymous PubPeer posters because "there is no reasonable connection between the flyer and pubpeer.com."

Finally the panel disposed of Dr. Sarkar's rather unusual claim that he would be entitled to the identity of the anonymous posters as part of his non-defamation claims. Citing to *Hustler v. Falwell* the panel held in no uncertain terms that "the same First Amendment protections apply whether Dr. Sarkar is seeking to unmask the speakers' identity in a defamation lawsuit or any other type of lawsuit."

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Also, Dr. Sarkar had taken the position during the appeal process that his non-defamation claims should proceed because they were based on conduct and not on speech. (Presumably meaning the act of sending the PubPeer.com comments to the University of Mississippi and Wayne State). Based on these allegations, the panel permitted those claims to proceed but in a most restricted manner.

The panel noted that Dr. Sarkar's claim of relying on conduct and not speech was far from clear in his complain and t emphasized that "We feel it necessary to clearly state that to the extent that his other causes of action rely in any way upon the statements made on Pubpeer.com those statements those causes of action may not proceed on remand because they are premised on constitutionally protected speech." Thus, Dr. Sarkar was left with trying to explain his conduct versus speech theory and would have to do so without any discovery from pubpeer.com as to the identity of the anonymous posters.

What Does the Decision Mean?

So far nine judges of the Michigan Court of Appeals have considered anonymous speech and all have found it to be constitutionally protected by the First Amendment in three rather different contexts.

Cooley involved the more common type of wide open consumer comment on the internet. In that case Michigan joined other courts in finding that the context of internet speech boded against it being considered as factual. *Ghanam* involved political speech harshly criticizing a public official. *Sarkar* involved neither of these situations but a discussion forum for scientists.

While Michigan has not specifically adopted *Dendrite*, the emphasis in both *Ghanam* and *Sarkar* on the court considering whether the plaintiff's underlying claim can withstand a motion to dismiss even if one has not been filed seems to get about as close to *Dendrite* as media lawyers could wish.

All in all *Sarkar* is a very detailed and very pro First Amendment decision. It continues Michigan's protection of anonymous speech. Additionally it provides a strong "opinion" decision in finding that the comments are protected, it reaffirms the Michigan authority that summary judgment is a " vital tool" to protect a chilling effect on protected First Amendment speech and it emphasizes that First Amendment protections apply far beyond defamation claims.

On anonymous speech in Michigan—so far so good.

James E. Stewart is a partner at Honigman Miller Schwartz and Cohn LLP in Ann Arbor, MI. Plaintiff was represented by Nicholas Roumel, Nacht, Roumel, Salvatore, Blanchard, & Walker, P.C., Ann Arbor, MI. Pubpeer Foundation was represented by Daniel S. Korobkin, ACLU Michigan; and Nicholas Jollymore, Jollymore Law Office, San Francisco, CA. The John Doe defendant was represented by H. William Burdett, Jr., Boyle Burdett, P.C., Grosse Pointe, MI.

University of Notre Dame Campus Police Force Not Covered by Indiana's Open Records Law

The Indiana Supreme Court recently ruled that the state's open records law does not apply to the University of Notre Dame's private campus police department, rejecting a suit by ESPN seeking student athlete crime reports. *ESPN v. University of Notre Dame Police Department*, (Ind. Nov. 16, 2016).

ESPN had argued that because the university police department effectively functioned as a law enforcement agency it was subject to Indiana's Access to Public Records Act, IN Code chapter 5-14-3 (Supp. 2014). The intermediate court accepted this argument, but the supreme court reversed unanimously. "A grant of arrest powers enabling university police departments to keep order on their private campuses does not transform those officers or the trustees who oversee them into public officials and employees," the court concluded.

Background

In 2014, ESPN investigative reporter Paula Lavigne made an opens records request seeking campus police incident reports involving 275 Notre Dame student-athletes, whether named as a victim, suspect, witness, or reporting party. Under Indiana law, private colleges are permitted to appoint police officers with arrest powers to protect their campuses. Ind. Code § 21-17-5-2.

ESPN argued the University police force was a "law enforcement agency" within the meaning of the open records statute. The statute defines "law enforcement agency" as:

> An agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff's department of a political subdivision, prosecuting attorneys, members of the excise police division of the alcohol and tobacco commission, conservation officers of the department of natural resources, gaming agents of the Indiana gaming commission, gaming control officers of the Indiana gaming commission, and the security division of the state lottery commission.

The Indiana Supreme Court held that under the plain meaning of the statute the private campus police force was not an agency or department of "any level of government" notwithstanding its exercise of police powers. Private campus police are "uniquely entrusted to enforce the rules and regulations of their appointing educational institution" and are agents of

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the private university not the state. "While the [Notre Dame] trustees permit these officers to perform some traditional police functions, they are also tasked with many University-specific duties, for example, enforcing the student code, escorting students late at night, and acting as student caretakers."

The court noted that a contrary ruling could lead to "absurd" results, such as making all records of Notre Dame subject to open records law.

ESPN was represented by James Dimos, Kandi K. Hidde, Maggie L. Smith, Jennifer A. Rulon of Frost Brown Todd LLC. Notre Dame was represented by Damon R. Leichty, Peter J. Rusthoven, John R. Maley, of Barnes & Thornburg LLP, Indianapolis, IN.

MLRC 2016 Annual Meeting

New Directors Elected; A Review of MLRC Projects and Events

The Annual Meeting of the Media Law Resource Center, Inc. was held on November 9, 2016 at the Marriott Marquis Hotel in New York.

Board Member Ken Richieri called the meeting to order. The first item of business was the election of new Directors.

Election of Directors

The membership elected two new directors to serve two-year terms: Karen Kaiser of The Associated Press, and Andrew M. Mar of Microsoft.

The membership also reelected two current directors for additional two-year terms: Jonathan Anschell of CBS Broadcasting, and Lynn Oberlander of First Look Media.

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

Marc Lawrence-Apfelbaum
Gillian Phillips, The Guardian
Kenneth A. Richieri, The New York Times Company
Randy L. Shapiro, Bloomberg L.P.
Regina Thomas, AOL
Kurt A. Wimmer, News Media Alliance

Finance Committee Report

Kurt Wimmer delivered the Finance Committee's report. He referred the Board and attendees to the Statement of Financial Position and noted that MLRC had quite a good year. Revenues exceeded expenses by roughly $120,000. Membership revenue increased in 2016. The MLRC Media Law Conference in Virginia was successful. Expenses were kept at a tight level. "Overall, a very good financial year"

Executive Directors Report

George Freeman reported that media membership increased by two; DCS membership dropped eight; but associate membership was up by four. Given the current economic climate

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of consolidations, he said, MLRC should be pleased with membership levels.

The Media Law Conference in Virginia was a success with 325 attendees, timely programming, and good evaluations from attendees.

The Annual Dinner later in the evening, honoring Daniel Ellsberg, had 604 paid attendees.

MLRC's publications are robust. They include the MediaLawDaily, MediaLawLetter, and Bulletin. Additional DCS Committee reports are issued as warranted.

MLRC concluded the first year working with Lexis to publish its 50-State Surveys in print and e-book. We had a great first quarter, but are meeting with Lexis to encourage it to be more proactive in marketing the books.

The MLRC Institute has been holding successful Media Law for Journalists events around the country. Workshops have been held in New York, DC and Boston. And four more are planned for Los Angeles, Miami, San Francisco, and Chicago.

The workshops are supported by a MacArthur grant of $45,000 and a Mutual Insurance grant of $25,000. The MLRC Institute will also apply to the Knight Foundation for a $225,000 grant.

MLRC has a new Legal Fellow, Alison Venuti, who is engaged in projects.

And MLRC has a new office subtenant: South Asian Americans Leading Together, an NGO dedicated to defending the civil rights of South Asian Americans.

MLRC held a successful Conference in Miami in 2016 on Press Freedom in Cuba and IP and newsgathering issues surrounding the Rio Olympics. In 2017, the conference will explore Online Piracy in Latin America; and US -Mexico relations.

In June, MLRC held its 2nd meeting in Paris to engage with European lawyers on media law developments and reform efforts in Europe. Topics included privacy law; protection of sources; national security vs. free press; comparative fair use law; and a debate on hate speech law. Next year the Paris meeting will be on June 12th 2017.

The London Conference will be held on September 25-26 at the Law Society. It will include discussion on the fallout from Brexit with Bloomberg Editor John Micklethwait already lined up to speak.

Entertainment Law Conference and Northern California Initiatives

Deputy Director Jeff Hermes reported on the next Entertainment Conference coming up on January 19, 2017 at the LA Times Building. Sessions will address: Music Copyright: Stairway to Heaven and Blurred Lines; Business with China; Hollywood and Section 230 issues; and Dealing with Fanworks.

MLRC's Northern California meetings have increased MLRC exposure to in-house lawyers there. Jeff has led 3 sessions since Nov. 2015. The 3rd session format was the most successful –

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a master class for people who already know Section 230 – aiming for GCs and AGCs – 85 people attended a 90-minute session.

Jeff reported on his "MonthlyDaily" recap of news from the MLD. Members seem to favor receiving the MonthlyDaily as a stand alone publication.

Digital Conference and Forum

Staff Attorney Michael Norwick reported on the pre-Dinner Forum focusing on Media Challenges in the 2016 Campaign.

He also highlighted potential sessions for the 2017 Digital Conference: Europe's war on US platforms; Privacy Issues; EU Copyright issues; Cooperating with law enforcement; Free speech and social responsibility, Cyberbullying; and a possible CEOs panel.

ICYMI and MLRC Institute Workshops

Jake Wunsch, MLRC Publications Manager, reported on the "In Case You Missed It" weekend publication. He also discussed how he and Assistant Manager Andrew Keltz are using social media and extensive research and email campaigns to promote the Media Law for Journalists workshops.

DCS Report

DCS President Charles Tobin reported on the work of MLRC's 16 committees and task forces (see the DCS Committee reports in this issue).

He thanked President Emeritus Sam Fifer for his service and welcomed incoming President Laura Prather.

Open Discussion

Ken Richieri expressed interest in finding new ways to get regular feedback from members. And he welcomed any new ideas from members. There being no further business the 2016 Annual Meeting concluded.

DCS Annual Meeting Reviews Accomplishments and Plans for 2017

The annual meeting of the MLRC Defense Counsel Section was held on Thursday, November 10th at Carmine's Restaurant on West 44th Street, by Times Square.

Over a hearty family-style lunch, DCS President Chuck Tobin led the meeting. On governance, members elected Rob Balin of Davis Wright Tremaine as DCS the new Treasurer. He will join Laura Prather, President; Jack Greiner, Vice President; and Jay Ward Brown, Secretary. Chuck will continue to serve as President Emeritus during the coming year.

George Freeman gave the Executive Director's report on MLRC's projects and plans, followed by reports from Committee Chairs on Committee accomplishments and plans for 2017.

Committee Reports

Advertising and Commercial Speech Committee

Co-Chairs: Brendan Healey, Michelle Doolin

Vice-Chair: Faiza Javaid

Presenting: Brendan Healey/Faiza Javaid

In 2016, the committee leadership (Brendan Healey, Michelle Doolin, and Faiza Javaid) continued to focus on developing the committee as a practice resource and forum for exchanging knowledge among MLRC members who advise clients on advertising and commercial speech issues. We used committee meetings in 2016 to host substantive presentations by members and outside speakers on current developments and issues of concern to advertising law practitioners. Presenters and topics included: Chuck Sennet, Assistant General Counsel for Tribune Media Company, spoke on the FCC's then newly released revisions to the Contest Rules; Mary Engle from the FTC spoke on the Revised FAQs for the Endorsement Guides; Achir Kalra from Forbes spoke on Ad Blocking; and Scott Dailard from Cooley spoke on *Spokeo*. We also intend to schedule a presentation in November discussing right of publicity.

In 2017, we intend to keep our members abreast of new legal and regulatory developments relating to social media and behavioral advertising. We hope to have presentations every other month, and we also intend to update the "Checklist on Advertising Content." The update would focus on advertising of marijuana (and related services and products), e-cigarettes, guns, hard liquor, Internet gambling (including daily fantasy leagues and Internet betting on horse racing), pharmaceutical drugs from other countries, as well as native advertising and business issues

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Reports and rigatoni at the DCS Annual Lunch at Carmine's in New York.

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such as rate cards. Candidly, we did not make much progress on this in the past year, but we hope to reinvigorate the effort in the coming year. Our committee continues to stay nimble and, as quickly as technology is changing and creating new legal issues, our committee follows topics as they develop and attempts to find speakers at the core of these issues to talk about them.

ALI Task Force

Chair: Thomas S. Leatherbury

The ALI continues to be fairly quiet with respect to issues affecting the media. The working group on the Restatement of Torts (Third) is not now considering those portions of the Restatement on libel and privacy. Moreover, the working group on Privacy is focusing on data privacy and consumer privacy rather than privacy issues that regularly crop up in representing media companies and journalists. Finally, the project concerning the Restatement of the Law of Copyright has released a second preliminary draft that will be discussed at a meeting this month. If you would like to be involved, please let me know. If you are interested in ALI membership, I would be pleased to walk you through the process.

Anti-SLAPP Task Force

Chair: Bruce E. H. Johnson

Presenting: Laura Prather

The MLRC SLAPP task force has been meeting irregularly in 2016, keeping track of new

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developments in state anti-SLAPP laws, assistance media law practitioners with anti-SLAPP expertise, and monitoring possible federal ant-SLAPP legislation. We intend to meet on a bimonthly basis in 2017. Anyone with an interest in, or expertise about, anti-SLAPP legislation and litigation is welcome.

California Chapter

Co-Chairs: Jeff Glasser, David Snyder, Sarah Cronin

Presenting: Jeff Glasser

The MLRC California Chapter held lively panels this year on (1) complying with new FTC guidelines for native advertising and *Sarver's* impact on right of publicity cases, (2) copyright and the "useful article" doctrine, and (3) the erosion of Section 230 protections.

The Chapter's first meeting, held on March 30 at Kelley Drye & Warren LLP's Century City offices, focused on the Federal Trade Commission's new guidelines on native advertising and the impact of the "Hurt Locker" case (*Sarver v. Chartier*) on right of publicity claims. Lauren Aronson of Manatt, Phelps & Phillips, LLC took us through the FTC's settlement with Lord & Taylor regarding native advertising and the key points of the guidelines. Kelli Sager, partner at Davis Wright Tremaine LLP, addressed *Sarver* and use of California's SLAPP statute to strike right of publicity and defamation claims targeting fictionalized portrayals of real people.

The second meeting, held on June 29 at Sheppard Mullin Richter & Hampton LLP's Century City offices, delved into key copyright cases in the entertainment and fees subject areas that are before the United States Supreme Court and other appellate courts around the country. The panel debated whether cheerleader outfits and the Batmobile are subject to copyright protection, how those cases are shaping the contours of the "useful article" doctrine, the scope of copyright protection generally, and how courts are defining standards for awarding attorneys' fees in copyright cases. Cases reviewed included *Varsity Brands v. Star Athletica, DC Comics v. Towle, and Kirtsaeng v. John Wiley & Sons*. Jack Lerner, law professor at UC Irvine School of Law; David Aronoff, partner at Fox Rothschild, LLP; Rachel M. Capoccia, partner at Jeffer Mangels Butler & Mitchell LLP; and Gunnar Gundersen, partner at Berliner Springut Steffin Azod LLP appeared on the panel.

The third meeting, held on October 19 at Kelley Drye & Warren's Los Angeles offices, dissected recent state and federal rulings that questioned the extent and nature of protections provided by Section 230 of the Communications Decency Act. The panel discussed the California Supreme Court's grant of review of the decision in *Hassell v. Bird* regarding takedown orders following default judgments; the Ninth Circuit's reversal in *Doe No. 14 v. Internet Brands* of an order dismissing a case based on Section 230, among others. Tom Burke, partner at Davis Wright Tremaine (which is representing Yelp in *Hassell v. Bird*); Susan

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Seager, lecturer at the Annenberg School for Communications and Journalism at the University of Southern California and formerly vice president of Fox Group Legal, Litigation Team; and Kevin Vick of Jassy Vick Carolan LLP led the discussion.

The fourth meeting in December will cover legal issues surrounding virtual reality in the entertainment industries.

Employment Law Committee

Co-Chairs: Tanya Menton, Thomas Wilson

Presenting: Thomas Wilson

In June 2016, the Employment Committee updated its report on the issues facing media employers who send journalist into dangerous situations. While the prior paper concentrated on assignments outside the U.S., the updated report includes U.S. domestic matters. Look for the article titled "Legal Considerations for U.S. Media Employers Who Send Employees 'Into Harm's Way'" on the MLRC website. We are told that 250 of your fellow MLRC members clicked on the report when it was first published. The Committee also presented a boutique session on employment law matters for media employers at the MLRC Virginia Conference. One attendee described it as a "master class." In the boutique session, we addressed issues related to violent attacks on journalists; freelancers, stringers, and other independent contractors in the media industry; managing journalists and their social media communications; and the coming cloud of sexual harassment litigation against media companies. During our meetings of the Committee this year, we addressed a wide range of issues including the use of Anti-SLAPP laws in employment discrimination cases, layoffs and buyouts, equal pay issues, on-line abuse of journalists, sexual harassment and retaliation litigation, and the use of alternative dispute resolution plans by media employers.

Entertainment Law Committee

Co-Chairs: David Cohen, Bradley Ellis

Presenting:

The mission of the Entertainment Law Committee is to keep its members apprised of key cases and the latest legal developments in areas of interest to our membership. To that end, the Committee meets telephonically for an hour the first Wednesday of every month. In preparation for each meeting, the Committee Chairs review a variety of publications and assemble approximately 20 items of interest. About a week ahead of each meeting, the Chairs circulate a list of these items to the Committee, from which members can select which items they would like to volunteer to present. A final meeting agenda with links and attachments is

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distributed 3-5 days before the call. Agenda items are selected with an eye toward currency, significance, balance and entertainment value.

Some of the specific topics discussed this past year include: Who "owns" "Who's On First"; FCC access and ownership issues; sports betting; fan fiction; and the usual (and unusual) array of right of publicity, trademark and idea submission cases.

Plus, there is often a Reality Television or other production-based matter to fill out the agenda (and remind us that people really are crazy). We also monitor previously discussed items and provide updates as warranted.

MLRC's Jake Wunsch, left, and Jeff Hermes heft leftovers back to the office.

The Committee is comprised of approximately 65 lawyers, both in-house and outside counsel, from around the country, and includes many of the leading lawyers in the entertainment and media arenas. Approximately 20 Committee members actively participate on each month's call. The monthly calls create opportunities for broad participation, foster in depth analysis and discussion, and allow Committee members to get better acquainted with each other.

International Media Law Committee

Co-Chairs: Robert D. Balin, Gillian Phillips and Julie Ford

Presenting: Robert Balin

Our committee conducts regular conference calls that focus on hot spots and hot topics across the globe. We often invite guest speakers - including journalists, regulators, lawyers and professors - to speak on recent media developments in their respective countries.

This year our meetings included a panel discussion with reporters who had worked in Syria and Afghanistan, a report from the UN Special Rapporteur on Privacy, speakers from Latin America, discussions of the criminal proceedings against German comic Jan Bohmermann and Italy's recent decision to put an expiration date on "relevant" news. Government suppression of free speech is a recurring discussion topic, and this year we heard from a Russian journalist about the Kremlin's dirty tricks and more recently from Nazli Selek about the devastating number of arrests and media outlet shut-downs following the attempted coup in Turkey last summer.

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We also keep close tabs on legal and political developments in the UK with regular updates from our committee members. Topics this year have included celebrity injunctions, the Panama Papers, press regulators and the anticipated effect of Brexit on the media.

Internet Law Committee

Co-Chairs: Jeremy Mishkin, Katherine Surprenant

Presenting: Mark Sableman

Our Spring meeting featured data privacy experts Jake Sommer and Kandi Sommers (ZwillGen). Given the recent proliferation of video content across devices on the Web, they presented a brief tutorial highlighting legal issues specific to video content useful to our membership, including recent lawsuits under the federal VPPA and the Michigan VRPA. In addition, Jake and Kandi reported on the status of the EU-US data privacy shield and the ongoing personal privacy vs. national security debate, as fueled by the Apple-DOJ dispute over iPhone security controls.

Our Fall meeting commemorated the 20th anniversary of Section 230, a/k/a the ironically-named Communications Decency Act. An all-star panel of Ambika Doran (Davis Wright Tremaine), Jack Greiner (Graydon) and Steve Zansberg (Levine Sullivan Koch & Schulz) discussed the past, present and future of the law that has done so much to enhance freedom of expression online. The meeting commenced with a recap of Section 230's inauspicious introduction as an add-on provision to a statute that the Supreme Court largely held unconstitutional. Our speakers summarized development of case law interpreting Section 230, including areas in which courts have created carve-outs to Section 230's protections. The discussion culminated with predictions of Section 230's future role in shaping Internet speech in light of recent trends in the court decisions and legislative proposals.

During this off-year of the biannual editions to the Committee's Practically Pocket-Sized Internet Law Guide, Committee members shared updates on their respective chapters. For example, Steve Goodman reported on the Court of Appeals for the DC Circuit's decision (by divided opinion) upholding the FCC's Open Internet (or Net Neutrality) Order. Steve pointed out that although the finality of that decision is still in question, it has paved the way for the FCC to start regulating ISPs under the Order's reclassification of broadband internet access service from a Title I information service to a Title II telecommunications service.

Legislative Affairs Committee

Co-Chairs: Leita Walker, Shaina Jones Ward

Presenting: Leita Walker

The Legislative Affairs Committee tracked a number of issues in 2016, including data

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security and privacy legislation, regulations related to drones, changes at the copyright office, FTC oversight of native advertising, and the Consumer Review Freedom Act of 2015. During the first half of the year, committee members provided oral updates on these topics during bi-monthly conference calls. However, the calls were not well attended, prompting the committee to consider other ways to keep the MLRC membership abreast of important federal legislative and regulatory developments. In 2017, we will continue to monitor such developments and to provide short updates as appropriate in the monthly Media Law letter, while being prepared to mobilize should a law or rule with major industry implications be proposed (such as the federal shield law proposals from a few years ago).

Litigation Committee

Co-Chairs: Amelia Brankov, James A. Hemphill

Presenting: Amelia Brankov

The Litigation Committee continues its series of every-other-month phone meetings to promote more interaction among committee members, and to provide a forum for more immediate exchanges of ideas and news. Each conference call begins with one or two members giving a brief presentation on a recent case or current issue relating to media litigation topics. Participants then have an open forum to discuss the presentations and to raise any practical or theoretical issues related to media litigation. Finally, participants discuss the status of ongoing larger projects, such as reports and white papers for the entire DCS membership, and kick around ideas for future projects. The committee is also near completion of its work on the long-overdue update to the MLRC expert witness bank, but help from members would still be welcome to close out this project.

Media Copyright and Trademark Committee

Co-Chairs: Marni Pedorella, Scott Sholder, Nancy Wolff

Presenting: Scott Sholder

MLRC's Media Copyright and Trademark Committee was established in 2013 to keep the MLRC membership current on cases and trends in the areas of copyright and trademark law, particularly for those who do not practice in these specialties on a day-to-day basis. The Committee holds one-hour teleconference meetings every other month, with meetings open to all MLRC members. A typical meeting agenda includes two or three brief presentations by experts in IP matters, followed by discussion, with a focus on timely issues and recent key cases, in both the news and entertainment arenas. Discussion areas in 2016 included topics such as recent developments in music copyright cases, like Led Zeppelin's win in the *Stairway to Heaven* jury trial, developments in the Copyright Office, the Star Trek fan fiction copyright

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action, and the "Nobody puts your old 401k in a corner" *Lionsgate v. TD Ameritrade* decision. The Committee chairs also circulate a bi-monthly email, outlining other "recent developments" in the field, generally with links and cites to recent cases of interest or relevant articles. The plan for 2017 is to continue this format for meetings and other communications, with a specific focus on counseling clients that have business interests on both sides of these IP issues. This format appears to be successful as the bi-monthly calls are well attended with lively discussion.

MediaLawLetter Committee

Co-Chairs: Russell Hickey and Michael Berry

Presenting: Russell Hickey

The MediaLawLetter Committee serves as a resource for Dave Heller and the MLRC staff, working to identify topics and write articles for the monthly MediaLawLetter and providing advice as needed about the MediaLawDaily. Over the past year, the MediaLawLetter has featured articles from NextGen Committee members, a regular monthly column from MLRC's Executive Director, George Freeman, covering topical developments, programs and events. The MLL also features a regular column by Jeff Hermes, one of MLRC's deputy directors, called the Monthly Daily, recapping cases and developments in the MediaLawDaily. Most recently, the MLL published Susan Seager's article "Donald J. Trump Is A Libel Bully But Also A Libel Loser," after the ABA declined to publish it, a controversy that gained substantial media coverage. In the coming year, the Committee will continue to work on improving the MediaLawLetter and MediaLawDaily.

Next Generation Media Lawyers

Co-Chairs: Matthew Schafer, Drew Shenkman, Christine Walz

Presenting: Matthew Schafer

In 2016, we have focused on expanding the Committee's reach to the West Coast by hosting social functions with new members in attendance, including a new event at MLRC's Legal Frontiers in Digital Media Conference and a happy hour organized in San Francisco this summer. Additionally, we have begun enlisting these new West Coast recruits to start planning mentoring and legal education events targeted at California Committee members. Initial efforts have been made to establish a similar outreach to associates in Chicago as well.

In addition to our focus on expansion, several committee members wrote monthly articles in the MediaLawLetter on a variety of topics, including personal jurisdiction in the defamation context and the right to public records in personal email accounts of government officials. Additional articles in the pipeline will cover topics regarding media insurance and the

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consequences of the inadvertent disclosure of attorney-client information in response to public records requests.

In the first quarter, Anna Kadyshevich, Adrianna Rodriguez, and Elizabeth Seidlin-Bernstein hosted a webinar on the topic of "Reporting on Hacked Materials." Brian Barrett at AP, Kate Bolger at Levine Sullivan Koch & Schulz, and Jeremy Goldman at Frankfurt Kurnit Klein & Selz joined as panelists for the webinar. About 100 members joined the webinar either online, in person, or over the phone. An upcoming webinar will cover legal and ethical issues surrounding newsgathering and the use of social media.

In 2016, we will continue to work on these initiatives with a special focusing on seeking out, organizing, and promoting the expansion of the Committee to the West Coast and Midwest. Moreover, the Chairs are planning to place renewed focus on the planning and hosting of webinars, which as a result of panelist and volunteer schedules were pushed later in the year than previously planned, and on the planning of in-person panels in New York City to bring together Committee members and foster a sense of community among this portion of the bar.

Finally, a personnel update: Rachel Strom, a partner at Levine Sullivan and a former chair of the Committee stepped down this year. She was replaced on the Committee by Matt Schafer, an associate at Levine Sullivan. The Committee would like to thank Rachel for volunteering her time over the last several years and in helping devise the Committee's strategic goals, which we look forward to working toward in the future.

The Committee, which is primarily targeted to those lawyers within the first ten years of their media law practice, is always looking for new members. If you work with anyone in this demographic interested in getting involved with MLRC, please have them contact any of the co-chairs.

Newsgathering Committee

Chair: Cynthia Counts

Presenting: Cynthia Counts

The Newsgathering Committee has completed the work on updating the Panic Book. The last update of this publication occurred in 2008. It will compile the sections and submit for publication on the website before the end of the year.

Work has also begun in earnest on the update of the Model Brief on Newsgathering Claims. The Committee anticipates that this will be the key project for the committee over the next calendar year. Like the Panic Book, the Model Brief on Newsgathering Claims has not been updated since 2008.

The Newsgathering Committee has also taken an active role in the MLRC Drone Task Force and its member Alicia Calzada has agreed to participate as a representative of the

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Newsgathering Committee. Over the course of the year, the Committee has also met to discuss various newsgathering events, the attack on open records and other access issues that have come to the forefront this past year.

On another note, we were wondering if there would be any interest/ability in attempting to compile a list of MLRC attorneys that have some criminal experience. Part of the Panic Book deals with criminal issues and we thought it would be good to get a list of MLRC attorneys that have criminal experience together and include this as a second part of this section so that people could have a readily available list of media attorneys that understand criminal law. We could include this as an option on the membership forms providing people the opportunity to self-identify as a media attorney with criminal experience or we could put out the request on the media law newsletters.

Pre-Publication/Pre-Broadcast Committee

Co-Chairs: Dana Rosen, Lisa Zycherman

Presenting: Lisa Zycherman

The committee held a timely live event this June in the New York offices of Davis Wright Tremaine, simulcast as a webinar. Heather Dietrick of Gawker Media and Mike Berry of Levine Sullivan presented on their then-recent experiences defending Gawker Media in the Hulk Hogan trial.

In its monthly conference calls, the committee had speakers who led discussions on a variety of legal issues and current cases, such as:

Scholz v. Delp, where the Massachusetts Supreme Judicial Court held that articles published by the Boston Herald regarding the suicide of Brad Delp, the lead singer of the rock band Boston, were protected opinion, including comments featured in the articles that purportedly implied Scholz was at fault for the suicide.

The Ninth Circuit's final decision in Sarver v. Chartier – otherwise known as The Hurt Locker case, which affirmed that the makers and distributors of the Academy Award-winning motion picture are protected by the First Amendment from claims by a real-life Army bomb disposal technician that the film both violated his right of publicity and defamed him.

Montgomery v. Risen, a decision by the U.S. District Court for the District of Columbia dismissing on summary judgment a libel action brought by a former federal contractor against James Risen, and his publisher Houghton Mifflin Harcourt Publishing Co., concerning a chapter in the book *Pay Any Price: Greed Power, and Endless War*, which discussed Montgomery's claims to have developed technologies that could detect hidden letters and numbers in Al Jazeera broadcasts, which the government subsequently employed in the war on terrorism.

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As well as presentations on current vetting trends, including:

Experiences doing pre-broadcast review for creators of fictional/scripted television and film that seek to incorporate their material into real life, documentary-style settings, featuring actual people, places, brands, etc. On this topic, we heard from attorneys with recent experience vetting portrayals of the OJ Simpson trial – including the critically acclaimed FX series and ESPN documentary.

Considerations that went into doing the "pre-pub" on the Whitney exhibition by Laura Poitras, "Astro Noise," which involved a range of topics, including mass surveillance, the war on terror, the U.S. drone program, Guantánamo Bay Prison, occupation, and torture.

A presentation by Susan Seager discussing her study "Donald J. Trump Is A Libel Bully But Also A Libel Loser," and the controversy that arose when the ABA asked Seager to make changes to her article before publication.

The committee is also currently working on a few pending projects regarding the Fair Report Privilege and a Libel Primer for journalists.

State Legislative Committee

Co-Chairs: Robin Luce Herrmann, Jean Maneke

Vice-Chair: Steve Zansberg

Presenting: Robin Luce Herrmann

The MLRC State Legislative Committee is now in its sixth year of existence. During the last year, the State Legislative Committee continued to work with more than thirty-five of the nation's leading government relations attorneys who represent First Amendment interests in more than half of the jurisdictions in the United States. We have identified and tracked legislative trends impacting the media and have exchanged ideas for how to most effectively combat legislative attempts to encroach upon the First Amendment and how to most persuasively get new legislation adopted to expand upon First Amendment protections. We are also maintaining the Committee's website page.

Some of the areas of legislation we are working on include: drone, "ag-gag", anti-SLAPP, open government, public notice, right of publicity, and more. Our committee has set up a webpage on the MLRC's website with draft legislation, current model bills, existing statutes, talking points and articles to assist the entire MLRC membership.

We typically meet once a month during the legislative session and recess for the summer. On our monthly calls, we keep each other informed on what is going on in the various states. Between monthly meetings, we exchange emails with inquiries, draft legislation and calls to action. Our goals for the upcoming year include soliciting more members from the government

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relations departments of more on-line organizations as well as some of the more strategic states that are not currently represented on the committee.

Report of the Body-cam Subcommittee (chaired by Jean Maneke): During the last 2 years, a number of bills arose in state legislatures around the country relating to law enforcement use of body cameras. It became clear that media lawyers needed to have available suggestions as to how the records created by those cameras should be treated in terms of public record access and retention. A subcommittee of the State Legislative Affairs Committee was formed to investigate and address this arising issue. We looked at a number of proposals coming out of various state legislators and compiled a report which addressed the history of the issue and the justifications for creation of a model policy on retention of and public access to police body-cam recordings. The basis of that model policy was that existing exemptions for confidential informants, personal privacy interests, trace secrets and related issues existed to adequately protect persons whose activities are captured in such recordings. Therefore, the Model Policy includes a set of principles to address any legislative reform activities. It clearly set out in its introduction the case law basis on which its various principles were rooted. The Model Policy contains three principles regarding availability of such recordings, including six elements of inclusion that should be in any state's policy regarding release of such recordings. A copy of the policy is available on the MLRC website at http://www.medialaw.org/component/k2/item/2837 . We continue to monitor activity nationwide involving body-cam use and developing litigation surrounding law enforcement use.

Drone Task Force: In 2016, in response to the FAA's new rules with respect to drones and the anticipated expansion in their use within the press, as well as the attempts to regulate drone usage by state and local authorities, the State Legislative Committee, along with the Legislative Committee and the Newsgathering Committee, have formed a Drone Task Force, comprised of 20+ MLRC members. Their 2 initial projects are: (1) To provide a compendium of sources of regulation with an overview of the FAA and other Federal regulations; and (2) Drafting a Compliance Guide that addresses: Safety and Security; Privacy and other Torts; Criminal aspects; and Differentiating newsgathering from Hobby/Commercial/Hunting use and University/teaching/research use. Our goal is to have a draft report by the November MLRC meeting.

Robin Luce Herrmann will be rotating off the committee at the end of 2016. Steve Zansberg will join Jean Maneke as Co-Chair, and Nikki Moore of the California Newspaper Publishers Association, will become Vice-Chair.