

**MLRC**  
*Media  
Law  
Resource  
Center*  
**MEDIA LAW LETTER**

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Reporting Developments Through December 31, 2018

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*From the Executive Director's Desk*  
**Santa's Gift List for  
Media Players Naughty & Nice**

**To Donald Trump** – A new copy of the Bill of Rights (since he obviously lost the one we gave him last year)

**To Donald Trump** – Reading lessons so he can read #1; only a few should be necessary since the First Amendment is quite short

**To Sarah Huckabee Sanders** – A top – which she can spin, a trait she's expert at

**To Stormy Daniels** – The DCS Directory, to find another lawyer

**To Robert Mueller** – A broken faucet, so that he can do a little more leaking

**To Fake News** – A undistinguished burial for a meaningless concept in a trap on one of Trump's foreign golf courses

**To the Masterpiece Cakeshop bakers** – A cake topper of two men, just in case they change their minds

**To Donald Trump** – An anthology of Henrik Ibsen plays so he can learn what "An Enemy of the People" is really about

**To Kellyanne and George Conway** – Either new spouses or new political views

**To Donald Trump** – Pinocchio's nose

**To Fact Checkers** – A larger desk

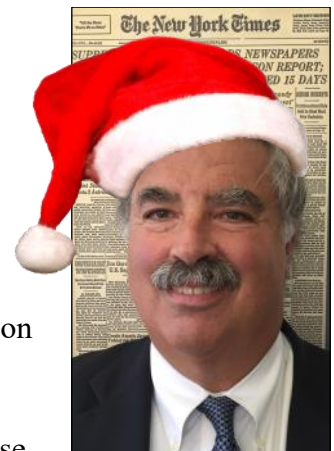
**To CNN, Fox News and MSNBC** – A continuation of the Trump reign

**To Jim Acosta** – A gold-plated White House press credential

**To Justice Ginsberg** – Good health

**To Justice Kavanaugh** – A 2019 calendar, to replace his 1982 one

**To the National Enquirer** – a return to the golden days of gossip – viz., O.J. and John Edwards – instead of "catch and kill."



**George Freeman**

**To Time** – a revival under its new billionaire benefactor.

**To Donald Trump** – The MLRC’s 50-State Surveys to be read before he retaliates for “unfavorable” content by revoking press credentials or campaigns for “opening up the libel laws”

**To Mike Pence** – Photos of him at the 2005 MLRC Dinner speaking out in favor of a federal shield law – when he was one of us

**To the White House Press Corps** – The ability and will to ask follow-up questions

**To Les Moonves** – A toy parachute, not the \$120 million kind

**To Olivia De Havilland** – Better use of her remaining years than the filing of a fruitless right of publicity lawsuit

**To Steve Bannon, Sean Spicer and Anthony Scaramucci** – ... wait, remind me who they are?

**To Ronan Farrow and Jodi Kantor** – A Harvey Weinstein bobblehead doll, and our thanks for their compelling and sensitive performances at our Forum

**To Jeff Greenfield, Lynn Sherr, Marvin Kalb and Max Frankel** – Our thanks and Nixon/Agnew bumper stickers for a great presentation on 1968 at our Annual Dinner

**To College Administrators** – Backbones, to defend controversial speech on campus

**To Mark Zuckerberg** – All the friends he can get, and lessons on how to testify effectively from Justice Kavanaugh

**To Merrick Garland** – Mitch McConnell’s hide, and a tape of the Kavanaugh hearings

**To Tom Kelley** – A rocking chair to enjoy retirement, and a visit from a levitating former Miss Wyoming

**To John Borger** – A rocking chair to enjoy retirement, and a turnbuckle to smash Jesse Ventura into

**To Donald Trump** – a dictionary, to help with his spelling on Twitter, and a Twitter interface without a “block” option

**To Truth** – A comeback

**To the Academy Awards** – My telephone number. If you get desperate for a host, I’m available, work cheap, and have a Fred Friendly hypo that kills.

**To the Capital Gazette** – Gun control legislation

**To the MLRC Staff** – My heartfelt thanks for all your work, effort and dedication 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 our loyal readers and members a very happy and healthy new year.**

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

# Media Law Resource Center and Southwestern Law School Present

The 16th Annual

## ENTERTAINMENT & MEDIA LAW CONFERENCE

Thursday, January 17, 2019 | Los Angeles

Reporting in the Age of #MeToo

Copyright, Trademark and the Public Domain

Developments in Idea Submission Law

Dealing with a Social Media Backlash

[www.medialawcon.com](http://www.medialawcon.com)

## In-House Counsel Meet at MLRC to Discuss Trump's Attacks on the Media



About 25 in-house media counsel met at the MLRC offices in mid-December to discuss strategies to respond to President Trump's attacks and threats on the media. It was, in a sense, a repeat of a similar meeting held two years ago, in December '16, in anticipation of a Trump Administration.

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

The meeting began with brief talks from three lawyers who recently brought suits against the White House, David Vigilante (CNN/Jim Acosta), Suzanne Nossel (PEN America re Trump's chilling First Amendment speech and activity) and Katie Fallow (Knight Foundation re Twitter blocks). They were asked to discuss the cost/benefit analyses that they went through before commencing litigation. From a legal standpoint, there was a general consensus that we were not worried about Trump's empty threats on libel, that the Government FOIA responses were not materially slower or more restrictive than prior administrations', that we did not expect many



more retaliations against journalists due to their content leading to barring them from White House access, and that the biggest threat was the possibility of continued prosecutions against government leakers, or worse, a possible prosecution against a media entity for publishing a leak they legally received. MLRC is planning to draft a model brief that could be used in that eventuality, a plan which was welcomed by the group.

Although it is a little out of our purview, responses to Trump's PR attacks on the media and the best ways to journalistically deal with his tweets and lies were also discussed, as they are inextricably intertwined with the legal threats. Although the discussion of these non-legal matters was very interesting, no ground-breaking conclusions were reached.

## **MLRC 2019 Events**

**January 17**

**Entertainment Law Conference**

Los Angeles, CA

**March 11**

**Latin American Media Law Conference**

Miami, FL

**May 20-21**

**Digital Law Conference**

San Francisco, CA

**September 15-17**

**London Conference**

London, UK

**November 6**

**Annual Dinner & Forum**

New York, NY

**November 7**

**DCS Annual Meeting**

New York, NY

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# Court Holds Kansas Anti-SLAAP Law Applies in Federal Court

By Eric Weslander

In the first decision applying Kansas' relatively new anti-SLAPP statute in federal court, Judge Carlos Murguia of the U.S. District Court for the District of Kansas concluded in a [Memorandum and Order](#) issued November 26, 2018 that the statute does apply in a federal diversity action in the District of Kansas, in light of the dual aims of the *Erie* doctrine to discourage forum-shopping and inequitable administration of the laws.

Emphasizing “the practical effects of not applying [anti-SLAPP] statutes in federal court,” the decision followed the approach of the U.S. Court of Appeals for the First Circuit in its decision in *Godin v. Schencks*, 629 F.3d 79, 86 (2010) which held Maine’s anti-SLAPP act to apply in federal court, instead of the approach taken by the D.C. Circuit in *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (2015).

Whereas the *Abbas* decision (authored by then-judge Brett Kavanaugh) characterized the District of Columbia’s anti-SLAPP act as conflicting with Federal Rules 12 and 56, the new District of Kansas decision, like the *Godin* decision, held that the SLAPP act at issue “des not substitute Rules 12 and 56, it merely supplements them for a narrow category of cases.”

The suit in [Caranchini v. Peck](#), No. 18-2249-CM-TJJ, was a 147-page complaint filed by a pro se Plaintiff (a former attorney who, the decision notes, has been disbarred in numerous jurisdictions and does not have an active law license) against Defendants, a then-married couple. Plaintiff was involved in an extramarital affair with the Defendant husband, according to the decision, and filed suit after both Defendants sought a restraining order against her. Plaintiff then brought three defamation counts against Defendants, claiming they made false statements in connection with an application for a temporary restraining order and a report of telephone harassment charges.

Defendants moved to strike the claims pursuant to K.S.A. § 60-5320, Kansas’ “Public Speech Protection Act,” which was enacted in 2016 to “encourage and safeguard the constitutional rights of a person to petition, and speak freely and associate freely, in connection with a public issue or issues of public interest... while, at the same time, protecting the rights of a person to file meritorious lawsuits for demonstrable injury.” K.S.A. 60-5320(b). The Act provides for a special motion to strike if a claim is “based on, relates to or is in response to a party’s exercise of the right of free speech, right to petition or right of association.” K.S.A. 60-5320(d). The Act provides for the special motion to be brought early in litigation, *i.e.*, within 60 days of service of the complaint, and requires a hearing on the

**In the first decision applying Kansas’ relatively new anti-SLAPP statute in federal court, Judge Murguia concluded that the statute does apply in a federal diversity action in light of the dual aims of the *Erie* doctrine to discourage forum-shopping and inequitable administration of the laws.**



motion not more than 30 days after service of the motion. The statute requires discovery to be stayed until the motion is decided.

There was no real question that Defendants' alleged statements—in addition to being privileged under a traditional defamation-law analysis -- by nature fell within the scope of the types of statements the Kansas anti-SLAPP Act was designed to protect, given that the Act broadly defines the right of free speech and the right to petition to include statements related to safety and community well-being as well as statements communicated during judicial proceedings.

The decision primarily focused, therefore, on the issue of whether the Act applied in a federal diversity action, a question of first impression in the District of Kansas -- and one which the Plaintiff did not address in her response in opposition to the anti-SLAPP motion. In addressing this issue, Judge Murguia first gave an overview of the *Erie* doctrine and its maxim that federal courts sitting in diversity apply state substantive law and federal procedural law, citing Justice Stevens' concurring opinion in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 419 (2010), which noted that "the line between procedural and substantive law is hazy" and that in some situations, "procedure and substance are so interwoven that rational separation become[s] well-nigh impossible." 559 U.S. at 419. Regardless of whether a law is characterized as procedural or substantive, the Judge wrote, the overriding consideration in the *Erie* analysis is whether "in a suit for the enforcement of state created rights the outcome would be 'substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in state court.'" (citing *Berger v. State Farm Mut. Auto Ins. Co.*, 291 F.2d 666, 668 (10th Cir. 1961).

Judge Murguia then distinguished the recent ruling by the U.S. Court of Appeals for the Tenth Circuit holding that New Mexico's anti-SLAPP statute was entirely procedural in nature. That decision, *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659 (2018), was not controlling, Murguia wrote, because of the unique features of New Mexico's statute which made it unlike many other states' anti-SLAPP acts.

Turning to the question of whether the Kansas act is substantive or procedural, the decision concluded that the act "seems to govern both substance and procedure," given that it sets forth a substantive purpose – to encourage and safeguard First Amendment rights – but that the Kansas Court of Appeals has concluded that the "heart" of the Act is to provide a procedural remedy early in litigation. See *T & T Fin. of Kansas City, LLC v. Taylor*, No. 117,624, 2017 WL 6546634, at \*4 (Kan. Ct. App. Dec. 22, 2017). For guidance, Murguia then turned to the conflicting decisions of other U.S. Circuit Courts of Appeal, ultimately concluding that the First Circuit's analysis in the *Godin* decision is more in line with the purposes of the *Erie* doctrine than the analysis used by the D.C. Circuit in *Abbas*, (which was recently followed by the Eleventh Circuit in its decision in *Carbone* matter). Murguia concluded, "This court is more

**The decision primarily focused on the issue of whether the Act applied in a federal diversity action, a question of first impression in the District of Kansas -- and one which the Plaintiff did not address in her response in opposition to the anti-SLAPP motion.**

persuaded by the First Circuit’s more detailed analysis, particularly in regard to the practical effects of not applying the Act in federal court... In passing the Act, the Kansas Legislature promulgated additional rules for parties bringing lawsuits under Kansas defamation law. In Kansas courts, the Act would require both parties to meet, essentially, heightened pleading standards. If this court declined to apply the Act, it would be ignoring the Kansas Legislature’s desire to protect individuals against defamation lawsuits that infringe on First Amendment rights.”

Declining to apply the law, Murguia wrote, would defeat the purposes of the *Erie* doctrine in that “A plaintiff could, and would, choose to file her defamation suit in federal court – so long as diversity exists – in order to avoid the heightened standards set forth by the Act in state court... The court would be applying Kansas defamation laws without the additional protections the Kansas legislature chose to enact.” The Court gave a nod to the *Abbas* decision, stating that it found the D.C. Circuit’s reasoning to be persuasive as far as anti-SLAPP acts being procedural in nature, but concluded that (a) the Kansas act fit Justice Stevens’ characterization of a rule that is undeniably procedural in nature yet “may exist to influence substantive outcomes, and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy.” *Shady Grove*, 559 U.S. at 419-20; and (b) that “the D.C. Circuit did not discuss the practical effects of not applying these statutes in federal court. And this court finds that applying the Act in federal court is the result that is most consistent with the purposes of the *Erie* doctrine.”

The Court also cited dicta in the *Los Lobos* decision -- which emphasized that some anti-SLAPP acts, unlike the New Mexico act, “shift substantive burdens of proof or alter substantive standards” – as an indication that the Tenth Circuit would likely agree that the Kansas act applied in federal court. The Court declined to strike the Plaintiff’s additional causes of action for harassment and conspiracy, although those counts were subsequently dismissed pursuant to a Rule 12(b)(6) Motion. Finally, the Court denied Defendants’ request for attorneys’ fees under the anti-SLAPP act for the time being, but stated it would entertain such a motion later in the case.

*Eric Weslander is a partner at Stevens & Brand LLP in Lawrence, KS, a former print, TV & online news reporter, and a past co-chair of the annual “Media & the Law” seminar in Kansas City, MO.*

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# First Amendment Protects Secretly Recording Government Officials in Public

By Michael J. Lambert

Recording police officers performing their duties in public, once a potentially perilous act, has become a clearly established constitutional right. Each U.S. Circuit Court of Appeals to address the question (First, Third, Fifth, Seventh, Ninth, and Eleventh) has held that the First Amendment protects recording police conducting official activity in public.

In December, a Massachusetts federal district court went further, becoming the first court to explicitly find that the right extends to *secretly* recording government officials performing their duties in public.

The U.S. District Court for the District of Massachusetts ruled that the state's wiretapping statute, as far as it criminalizes surreptitiously recording government officials in public, violates the First Amendment. [\*Martin v. Gross\*](#), No. 16-11362-PBS (D. Mass. Dec. 10, 2018). "Secret audio recording of government officials, including law enforcement officials, performing their duties in public is protected by the First Amendment, subject only to reasonable time, place, and manner restrictions," Chief U.S. District Judge Patti B. Saris wrote.

## Background

The court consolidated constitutional challenges brought by Project Veritas Action Fund, a conservative political organization, and Boston activists K. Eric Martin and René Pérez, represented by the ACLU of Massachusetts. The local activists, who often face safety concerns when recording in public, sought the ability to secretly record police without potential prosecution.

Their fear was not without merit. The Suffolk County District Attorney's Office opened at least 11 cases involving felony charges under the Massachusetts wiretap statute since 2011. And Boston police training videos specifically emphasized the illegality of recording police in secret.

The Massachusetts wiretap statute, enacted in 1968, criminalizes recording a communication without the consent of all parties involved in the communication. This contrasts the federal wiretapping law and the majority of state wiretapping laws, which allow recording with the consent of one party to the communication. The Massachusetts law also prohibits "the secret use of [surveillance devices] by private individuals."

The U.S. Court of Appeals for the First Circuit faced a similar challenge to the Massachusetts wiretap statute after Boston police charged Simon Glik under the law for filming police officers making an arrest on the Boston Common in 2007. The First Circuit, in *Glik v. Cunniffe*, held that individuals had a First Amendment right to record police carrying out their duties in public.

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## Analysis

*Martin v. Gross* teed up a question not addressed in *Glik* — whether the right also applied to secret recordings. Applying intermediate scrutiny, Judge Saris determined that the Massachusetts wiretap statute was “not narrowly tailored to protect a significant government interest when applied to law enforcement officials discharging their duties in a public place.” She found that the “First Amendment interest in newsgathering and information-dissemination” outweighed the “diminished privacy interests of government officials performing their duties in public.” By prohibiting all secret audio recordings of any encounter with a government official, even those in public, the government “severed the link” between the law’s means and its end.

## Conclusion

Under the court’s decision, journalists and individuals in Massachusetts can secretly record public officials performing their duties in public without legal risk. As the killings of Eric Garner and Water Scott demonstrated, the ability to record police bolsters the public’s ability to monitor the government and ensures that truth is revealed.

“We’ve seen that videos of police officers can show the realities of policing in powerful ways: People’s recording of police interactions have started national conversations about police reform and accountability,” Carol Rose, executive director of the ACLU of Massachusetts, said in a statement after the decision. “This ruling reaffirms that the fundamental right to record police officers do not disappear when a recording device is covered.”

So far, Judge Saris stands alone in holding that the right to record official activity in public extends to surreptitious recording. However, barring a First Circuit reversal, her decision may represent the first in a new wave of expansion for the right to record.

*Michael J. Lambert is a Media/First Amendment Associate Attorney at Prince Lobel Tye LLP in Boston.*

**The “First Amendment interest in newsgathering and information-dissemination” outweighed the “diminished privacy interests of government officials performing their duties in public.”**

# Blanket Sealing Order Violates First Amendment and NC Open Court Rules

By Jonathan E. Buchan

On December 18, 2018, the North Carolina Court of Appeals, in [\*John Doe, by and through his Guardian ad Litem et al. v. John Doe et al.\*](#), directed a state trial court to unseal most of a civil court file that had been sealed in its entirety since its commencement in late 2016. The Court of Appeals, after reviewing the sealed file *in camera*, held that the trial court's blanket sealing orders – in a case involving allegations of sexual abuse committed against one or more minors by one of the defendants – violated the First Amendment and the open courts provision of the North Carolina Constitution.

Although the case involved the clear “compelling public interest” in protecting the identities of the minor plaintiffs – an issue uncontested by *The Fayetteville Observer* newspaper which had sought the unsealing of the file – the Court of Appeals held that the sealing of the entire file was not a “narrowly tailored” remedy.

The Court of Appeals' 51-page unanimous opinion provides a detailed analysis of the constitutional standards to be applied in considering the sealing of a civil case file and firmly rejects the trial court's blanket sealing order approach. The opinion should provide strong direction to North Carolina trial courts considering the sealing of court records and closure of related proceedings

## The South Carolina Gag Order

In September 2016, Michael Lallier, a prominent Fayetteville, North Carolina businessman, was charged in South Carolina with felony sexual misconduct for allegedly molesting a 15-year-old Fayetteville boy during a NASCAR race weekend. A South Carolina trial judge promptly entered a sweeping gag order prohibiting anyone connected with the case – including “the Victim, Parents of the Victim, family members of the Victim... and Counsel for Victim and/or Victim's family,” as well as the prosecutor and the defendant's counsel – from making any public extrajudicial comments or releasing any documents related to the case. The order even made it difficult for the newspaper to obtain information from court officials about the status of the case. The order was so broad that counsel for the alleged victim and his family was uncertain if they could bring an action in the North Carolina state courts without permission from the South Carolina court.

In early 2017, *The Fayetteville Observer* challenged the South Carolina gag order. After a hearing on the challenge, the South Carolina trial court, on June 5, 2017 reversed itself and dissolved the gag order, noting the “heavy presumption against the constitutional validity of prior restraints or ‘gag orders.’” The newspaper also obtained an order from the trial court that effectively rejected the defendant's attempts to keep sealed from public view the search warrant

**Although the case involved the clear “compelling public interest” in protecting the identities of the minor plaintiffs, the Court of Appeals held that the sealing of the entire file was not a “narrowly tailored” remedy.**

documents related to the September 2016 arrest which provided details about the alleged molestation.

### The Sealed North Carolina Civil Case

In the meantime, *The Fayetteville Observer* learned of a civil case filed in Cumberland County, North Carolina state court - captioned *John Doe, by and through his Guardian ad Litem et al. v. John Doe et al.* That case file bore only a docket number and the notation: “CASE NOT AVAILABLE FOR THE PUBLIC UNTIL FURTHER NOTICE FROM [THE CLERK OF COURT].” Upon inquiry from the newspaper, the county’s Senior Resident Superior Court judge explained that because the sealed file involved Mr. Lallier, he had asked the state’s Administrative Office of the Courts to assign a special judge from outside the county to handle the matter to avoid any potential conflict of interest by local judges. *The Fayetteville Observer* subsequently reported that Mr. Lallier, the part-owner of a Fayetteville Chevrolet dealership, was a significant contributor to local, state and federal political campaigns, having contributed approximately \$90,000 to such candidates in the 2012 through 2016 time period.

Nothing in the public record regarding the case indicated the names of the parties to the sealed action, the names of their attorneys, or the name of the presiding judge. There were no public motions or orders relating to the sealing the file. The newspaper learned that Special Superior Court Judge William Pittman had been assigned to hold court in the county on November 22, 2016 to hear a civil motion in a case in which the Senior Resident Judge had indicated a conflict of interest. The court’s computer records indicated the case had been concluded on December 14, 2016.

After awaiting the outcome of its efforts to have the South Carolina gag order dissolved, *The Fayetteville Observer* in June, 2017 filed its Motion to Intervene and For Access to Court Records in the sealed case. On August 2, 2017, Judge Pittman heard argument from the newspaper’s counsel and from lawyers representing plaintiffs and defendants in the sealed case. At that hearing, it was revealed for the first time that the sealed case involved “allegations of sexual abuse committed against minors” and the court’s approval of a settlement of claims by minors against one or more defendants. Counsel for the plaintiffs and defendants argued that the sealed records contained information that, if made public, would cause the minors “suffering, embarrassment, emotional distress and trauma.” Counsel for plaintiffs in the sealed case stated that “the identifying characteristics of the unnamed minors are inseparably woven throughout the pleadings and general allegations. There is simply no way to unscramble the identifying facts from those that might have no harm to the unnamed minors.”

Later that day, the trial court entered its order denying the newspaper’s motion and declining to unseal any aspect of the record – not even the names of the defendants, the nature of the claims and defenses, or any information regarding the court-approved settlement of the claims of the minor plaintiffs. The court, noting that the sealed file contained two previous written

**The order was so broad that counsel for the alleged victim and his family was uncertain if they could bring an action in the North Carolina state courts without permission from the South Carolina court.**



orders sealing the file, found that the “identifying characteristics of the minor plaintiffs are inextricably intertwined throughout the pleadings and ancillary documents, including the Court-approved settlements.” The trial court found that there were no suitable alternatives to sealing the entire file.

The newspaper promptly appealed, and argument was heard by the Court of Appeals on August 22, 2018.

### **The North Carolina Court of Appeals Opinion**

In its December 18, 2018 opinion, the Court of Appeals, after noting that the sealing of an entire civil case file is “unprecedented in North Carolina,”: (1) vacated the original orders sealing the file, finding they were overbroad; (2) held that proper redaction of documents in the file will adequately protect the identities of the minors; (3) reversed the trial court’s August 2, 2017 order denying the newspaper’s motion for access to the sealed court file; and, (4) remanded the case to the trial court to hold a hearing to consider the proper extent of redaction consistent with the opinion and to enter a new order “opening the file with these limited redactions.”

The Court of Appeals rejected the trial court’s finding that information identifying the minors was “inextricably intertwined throughout the pleadings.” It held instead that “sealing of the *entire* file, even including names of attorneys, names of defendants, and sealing orders, cannot be justified by the interest in protecting the juvenile plaintiffs. The trial court should – and did – use pseudonyms for the juvenile defendants, and on remand should redact specific identifying information” in any documents which include this information.

The Court of Appeals also rejected the trial court’s finding that there was a compelling state interest in protecting the identities of so-called “innocent third parties” apparently mentioned in the sealed court records. The opinion held that the “trial court erred to the extent it relied upon the interest of the protection of the defendants or innocent third parties from embarrassment, trauma, or economic loss in sealing any portion of the court file.”

The Court of Appeals has provided North Carolina trial courts with a detailed roadmap for addressing the high constitutional bar to the sealing of court records in even the most sensitive situations. In doing so, it has articulated clearly that the North Carolina Constitution guarantees the public a presumptive right of access to court records. To overcome that right of access, a trial court must find that there is a compelling state interest in sealing, that alternatives to sealing have been considered and rejected, and that any sealing must be narrowly tailored to protect the interest at stake. Finally, the Court of Appeals held that any such sealing of court records is subject to review *de novo*, and not reviewed under an abuse of discretion standard.

*Jonathan E. Buchan, Natalie D. Potter, and Caitlin Walton of Essex Richards, P.A. in Charlotte, NC represented The Fayetteville Observer, a Gatehouse Media newspaper, in the trial court and in the Court of Appeals and were accompanied in the Court of Appeals briefing by John J. Korzen of the Wake Forest University School of Law Appellate Advocacy Clinic. Jay Bender of Baker, Ravenel & Bender, Columbia, SC and Mr. Buchan represented the newspaper in its challenge to the South Carolina gag order. Hugh Stevens of Stevens Martin Vaughn & Tadych represented a coalition of news media organizations who were amici in the appeal. Defendants were represented in the civil case by H. Gerald Beaver and James A. McLean, III of Fayetteville, NC. Plaintiffs made no appearance in the appeal.*

# California Federal Court Puts Ex-Boyfriend's Copyright Claims Over The Girls to Bed (Again)

By Abigail B. Everdell

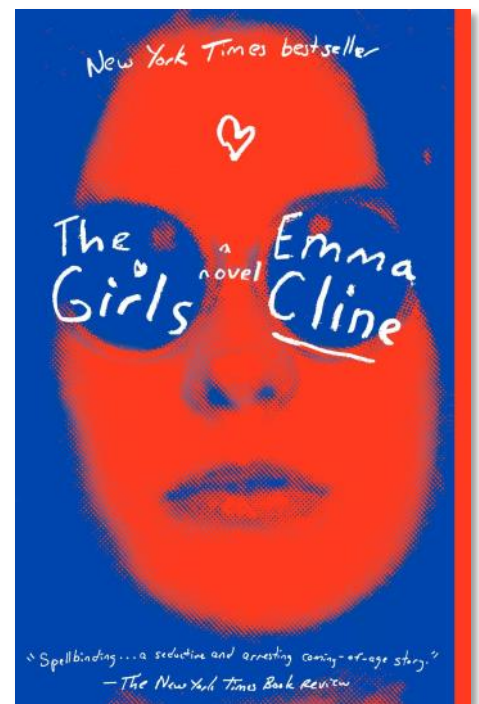
On November 19, 2018 Judge William H. Orrick of the Northern District of California dismissed with prejudice copyright and related claims against author Emma Cline and her publisher Random House that had been asserted by Cline's ex-boyfriend Chaz Reetz-Laiolo in a *fifth* amended complaint. [\*Emma Cline v. Reetz-Laiolo et al.\*](#), Related Case Nos. 3:17-cv-06866-WHO and 3:17-cv-06867-WHO (Nov. 19, 2018).

The decision finally put to rest a years-long saga over Cline's debut novel *The Girls*, during which Reetz-Laiolo relentlessly threatened baseless legal claims against Cline, even going so far as to leverage extraordinarily personal records of Cline's sexual history to threaten her into settlement (with the help of his attorneys at Boies Schiller Flexner).

## Background

An earlier decision by Judge Orrick on Reetz-Laiolo's copyright claims found no substantial similarity of protected expression as a matter of law between his unpublished screenplay *All Sea* and Cline's novel *The Girls*. See *Emma Cline v. Reetz-Laiolo*, 329 F. Supp. 3d 1000 (N.D. Cal. 2018). The court nevertheless allowed Reetz-Laiolo to amend his claims to the extent he could plausibly plead a theory of "intermediate copying," premised on the theory that Cline had at least unlawfully downloaded a copy of his work.

Reetz-Laiolo took the court's narrow invitation to its most extreme end, alleging not only that such a download had occurred, but also attempting to spin this theory into a vicarious infringement claim against Cline's publisher Random House and claims for disgorgement of profits from *The Girls*. He alleged – notwithstanding the earlier substantial similarity ruling – that Cline and her publisher had been "unjustly enriched" by non-protectable material and "ideas" from his work that had been incorporated into *The Girls*.



## District Court Decision

Judge Orrick correctly rejected this perversion of copyright law, holding that Reetz-Laiolo had not even plausibly alleged that Cline had downloaded his unpublished screenplay, much less that he could somehow be entitled to a remedy arising from her subsequent, non-infringing novel. See Opinion at \*25-27.

Judge Orrick’s opinion is the latest in a small but uniform set of decisions rejecting the application of the “intermediate copying” doctrine to literary works. *See also Madrid v. Chronicle Books*, 209 F. Supp. 2d 1227 (D. Wyo. 2002); *Quirk v. Sony Pictures Entm’t, Inc.*, No. C 11-3773 RS, 2013 WL 1345075 (N.D. Cal. Apr. 2, 2013); *Esplanade Prods., Inc. v. Walt Disney Co.*, No. CV1702185MWFJCX, 2017 WL 5635027 (C.D. Cal. Nov. 8, 2017). Under the “intermediate copying” theory, courts have allowed copyright claims to proceed *not* on the basis of the defendant’s final work, but upon an initial unlawful copying of the plaintiff’s work – typically computer code – by defendant, in order to “reverse engineer” the work and create a derivative, but technically non-infringing, final product.

The core of the theory is an acknowledgment that even a single unlawful download is a *prima facie* infringement – though in many cases courts have ultimately found the intermediate copy to be protected by fair use. *See, e.g., Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992), *as amended* (Jan. 6, 1993). In his opinion, Judge Orrick acknowledged the soundness of the intermediate copying theory, but noted its fundamental mismatch in the context of literary works, where the *sine qua non* of any copyright claim is substantial similarity of protected expression:

Just one year ago, a court in the central district [of California] was “unable to locate a single case in which he *Sega* “intermediate copying” theory [had] been extended to impose liability based upon the copying of non-software-related work (*e.g.*, a script, book, cartoon, etc.) in the course of creating a new work that is ultimately dissimilar to the plaintiff’s work.” *Esplanade Prods., Inc. v. Walt Disney Co.*, No. CV1702185MWFJCX, 2017 WL 5635027, at \*18 (C.D. Cal. Nov. 8, 2017) (appeal pending).

Indeed, intermediate copying is generally limited to cases involving software. *See* Order at 34–35 (citing cases). This distinction makes sense because when copied code is used as a building block to create something new, “bits of code can be found within the programs.” *See Madrid v. Chronicle Books*, 209 F. Supp. 2d 1227, 1236 (D. Wyo. 2002). “This is copying.” *Id.* With written language, however, “[t]he intermediate copying concept cannot result in copyright infringement without the basic component of substantial similarity.” *Id.* “Copying deleted or so disguised as to be unrecognizable is not copying.” *See v. Durang*, 711 F.2d 141, 142 (9th Cir. 1983).

The court therefore concluded that, because “Reetz-Laiolo asserts infringement only of the final version of *The Girls*,” and the court had “already determined that there are ‘few objective similarities, and no substantial ones’ between [Reetz-Laiolo’s screenplay] *All Sea* and *The Girls*, he cannot state a claim.” *Id.* at \*27.

In addition, the Court reject Reetz-Laiolo’s attempt to bring conversion, civil theft, and unjust enrichment claims based on Cline’s alleged copying of his work, finding these claims were preempted by the Copyright Act. *Id.* at \*27-30. Like the copyright claims, these claims were dismissed with prejudice.

Pursuant to Judge Orrick’s decision, Cline’s publisher Random House has been dismissed from the case entirely. Reetz-Laiolo and his co-plaintiffs will proceed with other claims against

**Judge Orrick’s opinion is the latest in a small but uniform set of decisions rejecting the application of the “intermediate copying” doctrine to literary works.**

Cline that have nothing to do with *The Girls* or any other writing by her. For Cline's part, she has raised affirmative claims against Reetz-Laiolo based on his and his attorneys' outrageous pre-litigation conduct, which have survived a motion to dismiss. While the case proceeds on other grounds, Cline's sole and exclusive authorship of her debut novel has been absolutely vindicated.

*Defendants Emma Cline and Penguin Random House LLC are represented by Elizabeth A. McNamara and Abigail B. Everdell of Davis Wright Tremaine LLP, Michael A. Vatis of Steptoe & Johnson LLP, and Thomas R. Burke of Davis Wright Tremaine LLP.*

*Plaintiffs Chaz Reetz-Laiolo, Kari Bernard, and Kristin Kiesel are represented by Edward Normand, Amos Friedland, Nathan Holcomb, and Kyle Roche of Boies Schiller Flexner LLP; Kevin Smith, Sapna Pall, and Benjamin Diessel of Wiggin and Dana LLP; and Ethan A. Balogh of Coleman & Balogh LLP.*

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# Copyright Protection for iPhone Photo Trumps Fair Use

By Mickey H. Osterreicher

As millions of images are uploaded to the Internet by professional photographers, visual journalists and everyday citizens, the misappropriation of those images and the concomitant copyright infringement of those works has risen to epic proportions. For the most part those infringements go unnoticed but when they are, the reaction of the infringer upon being informed of the infringement by the copyright holder ranges from one of entitlement to use anything found on the Web as it being in the “public domain” to claims of “fair use.” Those varying excuses for not seeking the permission of the copyright holder before using the image are made by the unsophisticated and those who should know better.

When some of those seeking to enforce their copyright do so, they or their lawyers are pejoratively labeled as “trolls,” a term that has come to mean a person or company that enforces copyright for economic gain through litigation, in a manner considered unduly aggressive or opportunistic, when in fact there are exponentially more infringements than there are enforcements.

Another area of inherent tension between infringers and creators is found in Section 106[1] of the Copyright Act dealing with the exclusive rights in copyrighted works and Section 107[2], setting forth limitations of those exclusive rights under Fair Use.

Which leads to a few recent cases and decisions the first of which is [\*Otto v. Hearst Communications Inc.\*](#)[3] where the court granted the plaintiff’s motion for partial summary judgment “on the issues of Hearst’s Liability for copyright infringement”[4] and denied Hearst’s motion for partial summary judgment “on both the issues of fair use and willfulness.”[5] This all came about as a result of Esquire.com (operated by Hearst) using an iPhone photo that had been taken by Jonathan Otto of President Trump appearing as an “unexpected guest” at a wedding held at the Trump National Golf Club in New Jersey in 2017.

According to the factual background of the case, Otto is a Vice President at Deutsche Bank and “is not and never has been a professional photographer,”[6] whose “intention was to document an important memory and newsworthy event . . . seiz[ed] that opportunity.”[7] Accordingly, he “planned to use the Photograph for personal, rather than commercial, purposes, and did not intend to share the photograph with friends and family or share it on social media.”[8] After editing the image on his iPhone he did share it by text with one friend, who then shared it with others including a relative of the bride who posted it on Instagram. From there it went viral and was “published in several media outlets, including TMZ, CNN, the Washington Post, and the Daily Mail”[9] as well as on Esquire’s website.

**Judge Woods found that Otto established that he had a valid copyright in the image, that the “actual copying” and “substantial similarity” elements had been met, that Hearst infringed upon Otto’s exclusive right to control the reproduction and distribution of his photograph and therefore, granted Plaintiff’s motion for summary judgment.**



The next day when Mr. Otto realized that his photos were being used without permission, credit or compensation, he “hired counsel [the Liebowitz Law Firm] and registered the photograph with the Copyright Office.”[10] Ten days after the photo was taken lawsuits were filed against those making unauthorized use of the photos. Four of those suits were settled “at least one of which resulted into a retroactive licensing agreement for the Photograph’s use.”[11]

While Hearst, which took down the photo after being served, chose to defend against the lawsuit.

In his 12/10/18 Opinion and Order, Southern District of New York, Judge Gregory Woods found that Otto established that he had a valid copyright in the image, that the “actual copying” and “substantial similarity” elements had been met, that Hearst infringed upon Otto’s exclusive right to control the reproduction and distribution of his photograph and therefore, granted Plaintiff’s motion for summary judgment on those issues.

The Court then explained “‘the fair use determination is an open-ended and context sensitive inquiry,’ weighing four non-exclusive statutorily provided factors in light of the purposes of copyright.”[12] In balancing those equities the Court also took note that while “while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship.”[13]

Finding that “an entity’s status as a news publication may be highly probative on certain relevant inquiries, such as whether that entity has a fair use defense to copyright infringement, it does not render that entity immune from liability under intellectual property laws.”[14]

The Court also noted “[i]t would be antithetical to the purposes of copyright protection to allow media companies to steal personal images and benefit from the fair use defense by simply inserting the photo in an article which only recites factual information—much of which can be gleaned from the photograph itself.”[15] The Court went on to say that allowing such behavior would discourage photographers from creating works and be a disincentive for publishers and other users to create images to illustrate their articles, and then asking “why pay to create or license photographs if all personal images posted on social media are free grist for use by media companies?”[16]

The Court also stated that “[s]tealing a copyrighted photograph to illustrate a news article, without adding new understanding or meaning to the work, does not transform its purpose — regardless of whether that photograph was created for commercial or personal use,”[17] leading to the finding that because Hearst’s used the entire image, was commercial in nature, did not add new meaning; was not transformative and harmed Otto’s licensing ability, the four factor analysis weighed against a finding of fair use.

“Allowing a news publisher to poach an image from an individual’s social media account for an article that does little more than describe the setting of the image does not promote ‘the progress of science and useful arts,’”[18] the Court concluded.

**As recognized by Judge Woods, for both citizens and journalists who capture newsworthy events with their cameras or iPhones the protections of copyright law should not turn on professional credentials or status.**



The Court also granted summary judgment to Otto on Hearst’s remaining affirmative defenses of: failure to state a claim; non-infringement; waiver; consent; and release finding that Otto “met his burden of demonstrating that no material issue of fact exists.”[19]

Finally the Court denied Hearst’s motion for partial summary judgment on “both the issues of fair use and willfulness,”[20] finding there “exist issues of material fact that could result in a reasonable jury finding for Otto”[21] and that the allegedly recurring pattern of infringement by Hearst may also support a verdict of “willful blindness.”[22]

As the First Circuit noted in a seminal case regarding the right to photograph and record police, “[t]he proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.”[23]

As recognized by Judge Woods, for both citizens and journalists who capture newsworthy events with their cameras or iPhones the protections of copyright law should not turn on professional credentials or status either.

*Mickey H. Osterreicher is of counsel to Barclay Damon, LLP and serves as general counsel to the National Press Photographers Association (NPPA). He is co-chair of the ABA Copyright Law Subcommittee on Fair Use and has participated in several amicus briefs supporting copyright infringement claims involving photographs.*

## Notes

[1] <http://www.copyright.gov/title17/92chap1.html#106>

[2] <https://www.copyright.gov/title17/92chap1.html#107>

[3] Case Number 1:17-cv-04712 at <https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2017cv04712/476398/85/0.pdf?ts=1544611571>

[4] *Id.* at 31

[5] *Id.*

[6] *Id.* at 3

[7] *Id.*

[8] *Id.*

[9] *Id.* at 4

[10] *Id.* at 6

[11] *Id.*

[12] *Id.* at 12 citing *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013).

[13] Id. citing *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015) (emphasis added).

[14] Id. at 13 citing *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 480 (2d Cir. 2007).

[15] Id. at 15

[16] Id.

[17] Id. at 5

[18] Id. at 12 citing U.S. Const., art. I, § 8, cl. 8

[19] Id. at 24

[20] Id. at 31

[21] Id.

[22] Id.

[23] *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011)

## **MLRC 2019 Events**

**January 17**

**Entertainment Law Conference**

Los Angeles, CA

**March 11**

**Latin American Media Law Conference**

Miami, FL

**May 20-21**

**Digital Law Conference**

San Francisco, CA

**September 15-17**

**London Conference**

London, UK

**November 6**

**Annual Dinner & Forum**

New York, NY

**[www.medialaw.org](http://www.medialaw.org)**

## 2 Milly Sues Epic Games Over Fortnite Dance Moves

### *What In The Wide, Wide World of Copyright Is Going On Here?*

By Andreas Becker

This month, rapper 2 Milly sued Epic Games, the creators of the wildly popular online game *Fortnite Battle Royale*, asserting two counts of copyright infringement, two counts of right of publicity, and unfair competition. 2 Milly claims that Epic stole his dance, the “Milly Rock,” by introducing it as part of downloadable content in *Fortnite*. The lawsuit is *Ferguson v. Epic Games, Inc., et al.* in the United States District Court for the Central District of California, Case No. 2:18-cv-10110. The complaint is available online [here](#).

For those unfamiliar, *Fortnite Battle Royale* is an online third-person shooter and battle royale game where, in the midst of the fighting (or perhaps after knocking out another player), players can have their characters do a short “dance.” These dances have gone viral on YouTube and in the gaming community. Players can purchase additional dance moves as paid in-game content and, according to 2 Milly, one of those downloadable dance moves – the “Swipe It” ([YouTube link here](#)) – improperly infringes upon his Milly Rock moves.

#### Copyrighting... Dance?

Can dance moves be copyrighted? The answer is complicated. You can get copyright protection for choreographic works but, as noted in a [Copyright Office circular](#), “choreographic works are a subset of dance and are not synonymous with dance. And even then, it seems like an uphill battle. As noted below, 2 Milly has yet to get a registration from the Copyright Office. Whoops. No statutory damages or attorney’s fees. See below.

Section 102 of the Copyright Act, 17 U.S.C. § 102, provides protection for “choreographic works. The above-linked Copyright Office circular defines choreography as “the composition and arrangement of a related series of dance movements and patterns organized into a coherent whole.” That circular also makes clear, however, that choreography “consisting of ordinary motor activities, social dances, commonplace movements or gestures, or athletic movements may lack a sufficient amount of authorship to qualify for copyright protection.” So while choreography *may* be subject to copyright protection, that only remains true if it is something more than, for example, ordinary motor activities or social dances.

The circular goes on to make clear that protection is not afforded to the following categories of conduct, even though they may be unique in some respects:

**Can dance moves be copyrighted? The answer is complicated.**



- **Commonplace movements or gestures** – for example, individual movements or dance steps, or even “short dance routines consisting of only a few movements or steps with minor lineal or spatial variations, even if a routine is novel or distinctive.” *Not protected.*
- **Social dances** – social dance steps and simple routines are not included within the ambit of copyright protection, as “[r]egistrable choreographic works are typically intended to be executed by skilled performers before an audience. By contrast, uncopyrightable social dances are generally intended to be performed by members of the public for the enjoyment of the dancers themselves.” This remains true even where such social dances have a “substantial amount of creative expression.” *Not protected.*

These limitations on protectable choreography extend beyond just a Copyright Office circular, of course. As noted by the Ninth Circuit only a few years ago, the legislative history of Section 102 recognized the almost-obvious nature of these types of limitations. *See, e.g., Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1043 (9th Cir. 2015) (“Nor did Congress define the term ‘choreographic work[ ],’ apparently because its meaning was ‘fairly settled.’ . . . The legislative history does explain, however, that it is not ‘necessary to specify that “choreographic works” do not include social dance steps and simple routines.’”).

The question then becomes: Does 2 Milly’s dance go above and beyond those categories of unprotectable works?

Based on our review of [2 Milly’s 2014 music video](#), probably not. 2 Milly’s “dance” seems to fall squarely within the unprotected category of “short dance routines consisting of only a few movements or steps with minor lineal or spatial variations, even if a routine is novel or distinctive.” Moreover, the fact that protected choreography is “typically intended to be executed by skilled performers before an audience” seriously calls into question the viability of 2 Milly’s copyright claims. He and his friends appear to be having fun, sure, but that doesn’t equate to protectable choreography. On top of all that, are 2 Milly and his friends’ movements

just the type of movements that are “performed by members of the public for the enjoyment of the dancers themselves”? This remains to be seen.

But wait, there’s more. The Copyright Office circular also notes that, as with other copyrightable works, a choreographic work must be fixed in a tangible medium of expression before it can be subject to protection. Specifically, it must “reveal[] the movements in sufficient detail to permit the work to be performed in a consistent and uniform manner.” 2 Milly seemingly asserts that his 2014 music video suffices. While this remains an open question, based on our review, the music video falls short of the type of works contemplated by the Copyright Act’s “choreography” protections. The video appears to depict 2 Milly and his friends swaying and moving (to varying degrees) to his song rather than truly depicting a choreographed dance. The movement of 2 Milly and his friends – much less the video itself – is certainly not a model of consistency and uniformity.

### Uh Oh – No Copyright Registration!

2 Milly’s complaint makes note of the fact that, though his music video was released around August 2014, he is only now “in the process of registering the Milly Rock dance with the United States Copyright Office”—to be clear, he submitted his application with the Copyright Office on December 4, 2018, only one day before he filed suit against Epic.

Section 411 of the Copyright Act prohibits the filing of a civil action for infringement absent preregistration or registration of the copyright. Then the question becomes: If 2 Milly’s application is rejected by the Copyright Office, does he even have a leg to stand on?

Putting that aside, however, Section 412 of the Copyright Act generally prohibits a plaintiff from recovering statutory damages or attorney’s fees for any infringement of a published work that occurs (i) after the first publication of the work and (ii) before the effective date of its registration. 2 Milly’s allegations appear to fall squarely in that category. He published his music video more than four years ago but waited until earlier this week to seek registration. Based on that alone, 2 Milly will likely be barred from recovering any statutory damages or attorney’s fees. In other words, he’ll need to seek actual damages and, really, what are those in this case?

**On top of all of the foregoing, 2 Milly will need to contend with many possible First Amendment defenses.**

### 2 Many Problems For 2 Milly?

On top of all of the foregoing, 2 Milly will need to contend with many possible First Amendment defenses. The U.S. Supreme Court has clearly held that video games are fully protected speech under the First Amendment, just like books, TV shows, and movies. *See Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011). Will 2 Milly have to face an anti-SLAPP motion from Epic Games under the assertion that his state law claims are a “SLAPP”—a strategic lawsuit against public participation? It remains to be seen.

2 Milly may also face problems for his ancillary, non-copyright claims under the doctrine of copyright preemption. Section 301 of the Copyright Act, 17 U.S.C. § 301, expressly states that rights equivalent to those protected by the Copyright Act are “governed exclusively by this title”—in other words, they are preempted. Will Epic take the position that 2 Milly’s right of publicity and (perhaps more likely) unfair competition claims are really just dressed up claims for copyright infringement? This, too, is well worth consideration.

Finally, 2 Milly seeks punitive damages on his copyright claims: Problematic for Milly, punitive damages are not available for copyright infringement claims.

Regardless, at the end of the day, this will be a fascinating one to follow. Stay tuned, everyone.

*Andreas Becker is an associate at Kelley Drye & Warren LLP in Los Angeles.*

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# Social Media for Businesses – Who Owns the Followers?

By Evynne Grover

A lawsuit filed in August of 2018 by a newspaper publisher against its former journalist employee raises several issues regarding the ownership of social media followers acquired during an employee's term of employment. According to the [complaint](#) filed in the US District Court for the Western District of Virginia, when journalist Andy Bitter first commenced employment as a staff writer for a newspaper to focus on Virginia Tech athletics, he was handed the password and account information for the Twitter account used by his predecessor at the newspaper. The Complaint alleges that Mr. Bitter utilized the Twitter account as part of his employment with the newspaper over many years, until he resigned and went to work for a competitor, Athletic Media Group ("AMG").

Notably, instead of transferring the Twitter account information and password to his employer upon exiting the newspaper, he continued to use the Twitter account, only now in his role with AMG. BH Media, Group, Inc. ("BHM"), the owner of the newspaper, sued Mr. Bitter contending that his continued use of the Twitter account in his new role is contrary to the Employee Handbook's requirement that employees return company-owned information assets upon termination of employment, and violates a myriad of federal and state laws, as well as common law.

## The Business of Social Media

BHM's complaint is instructive in demonstrating the vital relevance of social media to businesses. Social media outlets, including Twitter, provide a platform for businesses to advertise their brands and services, attract followers who may be current or potential customers, and drive direct customer engagement. On Twitter, the account owner has the sole ability to view the account's Twitter feed, which displays the posts and re-Tweets of its followers, and also has the sole ability to send direct messages to the followers.

Therefore, the account owner is in the unique position of being able to directly communicate with, and glean data from, actual and prospective customers, which is an opportunity not generally available from outside sources. BHM also contends its Twitter account is intended to steer online traffic to the Times' website, where page views and clicks on stories and content directly correlate to the amount of advertising revenue BHM receives.

## The Employer's Perspective

According to BHM, the Twitter account's 27,100 followers are essentially a confidential customer list that constitutes a trade secret and that appropriation of the account and those followers violates both the federal Defend Trade Secrets Act (18 USC § 1836) and the Virginia

**A lawsuit filed by a newspaper publisher against its former journalist employee raises several issues regarding the ownership of social media followers acquired during an employee's term of employment.**

Uniform Trade Secrets Act (Va. Code § 59.1-336). BHM argues that, as a result, it has suffered the loss of customers, opportunities and advertising revenue. It asserts that the unique nature of the follower list is nearly impossible to recreate and, even if it created a new Twitter account and hired someone to attempt to re-engage the followers, it is questionable whether the followers would choose to follow the new account, or whether their future engagement would be comparable.

BHM argues that Mr. Bitter has taken that list of customers and potential customers and is now using it for direct marketing of the products and services of AGM, a direct competitor of BHM, and that such taking and use constitutes common law conversion and a breach of his fiduciary duties. BHM also asserts that Mr. Bitter's use of the Twitter account after his resignation violates the Computer Fraud and Abuse Act, 18 USC § 1030, et seq., the Stored Communications Act, 18 USC § 2701, et seq., and the Virginia Computer Crimes Act, Va. Code § 18.2-152.2, et seq.

### The Employee's Perspective

In his Answer and Counterclaim, Mr. Bitter denied numerous factual allegations of the Complaint. Significantly, he contended that the Twitter account and log in information were transferred to him directly by his predecessor at the newspaper via their personal email accounts, and that the Twitter account has never been owned, controlled or accessed by BHM. Further, Mr. Bitter contends that no other BHM employee has ever posted to, requested or received access to any direct message from, or sent and received direct messages from the Twitter account. In addition, Mr. Bitter asserts a claim of defamation against BHM arising out of an article in the Roanoke Times reporting on the lawsuit.

**According to BHM, the Twitter account's 27,100 followers are essentially a confidential customer list.**

(BH Media and Mr. Bitter settled their dispute on November 8, 2018. While the terms have not been disclosed as of the date of this publication, Mr. Bitter tweeted that he will continue to use the disputed Twitter account, but also suggested that others follow the Twitter account of his successor at his prior employer.)

### Prior Case Insight

There is a dearth of case law on the issue but some cases contain judicial discussion that may provide guidance. Back in 2011, the cell phone news and review website PhoneDog filed a lawsuit in the US District Court for the Northern District of California against its former product review and video blogger employee, Noah Kravitz, with allegations similar to those in the BHM case. PhoneDog alleged that it provided Mr. Kravitz with a PhoneDog corporate Twitter account, which he used in furtherance of his employment with PhoneDog while accumulating approximately 17,000 followers, but that upon his resignation, Mr. Kravitz failed to return the Twitter account to PhoneDog. Instead, Mr. Kravitz changed the name on the Twitter account to his individual name and eventually used the Twitter account to market and

advertise the services of his new employer, a direct competitor of PhoneDog, to those Twitter followers.

PhoneDog framed its allegations as misappropriation of trade secrets in violation of California's Trade Secrets Act, intentional and negligent interference with prospective economic advantage, and conversion. PhoneDog claimed damage to its business reputation and goodwill, loss of users, and loss of opportunities. In addition, PhoneDog noted that its advertising revenue was tied to page views generated from users visiting PhoneDog's website. PhoneDog explicitly valued the followers at \$2.50 per month in suggesting a measure of financial damages. The [court](#) declined to dismiss the trade secrets claim, finding that consideration of whether the followers of an account constitutes trade secrets requires factual inquiry. The parties settled the case on confidential terms, with Mr. Kravitz retaining custody of the Twitter account.

CDM Media USA, Inc. filed a complaint in 2015 in the US District Court for the Northern District of Illinois, Eastern Division, against its former employee, Robert Simms. CDM contended it created a LinkedIn group which was a private online community comprised of chief information officers and senior IT executives, and appointed Mr. Simms the administrator of the LinkedIn group. Apparently, Mr. Simms resigned from CDM and failed to return access to the LinkedIn group to CDM. Instead, CDM complains, Mr. Simms commenced employment with a competitor, and used the LinkedIn group in his role with his new employer to solicit current and potential customers and vendors of CDM.

CDM asserted claims of breach of contract, violation of the Illinois Trade Secrets Act, and common law misappropriation. The [court](#) allowed the trade secrets claim to proceed, noting that the complaint "plausibly alleged" that the LinkedIn group's membership list was a "valuable secret commodity." However, the court rejected CDM's argument that private messages in the LinkedIn group were trade secrets. This matter was also settled before we could obtain more thorough court insight.

**There is a dearth of case law on the issue but some cases contain judicial discussion that may provide guidance.**

### Other Perspectives and Considerations

With the prevalence of social media in business, many individuals, including journalists, social media managers, entertainers, and influencers, find that their substantial social media following is a prerequisite to getting hired. They may view their followers as their individual "fans" rather than "followers" of their employer. These individuals will likely use their social media accounts to enrich and direct traffic to their new employers while also accumulating new followers during their terms of employment.

The conflicting perspectives raise numerous questions. Does the employer have an ownership interest in those followers, even though the account is owned by an individual who brought his or her previously-attained followers to the employer? Is the individual enriched by the gain in individual followers if he or she leaves and takes the followers to a new employer? How are those followers valued, and what terms need to be in place to govern the rights and

obligations of the parties on both sides? Even if these issues are resolved, how does such resolution stand up in the face of laws enacted in some states that limit a company's ability to request user names and passwords for social media accounts? These questions will likely evolve over time as social media evolves and wind their way through various courts before a consensus is reached.

### Conclusion

As social media becomes more intertwined in the fabric of business, it is critical to seek legal advice regarding the practicalities of its use and the consideration of developing forward-thinking policies and procedures. While it has become more common for businesses to establish social media policies, it is equally important to update those policies in step with the evolution of social media technology and practice, case law, and applicable federal and state laws.

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## MLRC 2019 Events

**January 17**

**Entertainment Law Conference**

Los Angeles, CA

**March 11**

**Latin American Media Law Conference**

Miami, FL

**May 20-21**

**Digital Law Conference**

San Francisco, CA

**September 15-17**

**London Conference**

London, UK

**November 6**

**Annual Dinner & Forum**

New York, NY

**[www.medialaw.org](http://www.medialaw.org)**

# GDPR: A Primer for Media Lawyers

By Bryony Hurst

This summary was presented at the 2018 MLRC Media Law Conference. The outline is intended as an overview and does not purport to include all aspects and provisions of, or exceptions to, the General Data Protection Regulation, but seeks to address generally those aspects most relevant to media companies and clients. For further background, please see <https://www.twobirds.com/~media/pdfs/gdpr-pdfs/bird--bird--guide-to-the-general-data-protection-regulation.pdf>.

## A. Overview.

The GDPR (See <https://gdpr-info.eu/>) significantly overhauls Europe's cornerstone data protection legislation at a time when information systems and digital business underpin human life. The changes that were ushered in by the GDPR beginning on May 25, 2018 are substantial and ambitious. The Regulation is one of the most wide-ranging pieces of legislation passed by the EU in recent years, and includes (but is not limited to) concepts such as the "right to be forgotten," data portability, data breach notification and accountability.

1. *In summary, the Goals of the GDPR are to:*

- Put Data Subjects Back in Control of their Data
- Increase Accountability, Data Governance and Record Keeping Requirements for Companies
- Harmonize EU Data Protection Framework
- Empower EU Data Protection Regulators

2. *Summary Game Changers:* The GDPR introduces significant changes and strengthens existing requirements, including via the following concepts:

- Transparency and Consent: i.e., specific information that must be provided to and, in certain cases, permissions required from individuals to justify collection and use of their personal data. Consent has to be unambiguous and cannot be assumed from inaction.
- Children and Consent: for online services which rely on consent to processing, verifiable parental consent is required for use of a child's personal data.
- Regulated Data: the definitions of "Personal Data" and "Sensitive Data" are broad and have been expanded.
- Personal Data Breach: a new mandatory data breach notification requirement is introduced for all entities handling personal data.
- Data protection by design and accountability: organizations are required to adopt significant new technical and organizational measures to demonstrate their GDPR compliance.

- Data protection officers: In certain circumstances, entities may be required to appoint a Data Protection Officer, which must meet certain independence and qualifications requirements.
- Enhanced Rights: Data subjects are given substantial rights including the right to be forgotten, data portability rights and the right to object to automated decision making.
- Supervisory authorities and the European Data Protection Board (EDPB): If an organization has multiple EU presences, one regulator acts as lead authority and coordinates with others. EDPB oversees and determines disputes between Data Protection Authorities (DPAs). [https://edpb.europa.eu/edpb\\_en](https://edpb.europa.eu/edpb_en)

## **B. When Does the GDPR Apply?**

*1. The Scope is Extra-Territorial, and intended to have a broad scope. (Articles 2 and 3; Recitals 15-21; 22-25).*

### **a. European Union:**

i. A data controller or data processor falls into the GDPR's scope where personal data is processed "in the context of the activities" of an organization with an EU "establishment." (broadly defined)

ii. An organization may be "established" where it exercises "any real and effective activity – even a minimal one – through "stable arrangements" in the EU. *Weltimmo v. NAIH* (C-230/14). The presence of an EU branch or subsidiary or even a single representative may be sufficient.

iii. It is irrelevant now if the actual processing of the data takes place in the EU or not (GDPR can apply even if controller is based outside of the EU and the relevant processing takes place outside of it).

iv. Organizations with EU sales offices, which promise or sell advertising or marketing targeting EU residents will likely be subject to the GDPR, since the associated processing of personal data is considered to be "inextricably linked" to and thus carried out "in the context of the activities" of those EU establishments. *Google Spain SL, Google, Inc. v. AEPD, Mario Costeja González* (C-131/12).

### **b. For organizations outside the EU, the GDPR will still apply when:**

i. Business offers goods or services: an EU resident's personal data is processed in connection with goods/services offered to him/her (payment is not required; but mere accessibility of a site from within the EU is not sufficient); or

ii. Business Monitors online behavior: the behavior of EU individuals is "monitored." Monitoring specifically includes the tracking of individuals online to create profiles, including where this is used to make decisions to analyze/predict personal preferences, behaviors and attitudes.

*2. GDPR divides entities into "data controllers" and "data processors":*



- a. Data controllers: companies that determine how data is collected and used
- b. Data processor: service providers

### **C. Principles for Processing Data (Article 5 and Recital 39)**

#### *1. Lawfulness, Fairness, Transparency*

a. Need to have a valid, legal ground to collect and use personal data, these include, but are not limited to, consent (see *infra*), performance of a contract, compliance with a legal obligation, and the “legitimate interests” [1] of the data controller.

i. Examples of “legitimate interests” include:

- Processing for direct marketing purposes or preventing fraud (Recital 47)
- Transmission of personal data within a group of undertakings for internal administrative purposes, including client and employee data (note – international transfer requirements apply) (Recital 48)
- Processing for purposes of ensuring network and information security, including preventing unauthorized access to electronic communications networks and stopping damage to computer and electronic communication systems. (Recital 49)

ii. The controller’s legitimate interests must be weighed against the fundamental rights and freedoms of the data subject, and only when the data subjects’ rights do not override the rights of the controller is the “legitimate interest” of the controller a valid ground for data processing.

b. The processing of sensitive personal data is prohibited unless an exception applies (Article 9(2)), including but not limited to:

- i. explicit consent (9(2)(a));
- ii. if it is necessary for carrying out obligations under employment, social security or social protection law, or a collective agreement (9(2)(b));
- iii. the data is manifestly made public by the data subject (9(2)(e));
- iv. necessary for the establishment, exercise or defense of legal claims or where courts are acting in their judicial capacity (9(2)(f));
- v. it is necessary for reasons of substantial public interest on the basis of EU or Member State law, which is proportionate to the aim pursued and which contains appropriate safeguard measures (9(2)(g));

c. Be transparent, in notices required to data subjects:

- i. Be concise;
- ii. Use plain language;
- iii. Ensure information is easily accessible.[2] (See Articles 12-14; Recitals 58, 60, 61, 62)

#### *2. Purpose Limitation*

- a. Use personal data only for purposes that were stated

b. No processing for incompatible or secondary purposes

### 3. *Data Minimization*

a. Personal data collected must be relevant for purposes for which it was collected and not excessive (e.g., collect age vs DOB)

### 4. *Accuracy*

a. Need to keep personal data accurate and up-to-date

b. Take steps to correct or delete inaccurate or outdated Personal data

### 5. *Storage Limitation (Data Retention)*

a. Keep personal data no longer than necessary to accomplish purposes for which it was obtained

### 6. *Confidentiality and Integrity (Security)*

a. Maintain appropriate technical and organizational measures to protect personal data (risk-based approach)

### 7. *Accountability*

a. The GDPR requires all organizations to implement a wide range of measures to reduce the risk of their breaching the GDPR and to be able to demonstrate compliance with GDPR.

b. Some key obligations include:

i. Privacy by Design: organizations must implement technical and organizational measures to show they have considered and integrated data compliance measures into their data processing activities. (Article 25, Recitals 74-78)

ii. Privacy Impact Assessments (PIAs): GDPR requires that a PIA must be run on any “high risk” processing activity before it is commenced. (Articles 35-36, Recitals 89-94)

iii. Data Protection Officer (DPO): the appointment of a DPO, who ensures an organization’s GDPR compliance, is required under certain circumstances. (Articles 37-39; Recital 97, Guidance from the Article 29 Working Party)

iv. Using Service Providers: GDPR imposes a high duty of care on controllers in selecting personal data processing service providers and requires specified contractual protections and obligations. (Articles 28-29, Recital 81)

v. Record of processing activities: organizations are required to maintain records of their data processing activities. (Article 30, Recital 82) Regulators may ask for a copy of these records.

## **D. Some Big Picture Issues**

### *1. GDPR contains very broad definitions (Article 4, 9 and various Recitals)*

a. Personal Data: “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.”

- b. Stricter requirements for Sensitive Personal Data[3] (Article 9)
  - i. Race, ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, data concerning sex life or sexual orientation.
  - ii. Genetic or biometric data
  - iii. Health/medical data

## 2. GDPR Has Strict Rules Requiring Specific Consent (Articles 6(1), 7)

a. The consent of the data subject is “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she by statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.” (Article 4(11)).[4]

i. Unambiguous consent may be signified by “ticking a box when visiting a . . . website, choosing technical settings . . . or by any statement or conduct which clearly indicates . . . the data subject’s acceptance of the proposed processing of their personal data. Silence, pre-ticked boxes or inactivity should therefore not constitute consent.” (Recital 32)

b. There is an effective prohibition on “bundled” consents and the offering of services which are contingent on consent to processing.

c. Consent must be separable from other written agreements and must be clearly presented in clear and plain language. (Article 7(2); Recital 42) There are special and specific rules for obtaining the consent of children.

d. Data subjects must have the right to revoke their consent at any time, and it must be as easy to withdraw consent as it is to give it (Article 7(3)).

e. Where consent is relied on as the basis for lawful data processing, a data controller must be able to demonstrate that consent was provided (Article 7(1)).

## 3. GDPR has Mandatory Data Breach Notifications (Articles 33, 34, 70, 83, 84, Recitals 85-88)

a. Data breach is more than loss of personal data, it is defined as “a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed”

b. Pressure is put on controllers and processors by short and often difficult deadlines for notification.

- c. Notification obligations vary depending on the type of entity:
  - i. Data processor: must notify data controller without undue delay after becoming aware of breach
  - ii. Data controller:
    - Notify regulator within 72 hours after becoming aware of breach (unless breach is “unlikely to result in a risk to the rights and freedoms of natural persons”)
    - Notify impacted individuals without undue delay if breach is likely to result in “high risk” to their rights and freedoms, unless the data was rendered unintelligible

(e.g., encryption), or if measures taken so that the “high risk” to the rights is no longer likely to materialize.

d. Data controllers must maintain an internal breach register (documenting each incident “comprising the facts relating to the personal data breach, its effects and the remedial action taken”).

e. Fines for violation of breach notification requirements:

i. Up to €10million or 2% of global annual turnover for the preceding financial year, whichever is the greater.

4. *Restrictions on Transfers of Personal Data to “third countries” (Articles 40-45, Recitals 78-91; 101-107)*

a. Transfers of personal data are restricted under the GDPR, and the Commission will have the power to determine whether certain countries, territories, etc. offer an adequate level of protection for data transfers.

b. Data transfers will be permitted where an approved code of conduct (Article 40) or an approved certification mechanism (Article 42)[5] is used, provided that binding and enforceable commitments are made by the controller or processor in the third country to apply the appropriate safeguards, including as regards the data subjects’ rights.

c. Breach of the GDPR’s data transfer provisions can lead to a fine up to 4% of worldwide annual turnover.

## **E. Data Subject Rights**

### *1. Information*

a. Notice at time of data collection

b. Specific disclosures are required (e.g., the purposes of processing, the categories of data processed, and the third party recipients or categories of recipients of the data)

### *2. Access (Article 15, Recitals 59, 63, 64)*

a. GDPR grants data subjects the right to understand if their data is processed and on what legal grounds. Data controllers must have a process for dealing with such requests.

b. The data subjects are entitled to obtain a copy of the data free of charge (with limited exceptions), usually to be provided within one month from the date of the request.

c. The access rights are intended to allow individuals to check the lawfulness of processing and the right to a copy should not adversely affect the rights of others (Recital 63).

### *3. Rectification (Article 16)*

a. Correct inaccurate or outdated data. In some circumstances, if personal data are incomplete, an individual can require the controller to complete the data, or to record a supplementary statement.

### *4. Erasure (Right to be Forgotten) (Articles 17, 19 and Recitals 65-66)*

a. Individuals can require data to be “erased” in certain specified situations (in essence, where the processing does not meet GDPR requirements, including upon withdrawal of consent (and no other justification for keeping data)). The right to erasure applies when:

- i. The data are no longer necessary for the purpose for which they were collected or processed;
- ii. The individual withdraws consent to processing (and if there is no other justification for processing);
- iii. If the processing is based on “legitimate interests” and the individual objects and the controller can’t demonstrate that there are overriding legitimate grounds for the processing.
- iv. When the data are otherwise unlawfully processed (i.e., in some way that is otherwise in breach of the GDPR).

b. Data shared with or disclosed to other data controllers: Data controller must inform other data controllers with whom it shared the data of the erasure request.

c. Exemptions: among others, there is an exemption if processing is necessary for the exercise of the right of freedom of expression and information, if not outweighed by subjects’ rights (similar balancing act to previous test applied in privacy claims).

#### 5. *Restrict Processing (Articles 18, 19 and Recital 67)*

a. Stops further processing of data: the controller may only store the data, and the controller must notify other recipients of the data if it has disclosed the data to others.

#### 6. *Data Portability (Article 20, Recital 68)*

a. Data subjects can demand that their personal data be ported to them or a new provider in electronic format if their data was (1) provided by the data subject to the controller (interpreted broadly); (2) is processed by automated means (so no paper records); and (3) is processed based on consent or fulfillment of a contract.

#### 7. *Object to Processing (Article 21, Recitals 69, 70)*

- a. Right to object to specific types of processing:
  - i. Direct marketing: The objection to direct marketing is absolute: once the individual objects, the data must not be further processed for direct marketing. There are no exemptions that allow the processing to continue.
  - ii. Processing based on legitimate interests or performance of a task in the public interest/exercise of official authority (there are limited exceptions); and
  - iii. Processing for research or statistical purposes (again, there are limited exceptions).
- b. Notification to individuals: In the case of processing for direct marketing and processing based on tasks in the public interest/legitimate interests, the individual’s right to object must be explicitly brought to his or her attention (at the latest at the time of first communication with the individual). This must be presented clearly and separately from other information, and in the case of online services, the individual must be able to exercise his or her right to object electronically.

#### 8. *Contest “automated decisions” and profiling (Article 4(4), 22 and Recitals 71, 72)*

- a. Prevents potentially damaging decisions taken without human intervention.

## **F. Key Areas Where Media Organizations are Likely to Encounter GDPR**

- a. Data Subjects exercising their rights (in particular the Right to Erasure)
- b. Damages claims based on data protection cause of action alongside claims for defamation/misuse of private information
- c. Data Breaches – including the shorter notification periods, the investigatory powers of regulators and the potential fines
- d. Handling of employee (HR) data: GDPR also applies to employee personal data processed by an employer.

## **G. Enforcement & Penalties**

### *1. Data Protection Authorities (DPAs), the EDPB, cooperation, and One Stop Shop (Articles 60-76; Recitals 124-140)*

a. Member States appoint one or more independent DPAs with enforcement powers and to monitor the application of the GDPR; one DPA per Member State serves on the new European Data Protection Board (EDPB). Generally, there are increased regulatory powers (e.g., no-notice audits, dawn raids).

b. If a controller or processor carries out “cross-border processing” in the EU, the DPA for the main establishment acts as lead authority in respect of that cross-border processing (One Stop Shop). The lead authority must cooperate with other “concerned” supervisory authorities.

### *2. Remedies and liabilities (Articles 77-82, Recitals 141-147)*

a. Individuals have a number of rights against controllers and processors under the GDPR, including:

i. The right to lodge a complaint with supervisory authorities where their data have been processed in a way that does not comply with GDPR (with a right to appeal to national courts against a supervisory authority’s legally binding decision);

ii. The right to an effective judicial remedy where a competent supervisory authority fails to deal properly with a complaint;

iii. The right to an effective judicial remedy against a relevant controller or processor; and

iv. The right to compensation from a controller or processor for material or immaterial damage resulting from infringement of the GDPR (individuals can bring claims for non-pecuniary loss, not just for compensation. The GDPR facilitates the potential for representative/class actions).

### *3. Administrative Fines (Article 83, Recitals 148-152)*

a. Supervisory authorities are empowered to impose significant fines on both data controllers and data processors. Fines are discretionary and must be “effective, proportionate and dissuasive.”

b. There are 2 tiers of administrative fines:



i. Some GDPR contraventions[6] will be subject to administrative fines up to €10 million or, in the case of undertakings, 2% of global turnover, whichever is greater. An example is the mishandling or failure to report a data breach to the regulator.

ii. Other GDPR contraventions such as those arising out of infringements of the rights of data subjects, the general data processing principles, or non-compliance with a DPA order[7] will be subject for fines up to €20 million or, in the case of undertakings, 4% of global turnover, whichever is greater. This type of fine could result from, for example, the failure to have a legal basis to process the data at issue.

c. Article 83(2) lists factors to be considered when imposing an administrative fine, including but not limited to:

i. the nature, gravity and duration of the infringement, and the nature, scope or purpose of the processing at issue, along with the number of data subjects impacted and level of damage suffered by them;

ii. whether the infringement is intentional or negligent.

iii. actions taken to mitigate the damage suffered by the data subjects;

iv. the degree of: the responsibility of the infringer and the cooperation with the supervisory authority;

v. the categories of personal data affected;

vi. whether the controller or processor notified the supervisory authority about the infringement;

vii. if there is any previous enforcement history;

viii. whether there was adherence to approved codes of conduct or approved certification mechanisms; and

ix. any other applicable aggravating or mitigating factors (e.g., financial benefits gained, or losses avoided, from the infringement)

## H. Next Steps

### *1. There have been a sharp rise in data breach and data privacy complaints from consumers:*

a. France (CNIL) reported a 50% increase in complaints in the first month (largely by consumer rights organization Noyb against large companies such as Facebook and Google)

b. In Austria, there have been the same number of complaints and notifications in a single month (June) as they would have received in 8 months the previous year

c. See also the UK's Information Commissioner's Office (ICO) recent GDPR report.

### *2. Since the GDPR's May 2018 enactment, certain DPAs have announced investigations, for example:*

a. France (CNIL): announced it intends to conduct 300 investigations in 2018 to assess GDPR and French data protection law compliance. <https://www.cnil.fr/fr/quelles-thematiques-prioritaires-et-quelle-strategie-de-controle-pour-2018>. (in French) As of August 1, CNIL had issued formal warnings to two companies regarding the processing of data for targeted

advertising. <https://www.cnil.fr/fr/applications-mobiles-mises-en-demeure-absence-de-consentement-geolocalisation-ciblage-publicitaire> (in French)

b. Dutch DPA: expected to undertake preliminary investigations to assess GDPR recordkeeping compliance in 30 randomly selected companies. <https://autoriteitpersoonsgegevens.nl/nl/nieuws/ap-start-onderzoek-naar-naleving-privacyregels-door-private-sectoren>

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## Notes

[1] Article 6(1)(f): where “processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests or fundamental rights and freedoms of the data subjects which require protection of personal data, in particular where the data subject is a child.” (emphasis added)

[2] Controllers must tell individuals the following: the identity and contact details of the controller; the contact details of the Data Protection Officer; the purposes of processing and legal basis for processing (including the “legitimate interests” if that is the legal basis); recipients or categories of recipients; details of data transfers outside the EU (including how the data will be protected and how the individual can obtain a copy of the Binding Corporate Rules or other safeguards, or where such safeguards have been made available); the retention period of the data or, if not possible, then the criteria used to set this; that the individual has a right to access and port data, to rectify, erase and restrict his or her personal data, to object to processing and, if processing is based on consent, to withdraw consent; that the individual can complain to a supervisory authority; whether there is a statutory or contractual requirement to provide the data and the consequences of not providing the data; if there will be any automated decision making (including profiling) – together with information about the logic involved and the significance and consequences of the processing for the individual.

[3] Recital 51 suggests that the processing of photographs will not automatically be considered as sensitive processing; photographs will be covered only to the extent they allow the unique identification or authentication of an individual as a biometric (such as when used as part of an electronic passport).

[4] The UK Information Commissioner’s Office, or ICO, has published specific guidance for UK organizations on GDPR consent. See <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/consent/>

[5] On May 25, 2018, the EDPB issued Guidelines on certification and certification criteria.

See [https://edpb.europa.eu/sites/edpb/files/consultation/edpb\\_guidelines\\_1\\_2018\\_certification\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_1_2018_certification_en.pdf)

[6] Contraventions subject to these maximum fines include infringement of the following obligations:

- To obtain consent to the processing of data relating to children (Article 8)
- To implement certain measures to ensure data protection by design and default (Article 25)
- on joint controllers to agree to their respective compliance obligations (Article 26)
- on non-EU controllers or processors for failure to designate representatives (Article 27)
- on controllers in relation to engaging processors (Article 28)
- on processors for certain failures in the subcontracting process with controllers (Articles 28-29)
- to maintain written records (Article 30)
- on failure to cooperate with supervisory authorities (Article 31)
- for failures regarding implementation of technical and organizational measures (Article 32)
- to report GDPR breaches when required (Article 33-34)
- for failures in the privacy impact assessment (Article 35-36)
- for failures in the appointment of Data Protection Officers (Articles 37-39)
- imposed on certification bodies (Articles 42-43)
- imposed on the monitoring bodies to take action for infringement of codes of conduct (Article 41)

[7] Contraventions subject to these maximum fines include infringement of the following obligations:

- the basic principles of processing, including failure to provide notice or have a legal basis to collect and use data (Article 5, 6, 7, 9)
- data subjects' rights (Articles 12-22)
- international transfers (Articles 44-49)
- obligations under Member State laws adopted under Chapter IX; and
- non-compliance with an order imposed by a supervisory authority (Article 58(1) and 58 (2))

# DCS Annual Meeting Reviews Accomplishments and Plans for 2019

The annual meeting of the MLRC Defense Counsel Section was held on Thursday, November 8<sup>th</sup> at Carmine's Restaurant on West 44<sup>th</sup> Street in New York City.

DCS President Jack Greiner led the meeting. The first matter of business was the election of a new executive committee member. Rachel Matteo-Boehm of Bryan Cave in San Francisco was elected DCS Treasurer for 2019. The other members of the 2019 DCS Executive Committee are: President Jay Ward Brown; Vice President Robert Balin; and Secretary Robin Luce Herrmann.

Jack will continue to serve as President Emeritus during the coming year. Jack thanked outgoing President Emeritus Laura Prather for her years of service and leadership on the DCS Executive Committee.

A ministerial amendment to the DCS By-Laws was adopted to conform the length of terms of DCS Executive Committee members to the current practice of one year in each position (a total of 5 years). The old version called for ExCom members to serve 2 years in each position (a total of 10 years).

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 2019.

## COMMITTEE REPORTS

### **Advertising and Commercial Speech Committee**

*Co-Chairs: Brendan Healey and Terri Seligman*

*Vice-Chair: Robin Luce-Herrmann*

In 2018, we 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 2018 to host substantive presentations by members and outside speakers on current developments and issues of concern to advertising law practitioners. Presenters and topics were as follows: Daniel Goldberg of Frankfurt Kurnit spoke on GDPR and its upcoming implementation; Bobby Baker from the Federal Communications Commission on FCC regulations and broadcast political advertising; and Christy Burrow from Cooley on state laws concerning digital political advertising. We also hope to have a presentation in November or December on the Supreme Court's decision in the Murphy case and its implications for the advertising of sports betting.

In 2019, we intend to continue to keep our members abreast of new legal and regulatory developments relating to social media and online advertising. We hope to have presentations every other month or at least every quarter. We have made progress on our update to the "Checklist on Advertising Content." There are actually two existing checklists, the "Advertising

Clearance Checklist” and the “Checklist on Advertising Content,” and we are working on combining them into one updated checklist. The update would focus on advertising of marijuana (and related services and products), e-cigarettes, guns, hard liquor, sports gambling (including daily fantasy games), pharmaceutical drugs from other countries, as well as native advertising and business issues such as rate cards. 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.

### **Anti-SLAPP Task Force**

*Chair: Bruce Johnson, Laura Prather*

The MLRC SLAPP committee, co-chaired by Laura Prather and Bruce Johnson, meets bimonthly and focuses its attention on recent SLAPP rulings, the progress of new anti-SLAPP bills in state legislatures without strong SLAPP legislation, possible model SLAPP statutes, and advice and counsel on securing federal anti-SLAPP protections.

### **California Chapter**

*Co-Chairs: Jeff Glasser, Sarah Cronin, Tami Kameda-Sims*

The MLRC California Chapter engaged in vibrant discussions this year on (1) right of publicity and false light claims arising out of docudramas; (2) whether embedding third-party content in a tweet constitutes copyright infringement, twitter is a public forum, and calling a company a copyright infringer and adult content distributor constitutes trade libel; and (3) when use of a trademark in a marketing campaign is trademark infringement and recent changes in California’s labor and employment law and the California Supreme Court decision’s potential effects on television and film production. While the California Chapter meets in-person for each of these discussions, members of the MLRC are welcome to participate by telephone.

The Chapter’s first meeting, held on April 25 at Kelley Drye’s Century City offices, looked at the recent *Olivia de Havilland v. FX Networks, LLC, et al.* decision, in which the California Court of Appeal overturned the trial court’s order that had allowed the plaintiff’s right of publicity and false light claims to proceed based on FX’s portrayal of her in the docudrama television series *Feud: Bette and Joan*. The panel also discussed the *Ramsey v. CBS* case pending in Michigan, where the brother of JonBenét Ramsey brought a defamation claim against CBS arguing that the television series *The Case of: JonBenét Ramsey* falsely conveyed to millions of viewers that he had killed his sister. The panel was led by Lou Petrich, partner at Leopold Petrich & Smith, Joel Weiner, partner at Katten Muchin Rosenman LLP, and Rochelle Wilcox, partner at Davis Wright Tremaine, who submitted an amicus brief in the *Olivia de Havilland* case on behalf of A&E Television Networks, the Reporters’ Committee for Freedom of the Press, First Amendment Coalition and other amici.

The Chapter's second meeting, held on July 11 at Davis Wright Tremaine's offices, delved into embedding content from third-party websites and claims of copyright infringement, a recent decision stating that Twitter is a public forum, and whether calling a company a copyright infringer and adult content distributor constitutes trade libel. Dan Laidman, of Davis Wright Tremaine, discussed the state of the law on embedding content from third-party websites, including the recent SDNY ruling in *Goldman v. Breitbart News*. Susan Seager, Lecturer in Law at USC Gould School of Law and UC Irvine School of Law, discussed *Knight First Amendment Institute v. Trump*, in which the district court granted plaintiffs' motion for summary judgment in part, and held that President Trump cannot block Twitter users because of their political opinions without violating the First Amendment because Twitter is a public forum. Ms. Seager also discussed *Prager University v. Google*, in which the district court dismissed a complaint against Google that was filed by conservatives who alleged they were being censored on YouTube, on the grounds that YouTube is not a public forum. Finally, Lincoln Bandlow, partner at Fox Rothschild, discussed *FilmOn v. Double Verify*, in which the California Court of Appeal affirmed the trial court's order granting DoubleVerify's anti-SLAPP motion on this basis that its reports were protected speech under the anti-SLAPP statute and that FilmOn had failed to establish a probability of success because the statements that it was a copyright infringer and adult content provider were essentially true.

The Chapter's third meeting, held on October 23 at Katten Muchin Rosenman's Century City offices, focused on the use of trademarks in marketing campaigns and the important developments in California's labor and employment law. David Halberstadter, partner and Deputy General Counsel at Katten Muchin Rosenman, discussed the recent lawsuit brought by Sesame Workshop in the SDNY based on the marketing campaign for the film *Happytime Murders*, which was directed by the late Jim Henson's son, Brian, and which made prominent use of the tagline "No Sesame. All Street." Sesame Workshop unsuccessfully sought a temporary restraining order, alleging that the use of the tagline "deliberately confuses consumers into mistakenly believing that Sesame is associated with, has allowed, or has even endorsed or produced the movie and tarnishes Sesame's brand." David discussed this recent litigation, as well as the law that generally applies to these types of trademark infringement claims. Michael Gallion, partner at Kelly Drye & Warren and head of the firm's West Coast labor and employment group and David Van Pelt, special counsel at Kelley Dyre & Warren, discussed the recent changes in California labor and employment law and its potential impact on the entertainment industry, including the California Supreme Court's ruling in April in *Dynamex Operations West Inc. v. Superior Court of Los Angeles*, which held that a person is an employee of a company unless they are conducting "work that is outside the usual course" of the company's business.

The fourth meeting will take place in December.



**Criminal Law Committee***Co-Chairs: Jacquelyn Schell, Kaitlin Gurney*

The newly-formed Criminal Law Committee aims to address the growing intersections between criminal and media law, from protecting journalists and sources from criminal liability to navigating search warrants and government subpoenas. Since its official announcement in May, the committee has held its inaugural webinar, worked with committee members to identify topics of interest, and planned its second webinar, scheduled for November 15, 2018.

At the Kick-Off webinar on June 12, 2018, three experienced panelists offered their advice about training and representing journalists reporting on protests, active crime scenes, and developing emergency situations. More than 100 participants tuned in as Drew Shenkman, senior counsel for CNN, Mickey Osterreicher, general counsel for the National Press Photographers Association, and Richard Zack, former Assistant U.S. Attorney, now with Pepper Hamilton, offered practical guidance on preparing reporters to avoid conflicts with police and best practices for lawyers in the event of arrest. (The webinar is available on the Pepper Hamilton website at <http://www.pepperlaw.com/events/what-to-do-when-your-reporter-is-arrested-at-the-scene-2018-06-12/>.)

Our next webinar, on November 15, 2018, will focus on safety and security in local newsrooms and television stations. Featuring Lucy Dalglish, Dean of the Philip Merrill College of Journalism, David Giles, Deputy General Counsel of The E.W. Scripps Company, and Dennis Burke, former U.S. Attorney for the District of Arizona, now with Ballard Spahr, this panel will discuss developing safety protocols, assessing online threats, and re-evaluating concerns posed by pro se libel plaintiffs and other media gadflies in the wake of recent events.

The committee expects to hold quarterly, topic-focused calls and may expand into publications or additional projects as the Committee develops. Likely topics include: (1) the Espionage Act and other threats to sources and leaks; (2) responding to search warrants, subpoenas, and other government information demands; and (3) FOSTA and criminal carve-outs to the CDA.

**Employment Law Committee***Co-Chairs: Thomas Wilson and Tanya Menton*

The Employment Committee monitors the development of state laws concerning non-compete agreements and broadcasting companies. What started as an East Coast issue has spread west with new laws in states such as Utah. Immigration continues to be a big issue for our members so we have had multiple discussions and internal communications about foreign journalist entering the U.S. and the ability to have U.S. based journalist enter other countries to work as journalist. Media employers continue to look for creative ways to involve their employees and the Committee is there with them to address in meetings and communications concepts such as workplace councils for employees and how those efforts work under U.S. law and in particular the National Labor Relations Act. We work with other MLRC Committees and

did have a joint meeting and issued joint communications with the Litigation Committee on effective ways to handle e-discovery in litigation, sharing information about software/methods protocols used that help reduce costs. Finally, but inevitably, we address #MeToo issues related to releases, confidentiality agreements, arbitration agreements and employment agreements. No doubt, that topic will carry us through into the new year.

### **Entertainment Law Committee**

*Co-Chairs: Lincoln Bandlow, Jessica Davidovitch*

The mission of the Entertainment Law Committee is to keep its members apprised of key cases and the latest legal developments in the world of entertainment. The Committee meets via a group conference call that is usually held on the first Wednesday of every month. In preparation for each meeting, the Committee Chairs review a variety of publications and assemble approximately 10 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 distributed 3-5 days before the call. Agenda items are selected with an eye toward currency, significance, balance and entertainment value.

Even when volunteers are not available to cover all of the topics compiled for each call, the compilation and circulation of those matters in the monthly pre-call email is a helpful resource for members of the subcommittee to review in their own time.

Some of the specific topics discussed this past year included:

- Feud Fight Meets First Right: Court Of Appeals Tosses Out de Havilland's Claims Against Docudrama.
- Gamers Know Lacey Jonas, They Like Lacey Jonas, They Have Played As Lacey Jonas – Lindsay Lohan, You're No Lacey Jonas: Court Tosses ROP Claim Against Grand Theft Auto.
- Take Two Tattoo Tussle Not Terminated: Judge Allows Copyright Lawsuit Over LeBron James Tattoo In Videogame To Continue.
- Google Ain't Government: Lawsuit Accusing YouTube of Censoring Conservatives Tossed Out.
- 9th Circuit Confirms That Thicke And Farrell Got To Give It Up: Jury Verdict in Blurred Lines Case Upheld.
- To Rip Off A Mockingbird?: Sorkin Sued For Adaptation Of Classic.
- Will Dual Survivor Contestant's Lawsuit Survive His Release?: Show Participant Sues For Defamation And Tries To Escape Release.
- TV Eyes Get Poked: 2nd Circuit Rules For Fox Against TV Tracking Service.

- More Cohen Results In Moore V. Cohen: Roy Moore Sues Sacha Baron Cohen Over Embarrassing Appearance On “Who is America?” See
- Hand Shake Do Not Deals Make: Court Finds in Dispute Between Johnny Depp and Manager that Oral Contract Not Binding.
- Living On The Copyright/Lanham Act Edge: Can Trump Be Sued For Playing Aerosmith Music At Rallies?
- Pre-1972 Recordings Lawsuit Stays On the Turntable: 9th Circuit Revises Lawsuit Against CBS.
- Fox Beats Seth Rich Case: Court Says Action Was End Run Around Clear “You Can’t Defame The Dead” Precedent.
- Why Wasn’t Anyone Thrown Out Of The Kavanaugh Hearings For Screaming Hysterically “This Guy Hates Anti-SLAPP Laws Being Applied in Federal Courts
- (Rom Bar-Nissim): A Troll Storm Is Coming ... And Gets You Sued: Gersh v. Anglin
- Court Chips Off The Old Twitter Block: Trump’s Blocking Of Twitter Users Violates First Amendment.
- Will California Supreme Court DoubleVerify Trial Court and Court of Appeal Anti-SLAPP Victories?: FilmOn v. DoubleVerify Goes Up To High Court On Commercial Speech And Public Interest Issues.
- The Cos and Effect In Opinion Jurisprudence: Cosby Lawyers Seek Supreme Court Review of Janice Dickinson Case.
- Can You Tell Me How To Get, How To Get To ... The Court So We Can Sue For Trademark Infringement?: Sesame Street Trademark Owners Not Fond of Murdering Muppets.
- Who Prevails In An Appeal On Trademarks That Are Key – Spongebob Squarepants – Protecting of Rights to Krusty Krab are We – Spongebob Squarepants.
- Oh, The Attorneys’ Fees You Will Seek: Star Trek/Dr. Seuss Mash Up Not An Infringement. See
- The Mark Of Z – For Z You In Court: Zorro Licensor Faces Copyright Infringement Trial.

We also monitor previously discussed items and provide updates as warranted.

In 2019, we would like to shift the focus of our monthly calls to involve more discussion of the specific matters that practitioners are actively working on, in addition to the summaries of significant new decisions and events.

## **Federal Affairs Committee**

*Co-Chairs: Leita Walker and Shaina Jones Ward*

Due to a hopelessly deadlocked Congress and the potential for overlapping and cumulative efforts among the various committees, members of the Federal Affairs Committee have found their many talents a bit under-utilized in 2018. MLRC is exploring whether it may be time to sunset this committee, which of course could always re-emerge, zombie like, if/and or when some important federal issue not already covered by another committee gains traction.

## **Insurance Committee**

*Co-Chairs: Betsy Koch, Eric Brass, Jim Borelli*

The purpose of the Insurance Committee is to bring together in-house counsel, defense attorneys, and insurance professionals to consider issues and developments of importance in media defense and insurance that will result in greater knowledge and understanding of the nuts and bolts of insurance coverage, the media insurance marketplace, and the risk management challenges faced by media clients today.

In our first full year in existence, we have grown to more than 40 members. Highlights of the year including the following:

Evynne Grover of QBE, on behalf of the Committee, authored an article titled “The ‘Pink Slime’ Insurance Coverage Dispute Shines a Spotlight on Media Liability Insurance,” which appeared in the December 2017 issue of the MediaLawLetter.

On behalf of the Committee, Terrence Keegan prepared an article, “This Means War: Dispute Over Scope of Insurance Policy’s ‘War’ Exclusions Rests On ‘Layperson’ Understanding of Term.” The report, which was published in the January 2018 MediaLawLetter, concerns the coverage litigation between Universal Cable Productions (NBC Universal) and Atlantic Specialty Insurance arising out of Atlantic's denial of coverage, based on its policy's war exclusion, for expenses incurred by NBC Universal when it was forced to cease filming in Israel as the result of the conflict with Hamas.

The Committee held a meeting at the Forum on Communications Law 2018 Annual Conference in Napa Valley, CA on March 1. While we had hoped to include remote participants by teleconference, the cost of adding a conferencing phone to the meeting room was prohibitive. Nonetheless, eight members of the Committee attended the meeting in person and engaged in an informal discussion of current issues in media insurance and potential topics for future Committee meetings and articles.

Committee members helped organize, and were the moderator and panelists, in a session of the Media & the Law Seminar in Kansas City, MO in May entitled “Media Insurance 101 – What every lawyer needs to know to defend an insured client, including navigating the tripartite relationship, selection of counsel, settlements.”

The Committee held a meeting by teleconference on October 23, in which we tested, for the first time, MLRC’s new Chime videoconferencing system to share slide decks. David Hallstrom

of Willis Towers Watson and James Shreve of Thompson Coburn led an informative discussion about cyber liability and cyber insurance for media and entertainment companies. The PowerPoints used by the speakers were emailed to all Committee members following the meeting.

Ed Copeland is working on a report about the Media Insurance 101 session, which was published in the November issue of the MediaLawLetter.

Committee members, together with the new ABA Forum Insurance Committee, are developing a program on insurance to be presented at the Forum on Communications Law 2019 Annual Conference.

In the coming year, the Insurance Committee hopes to hold quarterly meetings with presentations on topics such as claim trends, emerging exposures, claims attorneys' role in defense/litigation strategy and reporting requirements, unique insurance coverage needs of particular media business classes, such as film and entertainment, in-house risk management, and/or selection of counsel and insurance company panels. We will also continue publishing articles reporting about developments in media insurance in the MediaLawLetter and elsewhere, and hope to participate in one or more of MLRC's conferences including, but not limited to, the 2019 London Conference.

### **International Media Law Committee**

*Co-Chairs: Gillian Phillips and Julie Ford*

*Vice-Chair: Peter Canfield*

Our committee conducts conference calls that focus on a variety of current "hot" topics across the globe. We try to invite a range of external guest speakers – including journalists, regulators, lawyers and professors - to speak on recent media developments in their respective countries.

This year our meetings included a discussion of press issues in Turkey, updates on the state of the law in Canada and Mexico and a session on cross-border vetting and the impact of insult, libel and privacy laws in faraway places. We also had a compelling session on overseas abductions and on lessons learned and best practices around protecting reporters in hostile international environments. From Europe, we had updates on the current state of media law in Germany, the Netherlands and France, including various initiatives on hate speech on the internet and the continuing impact of the right to be forgotten in Europe.

We also feature regular reports and updates on legal and political developments in the UK. Topics this year have included the anticipated effect of Brexit on the media, the General Data Protection Regulation, the Investigatory Powers Act summary section 40 of the Crime and Courts Act 2013 to foreign/US media companies and proposed changes to the UK Official Secrets Act.

For 2019, in addition to covering as many national updates as we can co-ordinate, we are thinking about sessions on Asia and reporting on disasters and violence, as well as covering developments in Australia and Ireland.

**Internet Law Committee***Co-Chairs Matt Leish & Judy Endejan*

The Internet Law Committee interacts primarily through quarterly conference calls. The first for 2018 occurred on March 21. Ken Norwick and Jack Greiner discussed issues associated with embedding, linking etc. of photos plucked from the web. Ken focused on *Goldman v. Breitbart*, in which he represented the plaintiff, who took an informal photo of Tom Brady and NBA officials and uploaded it to his Snapchat account. From there, the photo made it to Twitter and multiple websites where it was “embedded” but accessible to viewers through a series of instructions, even though the photo was not stored on the sites’ servers. Goldman sued for copyright infringement in the United States District Court in New York. Judge Katherine Forrest ruled in Goldman’s favor, rejecting the here-to-fore well-accepted “server test” from the Ninth Circuit, finding that embedding violated the “display” rights in the Copyright Act.

The Committee’s second call occurred October 3 and examined “*Private Censorship of Speech on Websites and Social Media Platforms: old wine in a new bottle or a new brew?*”

The topic discussed was platforms for Internet speech, owned by private entities, who have the right to control access and perhaps content. Tom Burke updated the Committee on *Hassell v. Bird*, a bad decision from the California Court of Appeals reversed by the California Supreme Court in 2018. This case involved an attempt to get Yelp to take down negative content. Yelp decided to allow the negative content to remain on its site, despite court orders and threats of contempt for its refusal to take it down. Section 230 saved the day for Yelp, protecting Yelp’s rights. Professor Tamara Piety, a recognized First Amendment academic discussed First Amendment ramifications when site providers decide to take down various speakers, such as Alex Jones and Infowars. Prof. Piety co-wrote an amicus brief in the *Gilmore* case, in Virginia, where *Gilmore* sued Jones for the harm he suffered after *Gilmore* published a photo of the Charlottesville melee in 2017 and Jones accused *Gilmore*, among other things of being a CIA plant.

The final call for 2018 is scheduled for November 28, 2018 and will explore the efforts of numerous states to enact Net Neutrality legislation following the FCC’s decision to repeal Obama-era net neutrality rules. The Department of Justice has sued California to enjoin its Net Neutrality legislation that went into effect on September 30. The November call will also feature a discussion of California’s recently enacted data privacy law.

In addition to our quarterly calls, in February the Committee published a substantially updated version of the Practically Pocket-Sized Guide to Internet Law, available on the MLRC website. The Guide offers a series of concise articles on a wide-range of Internet law questions that come up in day-to-day media law practice.

The Committee is exploring additional activities for 2019, and it welcomes input from its members and the MLRC membership for ideas for projects related to the Internet.



**Litigation Committee***Co-Chairs: James Hemphill, Steve Mandell**Vice-Chair: Thomas Curley*

The Litigation Committee has been revitalized with the appointment of a new co-chair and vice chair, and with a very well-received conference call/discussion on e-discovery issues, conducted jointly with the Employment Committee. For the new year, the Litigation Committee plans additional phone meetings and conferences, and is currently working on a joint presentation with the Employment and Newsgathering Committees. The Litigation Committee will be reaching out to other Committees to explore other cooperative projects, and welcomes ideas from any and all DCS members.

**Media Copyright and Trademark Committee***Co-Chairs: Scott Sholder, Toby Butterfield, Lauren Fisher*

The Media Copyright and Trademark Committee has approximately 50 members. We hold conference calls every 6-8 weeks in which we hear from invited speakers and committee members about recent court decisions, legislative developments and practice pointers. Examples of topics we have addressed in the last year include issues concerning artificial intelligence, copyright and trademark fair use, anti-counterfeiting efforts in particular concerning streaming media, copyright “troll” litigation and recent federal legislative initiatives. Meetings in coming months will likely address recent statute of limitations decisions, copyright cases headed to the Supreme Court, and the interrelationship of IP cases with disputes over the scope of licenses. We regularly welcome new members.

**Newsgathering Committee***Co-Chairs: Cynthia Counts and Edward Fenno*

The MLRC Newsgathering Committee has been revitalized this year by the addition of Edward Fenno from South Carolina as Co-Chair. While still learning the ropes from veteran Co-Chair Cynthia Counts, Edward has contributed some fresh ideas and strategies for member interaction and events -- leading to some of the most interesting and informative member conference calls in recent years. Edward has also brought energy and enthusiasm to the committee, and helped edit the updated MLRC Model Brief on Newsgathering -- which is now in its final stages before presentation. The committee also added Rachel Matteo-Boehm last month as Vice-Chair, and is looking forward to her new insights and ideas in the upcoming year.

## **Next Generation Media Lawyers**

*Co-Chairs: Matthew Schafer, Al-Amyr Sumar, Amy Wolf*

The Next Gen committee had an active 2018. We hosted a “mentor call” with Laura Prather where Laura joined via webinar to give advice to committee members about planning their careers and maximizing the experience of being an associate. We also hosted a webinar entitled Journalism 101 that focused on how newsrooms think of their lawyers’ role in the reporting process that offered insight from panelists from the reporter, editor and standards perspectives. We also have had two in-person roundtable events where a smaller subsection of the committee gets together to informally discuss current issues in media law, including issues that arise on social media and abroad. The committee also hosted a happy hour at the MLRC conference in Virginia — we added members to the committee and reconnected with fellow members.

Next year, the committee hopes to continue organizing webinars and smaller salon-type gatherings. We anticipate at least some of these events to take place in Philadelphia and/or D.C in an effort to expand the committee’s presence and further encourage the next generation of media lawyers to connect, learn from one another and navigate the next steps in their careers.

## **Pre-Publication/Pre-Broadcast Committee**

*Co-Chairs: Collin Peng-Sue and Lisa Zycherman*

*Vice-Chair: Alexia Bedat*

Our committee convenes monthly conference calls to engage with speakers on timely information for lawyers who vet. We program a mix of topics to inform our members on cutting edge and topical information, including:

- An exploration of Virtual Reality (“VR”) and its implications for lawyers advising VR content creators, including discussion with USC Professor Robert Hernandez, who addressed what this emerging technology means in the entertainment and journalism spaces and anticipatory issues.
- A comparative discussion on the similarities and differences between vetting sexual harassment allegations in the UK v. US, with the assistance of Guy Vassall-Adams QC of Matrix Chambers (London).
- The latest on responding to copyright infringement claims on Youtube and other social media platforms, with an update on the EU Copyright Directive.

We also focus on perennial topics for vetting counsel, including: misappropriation issues addressed in Olivia de Havilland’s suit alleging that “Feud: Bette and Joan” sullied and improperly profited off her name; using third-party content in the background of a television series; the variety of state wiretap laws; and maintaining attorney-client privilege during the pre-publication/pre-broadcast review process.

**State Legislative Committee***Co-Chairs: Jean Maneke and Steve Zansberg**Vice-Chair: Nikki Moore*

The MLRC State Legislative Committee is now in its eight year of existence and continues to grow in membership, breadth, and overall wonderfulness.

The State Legislative Committee includes more than forty-six of the nation's leading government relations attorneys who represent First Amendment interests in thirty-six jurisdictions in the United States. We identify and track legislative trends impacting the media and exchange ideas about ways to most effectively combat legislative attempts to encroach press freedom and government transparency. Some of the areas of legislation we regularly monitor and discuss are: Drone regulation, "ag-gag," anti-SLAPP, open records, open meetings, public notices, right of publicity/survival, and more.

We meet once a month, by teleconference, during the winter and spring legislative sessions, and continue our meetings almost every month over the summer. On our monthly calls, we keep each other informed about what is going on in the various states, and we try to identify emerging trends that we should bring to the attention of MLRC's leadership. Between monthly meetings, we exchange emails with inquiries, draft legislation, and calls to action.

In 2018, our committee prepared three articles published in the MediaLawLetter describing legislative victories in state houses and how the local media representatives "got it done," as well as a recent survey of emerging state legislation. In February 2018, in conjunction with the Federal Affairs and Newsgathering Committees, we co-produced the MLRC Report, "Drones: Regulation and Practices." We also collaborated with Laura Prather and Bruce Johnson, co-chairs of the MLRC's Anti-SLAPP Task Force to begin assembling resources to assist member firms in litigating against constitutional challenges to existing anti-SLAPP laws and arguments in support of application of anti-SLAPP statutes in federal courts.

Our committee is presently working with members of the press in Wyoming who are planning to introduce a bill next month to enact a Press Shield Law in that state (following up on our having assisted the Vermont Press Association, in 2017, to successfully enact a shield law).

In the coming year, we will continue efforts to seek member representation in all 50 states, and to partner with other national organizations who monitor state legislative activities.

We invite anyone with an interest in such topics to join our committee; simply contact one of the three committee chairs to express your interest. Thanks.

# 10 Questions to a Media Lawyer:

## Judith Margolin

*Judith Margolin is Vice President, Deputy General Counsel at Penske Media Corporation in New York.*

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

My first job of any sort was as a waitress. I spent many years working for a caterer in high school, and that job taught me that I didn't want to be in food service! Even at that age, my legs really hurt at the end of a shift. However, I am still very proud that I was earning money at a relatively young age. I still enjoy looking at my social security statement (which I think they've stopped sending annually), which shows that in the early 1980's, I was earning about \$198/year.



I didn't start my legal career in media. I was at Cleary Gottlieb in Washington D.C. and New York, and spent most of my time there as a commercial litigator doing product liability defense and other big corporate litigation. I then switched to the corporate side and was looking for a fantastic in-house opportunity when Alex Gigante hired me to join the legal department at what was then Penguin Putnam Inc. I was very fortunate. Alex told me that he was open to hiring a former litigator. He believed that litigators had the skill set and flexibility to learn about new areas of the law. He was a litigator himself (and indeed, still is). And I was also a graduate of

NYU Law School, which was true of everyone else on the Penguin Putnam legal team at the time.



ID from Margolin's first media job, circa 1997

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

I love the breadth of my role. I am involved in so many different elements of our business, I wear many hats, and I have a hand in a million different legal issues. I'm a counselor, a litigator, a negotiator and deal-maker.

My day may start by working with an editor on an investigative piece, and then I'll jump into a potential acquisition, and then an HR question, and then a landlord/tenant issue, and then a consumer marketing question and so on.

What I like least is on the flip side of what I like best: because I'm involved in so many matters, sometimes it's hard to manage and keep track of my overflowing inbox and documents. I think I do an excellent job of responding to my clients, but only an adequate job of controlling my files. I wish I had an extra hour every day to get more organized.



Also, although I appreciate all of the advances in technology, I really don't enjoy the fact that I can never fully disengage from the office. I remember in the early 2000's, when I was closing Time magazine on Friday nights and Saturdays, and Sports Illustrated on Sundays, I would have to stay home to watch my fax machine just in case a story came through. Now I can check my email from Fairway, or the gym or my kids' school play, which is great, but it's also hard to relax.

I sometimes think about how Abraham Lincoln practiced law. Was that better? I'm not sure. He certainly had more time to think deep thoughts.

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

I'd say that as a younger lawyer, especially in the law firm setting, I wasn't always adept at managing office politics. I think if I went back to a firm now, I'd approach it very differently.

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

I haven't been a litigator in many years, and I rarely go to court, much less argue motions. I do oversee litigation involving my clients and have done so on a few big defamation and publicity rights lawsuits. I wouldn't want to re-live them, however. My role is always behind the scenes, thankfully.

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

I have two artifacts from the transfer of editorial power at Time Inc. from Norm Pearlstine (in his first stint as Editor in Chief) to John Huey. One is two very (very) stale cookies with their





**Two artifacts from the transfer of editorial power at Time Inc. from Norm Pearlstine to John Huey. One is two very (very) stale cookies with their images on it. The other is a coffee mug with Norm's face on it, and on the other side, a black square where John's face appears when you place hot liquids inside the cup.**

images on it. The other is a coffee mug with Norm's face on it, and on the other side, a black square where John's face appears when you place hot liquids inside the cup. Strange, but true.

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

The New York Times. And then I usually check in on my clients, which at the moment include Variety, IndieWire, Deadline Hollywood and Rolling Stone.

I'm also addicted to WWD's daily email, the Essentialist. WWD is another one of our publications at Penske Media, and they do some terrific reporting on the media industry, as well as fashion.

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

It's complicated. I loved law school, and I'm very happy as a lawyer. But of course it depends on the person, the law school they're likely to attend, and what they expect to do when they graduate.

A lot of people feel alienated by big law firm practice – for good reason. I wish more young lawyers started their careers differently, because I think they'd be happier. When I was in my third year of law school, I did a clinic at the Manhattan DA's office, and I can't imagine a more energetic and engaging place to work for young lawyers. That would be an amazing place to start a career.

I personally feel very fortunate to have found an area of the law that I enjoy so much. And I really appreciate working in-house, where I can help my clients solve their problems constructively rather than parachuting in only after the fact to deal with a crisis.



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

I'm often approached for advice by young lawyers who are working in large law firms, in areas that have nothing to do with media law. For those people, I often encourage them to get involved with a bar committee focused on media law or one that has some adjacency to media law, such as copyright. Even if you can't officially join, most bar committees don't object to observers, and some allow law student representatives. I think this is a fantastic opportunity to meet people, network and learn.

**9. What issue keeps you up at night?**

Probably the same issue as many in-house lawyers: keeping up with the rapidly evolving privacy and data security laws in the US and around the world.

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

Earlier in my life I thought about becoming a psychologist. I don't think I would have had the patience for it, and ultimately law was a better choice. But having strong EQ skills has been a great asset, especially when you're in-house.

**MLRC 2019 Events**

**January 17**

**Entertainment Law Conference**

Los Angeles, CA

**March 11**

**Latin American Media Law Conference**

Miami, FL

**May 20-21**

**Digital Law Conference**

San Francisco, CA

**September 15-17**

**London Conference**

London, UK

**November 6**

**Annual Dinner & Forum**

New York, NY