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#### MLRC MediaLawLetter

## From the Executive Director's Desk Does the Trump Effect Extend to Jury Verdicts? Consultants to Weigh In

And a Lovely Speech on the Collegiality and Uniqueness of the Media Bar

The "Trump effect" on many aspects of our country's life has been hotly debated, but a general consensus exists on his effect on the media and the First Amendment. Most of us say, with some relief, that his actual effect on legal matters has been slim to none.

Despite all his blustering, the libel laws have not been changed or "opened up"; if anything, there have been fewer prosecutions of government leakers than in the Obama Administration. Despite some threatening words by Trump and his barely surviving Attorney General, there have been no prosecutions or grand juries targeting the press for publishing leaks. FOIA requests have been answered just as slowly, with just as many redactions and citings of exemptions, as in other administrations. The kicking out of "unfavorable" reporters from press conferences and other White House interviews and photo ops has occurred on a few occasions, but rather unsuccessfully and does not seem at all likely to become a trend. And, while there has only been one bona fide press conference, I



How people feel about the media influences how many suits are filed against them; it affects how judges rule; and, perhaps most interesting, and at the heart of this intersection, is how Trump's campaign against the media has affected jury verdicts. believe with the President's constant tweeting, which gives a pretty good indication of what's in his so-called **George Freeman** mind, his administration has, in the end, been more open and transparent than most of his predecessors'.

On the other hand, Trump's daily blasting of the media has had its intended deleterious effect. While other administrations have attacked the press, never has it been done with such fury and frequency as in the past year. Whether the purpose of this unprecedented bombardment has been to undercut the power of an important institution which he cannot control and stands in his way; to shore up his base; to simply, in line with his character frailties, attack anyone who does not view him as an all-powerful, all-wonderful being; or is because instead of any positive narrative, he lives by attacking others, it has had an effect. And that effect has been extremely detrimental to our democracy. Opinion polls show that the press now has even less trust and credibility than the low levels it's had in prior decades; that

more people than ever don't believe what they see and read in the media; and that these numbers are deeply divided depending on which political party respondents are in.

Where these two very different tendencies intersect is in the jury box – and in litigation, broadly looked at. It's not a specific legal change or policy, but litigation is certainly reflective

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of public opinion. How people feel about the media influences how many suits are filed against them; it affects how judges rule; and, perhaps most interesting, and at the heart of this intersection, is how Trump's campaign against the media has affected jury verdicts.

The MLRC does not track libel filings, but anecdotally at least, it certainly seems as if there has been a precipitous rise in them in the last year. And it's not much of a leap to assume that the increase of suits against the media could be due to people's greater readiness to take the media on, just as the president has, or a feeling that since the public, in general, views them so poorly, plaitiffs' chances in a litigation are greater than heretofore. I have seen no indication that judges rulings have gotten more anti-press, and my general sense is that judges – who, after all, have been victimized in the same way by the President as the press – will remain immune to public opinion in this area and steadfast in their belief in the importance of First Amendment law and values. But a huge influx of Trump appointees and the almost inevitable reflection of popular opinion in judicial decisions might, over time, threaten that sanguine view.

More to the point is whether jury verdicts – both their decisions on liability and the amount of damages awarded – have been affected by Trump's vitriol against the media. There haven't been enough trials to really see a trend. Of course, the unprecedented Pink Slime/ABC settlement probably resulted from ABC/Disney lawyers' and executives' fear of where the jury was likely to go, but whether the fear of a huge verdict was because of the jury's bias in favor of the hometown manufacturer/plaintiff, its negative view of ABC and the media caused by Trump's bloviating, or other factors is not known. ABC has refused to discuss or explain these matters publicly.

So to try to get answers to these important questions, at the MLRC's Virginia Conference (in Reston, Va. Sept. 26-28), we will have a program where jury consultants will address these issues. They will present both research aimed for their conference presentation and their experience in picking juries and observing voir dire and focus groups during the period of the Trump campaign and administration. The

At the Virginia Conference in September, jury consultants will present both research aimed for their conference presentation and their experience in picking juries and observing voir dire and focus groups during the period of the Trump campaign and administration.

results should be both fascinating and important. If there is little or no Trump effect, then we can treat Trump's bluster for what it is – just that. But if his barrages have led to juries coming out with more results against media defendants and higher verdicts, then we have a serious problem to grapple with. Either way that program – and the other breakfast program on the Masterpiece Cakeshop case, pitting First Amendment interests against LGBT interests (which the Supreme Court should have decided by the time of our Conference) which will include the lawyers who litigated the case and be moderated by Floyd Abrams – should be compelling. Both conference days should get off to rousing starts with these two breakfast programs.

\* \* \*

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At the recent Forum of Communications Law's Boca Conference (which is what I still call it) in Napa, Ca., John Borger of Faegre Baker Daniels in Minneapolis was given its Champion of the First Amendment award. While this was a great honor – and we congratulate John for it – my emphasis is on the truly lovely speech John gave in accepting the award.

The speech's theme was to underscore how lucky we are to be media lawyers, and how unique the media bar is. John cited the wonderful and interesting people who make up our little community, the collegiality of our lawyers (despite the competitive business setting), and the common mission we share – to preserve and protect the rights of free speech and a free and independent press for our clients and for our society. These are all important points, and ones which we sometimes overlook in the hurly-burly of our quotidian lives.

Indeed, a number of experienced lawyers I spoke to at Napa said that the value of John's talk was in sharing those ideas with the younger lawyers in the audience, who perhaps are not quite aware of how fortunate they are to be part of this unique group.

John cited the MLRC as an organization which, along with others, helped bring about the comity, collegiality and common purpose of our bar. Indeed, our conferences, our committees, really everything we do has a substantive educational purpose – but has an underlying goal of having our members become friends, congenial colleagues and lawyers sharing common interests and goals. When I am trying to solicit new members, I sometimes speak about their opportunity, through membership, of being on the First Amendment team, and I think it was

that feeling of teamwork, of comity and collegiality, which John was talking about. One sees all this in the engaged conversation at our committee meetings as well as in the excited buzz of conversation during breaks and receptions of our conferences as well as, most certainly, at our Annual Dinner.

So I'm happy to congratulate John for his honor, and also to thank him for giving me an easy opportunity to bring these ideas front and center. No matter how frustrating our jobs sometimes are, we should never forget how fortunate we are to be part of the media bar, and we should take care to pass that legacy on to future generations.

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

No matter how frustrating our jobs sometimes are, we should never forget how fortunate we are to be part of the media bar, and we should take care to pass that legacy on to future generations.

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### New York Federal District Court Rules Embedded Images Can Be Infringing

Goldman v. Breitbart: The Background and Decision

On July 14, 2016, I received a call from a young man looking for a copyright lawyer. (By coincidence, he got my name through a lawyer who eventually represented one of the defendants in the case to be discussed below.) He said that on July 2 he took a photo that within a few hours, without his knowledge or consent, went "viral" on the Internet, prominently appearing on countless well-known and heavily-trafficked websites. I thought: a slamdunk case of infringement. How little — alas — I knew.

The photo was of NFL superstar Tom Brady with officials of the Boston Celtics, who were apparently using Brady to lure NBA superstar Kevin Durant, newly a free agent, to the Celts. The young man, Justin Goldman, had posted the photo on his private Snapchat account, whereupon one of his authorized recipients started a convoluted chain of events that resulted in several tweets containing the photo being uploaded to Twitter. And those tweets were promptly seen by all those websites. And the rest, so to speak, is copyright history.





**Defendant NESN's embed** 

I took the case. And I quickly learned that possibly hundreds of websites (including some of the most popular) all made at least one of those tweets - with the photo front-and-center visible on their sites. And I quickly learned that virtually all of those sites vigorously disputed our infringement claim, invoking a word I had never before heard in the copyright context: "embed." Many, but not all, blew us off, with several aggressively threatening legal sanctions if we proceeded against them. (At the same time, an ever-increasing number agreed to settle.)

"Embed" as a defense to copyright infringement? Did I miss that class? How could it possibly immunize all those prominent

unauthorized uses? Well, it turns out that a 2007 decision by the U.S. Court of Appeals for the Ninth Circuit – serving California and other western states -- created the "embed" phenomenon. That case involved photos of nude models that were retrieved - swept-up - by the Google Image

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Search service. Users of the search engine seeking such photos would see them in lowresolution "thumbnails," but - as a result of coded "instructions" contained within the thumbnails - if they clicked on the thumbnails they would see the full high-resolution photos. The owner of those photos sued Google for copyright infringement, claiming in part that making them available in that way infringed the "exclusive right" granted to copyright owners in the U.S. Copyright Act to "display" their works "publicly" (the "display right"). In short, the owner claimed that Google unlawfully "displayed" the photos when it facilitated the appearance of them when the users clicked on the thumbnails.

The appeals court held that Google had not infringed the owner's display right. It reasoned that because Google didn't itself make copies of or store the photos on its server, and only provided "instructions" that facilitated its users' access to them, it was not (for purposes of the display right) "displaying" the photos. The court called this the "Server Test." (The case is Perfect 10, Inc. v. Amazon.com, Inc, 508 F.3d 1146 (9th Cir. 2007).)

Segments of cyberworld, and especially websites, quickly latched-onto the Perfect 10 (sometimes "P10") decision. They concluded that the decision declared a "rule of law" that if a

site - through coded "instructions" addressed to its users' browsers made content found on other sites appear on theirs - but without making a copy or saving it on their servers – those sites would not be "displaying" that content and therefore could not be found to infringe the display right. And that is what (most of) the websites in our case said they had done, explaining why they believed the appearance of the Brady photo on their sites was legally immune. P10, they claimed, fully legalized their actions.

Unpersuaded, we pressed our claim in discussions with lawyers for numerous sites, which resulted both in settlements and in "tell it to the judge" responses. Ultimately, in October 2016, we filed our first case -

"Embed" as a defense to copyright infringement? Did I miss that class? How could it possibly immunize all those prominent unauthorized uses?

against Advance Publications, Inc., the owner of several websites that embedded the photo as well as its own bounty of valuable copyrighted content, including from such publications as Vanity Fair, Vogue, and the New Yorker magazines. And then, in April 2017, we filed a second suit, against nine website-owning companies including Yahoo, Time, Inc., Gannett, NESN, and the first-named defendant, Breitbart News Network, LLC.

The Breitbart case was assigned to Judge Katherine B. Forrest, who showed an immediate interest in it and who promptly issued orders to expedite its consideration. The Advance case was assigned to Judge Andrew L. Carter, Jr., and it was ultimately put on a conventional (nonexpedited) schedule. It proceeds on that schedule. As a result, the Breitbart case took the lead in addressing (at least) the "embed" issue.

The Complaints in both cases contained extensive assertions addressing why the P10 "Server Test" lent no support for what these defendants did. (In an early order, Judge Forrest observed: "Here, the [Second Amended Complaint] is pled in an odd way—with much argument and few facts." (That Complaint contained three extensive hypotheticals that were part of that "argument," and we subsequently added several more in our briefing.) Almost

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immediately, most of those defendants (a few didn't embed) made motions to dismiss, claiming "as a matter of law" that their uses of the photo were *P10*-protected non-infringing "embeds" and, separately, were protected by the "fair use" doctrine in copyright law. Those motions were fully briefed by mid-August 2017, and less than a week later Judge Forrest denied both, stating: "[T]he Court has determined that it cannot resolve either of the instant motions under the Rule 12(b)(6) standard of review. The case law in this area, and the facts necessary to resolve the motions, make the motions a poor fit for a motion to dismiss."

Soon thereafter, it was agreed that there would be brief discovery on the embed issue and then the embedding defendants would move for summary judgment on that issue. (All other issues, including "fair use," would be dealt with later, to the extent the case survived that motion.) That motion was fully briefed by late November 2017, including *amicus* briefs supporting each side. (The amicus brief supporting the plaintiff, prepared by Kenneth L. Doroshow of Jenner & Block in Washington, D.C., on behalf of Getty Images (US) Inc.,

American Society of Media Photographers, Digital Media Licensing Association, National Press Photographers Association, and North American Nature Photography Association, was heavily relied on in Judge Forrest's ultimate opinion. The amicus brief supporting the defendants was submitted by the Electronic Frontier Foundation and Public Knowledge and was prepared by Mitchell L. Stoltz of EFF.)

Two days later, Judge Forrest issued an order directing the parties to respond to several new questions that she considered relevant to her adjudication of the motions. (Those questions centered on the fact that the defendants' embeds were from tweets that contained the photo.) The parties' replies to those questions were filed on December 18, and two days later Judge Forrest issued a further order that stated: "Having reviewed the parties' supplemental briefing, the Court believes that oral argument will be useful to resolution of this motion. Accordingly, oral argument is scheduled for Tuesday, January 16, 2018, at 2:00 p.m. The Court will allot ninety minutes to each side."

In her opinion, Judge Forrest closely examined the display right, emphasizing that the Copyright Act itself defines "display" as follows: "To display a work ... is to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process."

That oral argument took place as scheduled, albeit lasting only about two hours. Four weeks later, Judge Forrest rendered her <u>25-page opinion</u> denying the websites' motion for summary judgment on the embed issue and granting partial summary judgment on the issue to plaintiff Goldman.

In her opinion, Judge Forrest closely examined the display right, emphasizing that the Copyright Act itself defines "display" as follows: "To display a work . . . is to show a copy of it, either directly or by means of a film, slide, television image, or *any other device or process*" (Judge Forrest's emphasis). She further declared: "[I]n considering the display right, Congress cast a very wide net, intending to include '[e]ach and every method by which the images ... comprising a ... display are picked up and conveyed,' assuming that they reach the public... It further noted that 'display' would include the projection of an image on a screen or other surface *by any method*, the transmission of an image by electronic or other means, and the

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showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.' ... (emphasis added). Indeed, an infringement of the display right could occur 'if the image were transmitted *by any method* (by closed or open circuit television, for example, *or by a computer system*) from one place to members of the public elsewhere."

Clearly, Judge Forrest interpreted the display right with its proper historic breadth.

The opinion then discussed the post-*P10* decision by the Supreme Court in *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 134 S.Ct. 2498 (2014). In that copyright case the Court rejected a technical argument that stressed a difference between cable companies and what Aereo did, stating: "[T]his difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into 'a copy shop that provides its patrons with a library card.'"

Judge Forrest's opinion then turned to *P10*'s "Server Test." She noted that, despite the defendants' claims, very few other courts have even mentioned, much less adopted, the "Server

Test." And she then noted a November 2017 decision from a federal district court in Texas (*The Leader's Institute, LLC v. Jackson*, 2017 WL 5629514 (N.D. Tex. November 22, 2017)) that forcefully rejected *P10* and its "Server Test" in a case alleging infringement of the display right.

The opinion then confronted the ultimate issue to be decided. It summarized the parties' competing positions as follows:

"Defendants' argument is simple—they have framed the issue as one in which the physical location and/or possession of an allegedly infringing image determines liability under the ... exclusive display Despite the defendants' claims, very few other courts have even mentioned, much less adopted, the "Server Test."

right. Defendants argue that—despite the seamless presentation of the Brady Photo on their webpages—they simply provided 'instructions' for the user to navigate to a third-party server on which the photo resided. According to defendants, merely providing instructions does not constitute a 'display' by the defendants as a matter of law. They maintain that *Perfect 10's* Server Test is settled law that should determine the outcome of this case.

"Plaintiff maintains both 1) that to apply the Server Test leads to results incongruous with the purposes and text of the Copyright Act; and 2) even if the Server Test is rightfully applied in a case such as *Perfect 10*, or another case in which the user takes a volitional action of his own to display an image, it is inappropriate in cases such as those here, where the user takes no action to 'display' the image. He and his amici caution that to adopt the Server Test broadly would have a 'devastating' economic impact on photography and visual artwork licensing industries, noting that it would 'eliminate' the incentives for websites to pay licensing fees, and thus 'deprive content creators of the resources necessary to invest in further creation.""

Judge Forrest then declared her conclusion: "The Court agrees with plaintiff. The plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme Court jurisprudence provide no basis for a rule that allows the physical

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location or possession of an image to determine who may or may not have 'displayed' a work within the meaning of the Copyright Act. Moreover, the Court agrees that there are critical factual distinctions between *Perfect 10* and this case such that, even if the Second Circuit were to find the Server Test consistent with the Copyright Act, it would be inapplicable here."

Further: "It is clear ... that each and every defendant itself took active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown. Most directly this was accomplished by the act of including the code in the overall design of their webpage; that is, embedding. Properly understood, the steps necessary to embed a Tweet are accomplished by the defendant website; these steps constitute a process. The plain language of the Copyright Act calls for no more."

About Perfect 10 itself, the Judge wrote: "The Court declines defendants' invitation to apply

*Perfect 10's* Server Test for two reasons. First, this Court is skeptical that *Perfect 10* correctly interprets the display right of the Copyright Act. As stated above, this Court finds no indication in the text or legislative history of the Act that possessing a copy of an infringing image is a prerequisite to displaying it. The Ninth Circuit's analysis hinged, however, on making a 'copy' of the image to be displayed—which copy would be stored on the server. It stated that its holding did not 'erroneously collapse the display right in section 106(5) into the reproduction right in 106(1).' But indeed, that appears to be exactly what was done."

"Second, even if it correctly interprets the Act, to the degree that defendants interpret *Perfect 10* as standing for a broadly-construed Server Test, focusing on the physical location of allegedly infringing images, this Court disagrees. Rather, *Perfect 10* was heavily informed by two factors—the fact that the defendant operated a search engine, and the fact that the user made an active choice to click on an image before it was displayed—that suggest that such a broad reading is neither appropriate nor desirable."

Finally, Judge Forrest declared: "In addition, the role of the user was paramount in the *Perfect 10* case—the district court found that

users who view the full-size images 'after clicking on one of the thumbnails' are 'engaged in a direct connection with third-party websites, which are themselves responsible for transferring content."

"In this Court's view, these distinctions are critical. In *Perfect 10*, Google's search engine provided a service whereby the user navigated from webpage to webpage, with Google's assistance. This is manifestly not the same as opening up a favorite blog or website to find a full color image awaiting the user, whether he or she asked for it, looked for it, clicked on it, or not. Both the nature of Google Search Engine, as compared to the defendant websites, and the volitional act taken by users of the services, provide a sharp contrast to the facts at hand.

The plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme **Court jurisprudence** provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have 'displayed' a work within the meaning of the Copyright Act.

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"In sum, the Court here does not apply the Server Test. It is neither appropriate to the specific facts of this case, nor, this Court believes, adequately grounded in the text of the Copyright Act. It therefore does not and should not control the outcome here."

But the opinion did not quite end there. In a concluding section, Judge Forrest downplayed the defendants' proclaimed fear that a decision against them would "radically change linking practices, and thereby transform the Internet as we know it." As she put it, "The Court does not

view the results of its decision as having such dire consequences." She stressed that in this case, and by extension in others that might follow it, her decision does not mean the plaintiffs will ultimately win. She wrote: "Certainly, given a number as of yet unresolved strong defenses to liability separate from this issue, numerous viable claims should not follow."

And she concluded: "In this case, there are genuine questions about whether plaintiff effectively released his image into the public domain when he posted it to his Snapchat account. Indeed, in many cases there are likely to be factual questions as to licensing and authorization. There is also a very serious and strong fair use defense, a defense under the Digital Millennium Copyright Act, and limitations on damages from innocent infringement."

#### Postscript

Perhaps predictably, those who believe the Internet -- and everything on it -- should be "free" responded hysterically to the decision, especially as it is perceived to apply to Twitter and other social media. But it should be remembered that in our case Goldman had not posted his photo to Twitter and that, no doubt, the overwhelming majority of content on Twitter, etc., is actually posted by the rightful owners. In such cases, Twitter's Terms of Service explicitly authorize embedding. Of course, as a result of this decision, websites may have to think twice before helping themselves to presumably copyrighted content they see in tweets and the like, but they already exercise precisely that kind of caution before they help themselves to content that they see everywhere else. There is no reason why content on the Internet should not receive the same degree of care. As for Mr. Goldman's claims, Judge Forrest is correct that the case will now proceed to litigating other defenses, with substantive motions and perhaps a trial to follow. We may not know who ultimately will win this case for several years. But for now, at least in this Court, the blanket "embed" defense in cases like this one can no longer credibly be asserted. (As this LawLetter was about to be published, the embedding defendants filed motion papers asking Judge Forrest to certify the case for an immediate interlocutory appeal to the Second Circuit – a matter within her discretion. We will oppose that motion.)

Kenneth P. Norwick is a partner at Norwick & Schad.

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### Hypotheticals from Complaint in Breitbart

27. Plaintiff's undersigned counsel has previously presented the following hypothetical to (prior) counsel for the defendants in <u>Advance</u>: "A copyright lawyer walks into a bar -- named 'Remember 9/11.' At each end of the bar is an oversized computer screen, and each constantly shows (displays?) the exact same visual image: a full-screen, full-color rendition of the (much litigated) photo of the flag-raising at Ground Zero. The source for one computer is a 'copy' of the photo; the source for the other is a 'link' to a distant website, which may or may not have authority to offer the photo. Is one an infringement, and the other not? Can one (at least hypothetically) be enjoined, and the other not? Should these (otherwise identical) displays be treated wholly differently as a matter of copyright law?"

28. Advance's counsel candidly responded: "While your '9/11 Bar' hypothetical does a good job of showcasing how the server test can be perceivably absurd, it does not address the fact that the language of the Copyright Act [sic] does not consider in-line links to be infringing." Whether the "language" of the Copyright Act in fact mandates the admittedly "absurd" outcome to be urged by defendants here will be the central issue to be decided by this Court in this case. (Second Circuit: "A statute [here, the Copyright Act] should be interpreted in a way that avoids absurd results." <u>United States v. Dauray</u>, 215 F.3d 257, 264 (2d Cir. 2000).)

29. More recently, Plaintiff's counsel presented a second hypothetical to counsel for the defendants in <u>Advance</u>: "A company named Server, Inc. owns 500 highway billboards in the state of New Jersey, all of which are controlled by computers. The 'Trump for President' campaign -- or, alternatively, the Klan, or maybe just a prominent 'Gentlemen's Club' -- contracts with Server, Inc. to display in full and filling the entire billboards the Ground Zero flag-raising photo, possibly with a legend at the bottom saying 'Brought to you by . . . .' Instead of getting a license from the copyright owner for these 500 displays, the entity chooses the 'embed' method of acquiring and displaying the photo. Questions: Infringement? or Perfectly Legal?"

30. Advance's counsel did not respond to that hypothetical. Here too, if the defendants are to prevail in this case, this Court will necessarily have to find that those 500 uses are "perfectly legal."

31. And here's a third (and final) hypothetical: "It is the seventh game of the World Series -- for these purposes, at Citi Field -- and during the 'seventh inning stretch' the people in charge decide -- without any authority -- to display that same flag-raising photo in full on the jumbotron, where it is seen by 50,000 people in the stadium and by 100 million people on television. Solely to avoid the (presumably high) license fee that would otherwise be required, it is decided to display the photo through [the] 'embed' process. Questions: Infringement or Perfectly Legal?" For the defendants to prevail in this case, this Court will have to find that that (humongous) display of that copyrighted photo was perfectly legal.

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### **Court Awards \$6.75 Million to Graffiti Artists Under VARA**

#### **By Naomi Sosner**

In a dramatic denouement to what is now known as the 5Pointz litigation, last month a federal judge in Brooklyn awarded twenty-one graffiti artists—or aerosol artists, the term used by the court—a combined \$6.75 million. <u>Cohen v. G & M Realty L.P.</u>, No. 13-cv-05612, 15-cv -3230, 2018 U.S. Dist. LEXIS 22662 (E.D.N.Y. Feb. 12, 2018) (Block, J.) (*"Cohen II"*).

The sum represents the maximum statutory damages under the Visual Artists Rights Act of 1990 ("VARA"), 17 U.S.C. § 106A, for forty-five works of "recognized stature" destroyed in 2013 at the 5Pointz complex in Long Island City, Queens.

The forty-five works were among tens of thousands of murals that swirled, for various periods of time, the walls of the 5Pointz complex's decade-long evolution from an unusual collaboration between real estate owner and graffiti artist into "the repository of the largest collection of exterior aerosol art" in the nation. *Cohen v. G & M Realty L.P.*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013) ("*Cohen I*"). The litigation is the first decision to protect outdoor graffiti under VARA.

#### Background

In the 1960's, Gerald Wolkoff, native of Brownsville, Brooklyn, created and sold a floor-waxing business before graduating high school. He used the proceeds to establish a residential development company that, years later, he transitioned into commercial and industrial development. By the late 1970s, Wolkoff was buying property in Long Island City, which was, at the time, a manufacturing hub. He bought 5Pointz, a complex of 10 warehouse buildings, for a little over \$1 million, and converted them, in the early 1990s, into artist studios. Wolkoff met Pat Delillo of Phun Phactory, a nonprofit that pointed graffiti artists to buildings in Long Island City whose owners

A federal judge in Brooklyn awarded twenty-one graffiti artists—or aerosol artists, the term used by the court—a combined \$6.75 million.

allowed graffiti, and granted oral permission for aerosol artists to paint 5Pointz. Graffiti artists sprayed all over the buildings, but the area remained gritty and there was no control over the quality of the artists or the work.

In 2002, Wolkoff effectively made Jonathan Cohen, a plaintiff, the curator of the complex. Cohen, also a graffiti artist, organized a cleanup of the area and established a system for creation and curation. Artists competed for prime real estate, prizing the walls facing the 7 train tracks, near the loading docks, and inside the buildings. Crime dropped in the neighborhood, and, over time, 5Pointz became famous for its art. "...[Wolkoff's] building emerge[d] as a mecca for the world's largest collection of quality outdoor aerosol art." *Cohen II*, at \*17.

According to Wolkoff, his permission to paint on 5Pointz was given with the caveat that the complex would, at some point, come down, and at trial Cohen acknowledged he knew Wolkoff

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Artists competed for prime real estate, prizing the walls facing the 7 train tracks, near the loading docks, and inside the buildings. Over time, 5Pointz became famous for its art.

intended to demolish the warehouses and replace them with luxury condominiums. Nevertheless, when in May 2013 Cohen learned that Wolkoff had begun the regulatory process to seek approval for the condos, Cohen made various attempts to save 5Pointz, including having it deemed a site of cultural significance and buying the complex outright. These efforts unsuccessful, Cohen, along with other grafitti artist plaintiffs, filed suit under VARA to enjoin Wolkoff from destroying 5Pointz.

On November 12, 2013, after a hearing, Judge Block denied plaintiffs' application for injunctive relief. Eight days later, the court issued its written opinion. Rights accorded under VARA, in the court's view, are in tension with traditional property rights; in balancing the two, the court refused to enjoin Wolkoff but noted that he may be liable for damages if it was ultimately determined that plaintiffs' works were protected under VARA.

Wolkoff, the court noted in Cohen II, took drastic action in the

VARA amended existing copyright law to guard two "moral rights" of artists, the rights of attribution and integrity.

eight-day interim between the court's decision and the release of its written opinion. Wolkoff whitewashed the walls of 5Pointz, destroying nearly all of the art. Some works were entirely masked in the paint, while others were half-visible, half-hidden under inconsistently applied layers. None of the whitewashed works were recoverable. 5Pointz thus remained, a sepulcher of white, for the nearly ten months that followed while Wolkoff obtained the regulatory permits needed to demolish the warehouses. This phase of litigation commenced to determine whether plaintiffs could recover monetary damages under VARA.

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#### VARA

VARA amended existing copyright law to guard two "moral rights" of artists, the rights of attribution and integrity. In protecting the right to integrity, VARA provides "the author of a work of visual art" the right

- (A) to prevent any intentional destruction, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
- (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

17 U.S.C. § 106A(a)(3).

Section 113(d) of VARA addresses two scenarios concerning a protected work of art that has been integrated into a building after June 1, 1991, VARA's effective date. As the court summarized:

Under § 113(d)(1), if a work is not removable without destroying, mutilating, distorting, or otherwise modifying the work, the artist's VARA right of integrity under § 106A(a)(3) attaches, and the artist may sue to prevent the destruction of the work unless the right is waived "in a written instrument . . . that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal." § 113(d)(1)(B).

Under § 113(d)(2), if a work is removable without destroying, mutilating, distorting, or otherwise modifying it, VARA gives the artist the opportunity to salvage the work upon receipt of a 90 days' written notice from the building owner of the owner's "intended action affecting the work of visual art." 17 U.S.C. §§ 113(d)(2)(A)-(B). If the artist fails to remove or pay for the removal of the works within the 90 days —or if the owner could not notify the artist after making a "good faith effort," 17 U.S.C. § 113(d)(2)(A)—the artist's VARA rights are deemed waived for the removable work, and the owner may destroy them without consequences.

Cohen II, at \*7-8.

Damages under § 106A(a)(3) are the same as those granted for copyright infringement unlimited actual damages and statutory damages of not more than \$30,000, unless the court finds that the defendant acted willfully in violating the applicable VARA protection—in which

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case statutory damages are capped at 150,000 per work. The plaintiff must elect either actual or statutory damages before final judgment is rendered. 17 U.S.C. § 504(c)(1).

#### **Application of VARA**

In *Cohen I*, the court held that plaintiffs' aerosol art constitutes "visual art" under VARA. *Cohen I*, at 216. The plaintiffs' entitlement to damages, and the magnitude of damages available, turned on whether, at trial, it was determined that § 106A(a)(3)(A) or (B) applied—meaning, that the destruction/mutilation/other modification "prejudice[ed]" the artist's honor, or whether the destroyed works were of "recognized stature"—and that Wolkoff's acts were willful. At plaintiffs' insistence, the court convened a jury to issue what ultimately became advisory findings. (Prior to summation, plaintiffs, with Wolkoff's consent, waived their jury rights. Rather than dismiss the jury, the court converted the jury decision into an advisement. The jury found Wolkoff liable, and his acts willful. The jury further awarded damages in connection with thirty-six of the forty-nine works of art at issue in this litigation. The court ultimately agreed that Wolkoff willfully violated plaintiffs' rights with respect to the thirty-six works, and expanded its decision to another nine works. *See Cohen II* at \*4. )

The jury, and the court, concluded that Wolkoff willfully violated plaintiffs' VARA rights

under § 106A(a)(3)(B) by destroying works of "recognized stature." Wolkoff's main argument was a threshold one: that VARA does not apply to temporary works of art, and that plaintiffs knew their works were temporary—because it was common knowledge that the warehouses would at some point come down, and, moreover, because the work of an outdoor grafitti artist is in essence ephemeral; on 5Pointz, grafitti appeared and disappeared, erased and replaced over

The court concluded Wolkoff acted with "the epitome of willfulness."

and over again. The court, looking to VARA's § 113(d), the provision addressing temporary work on buildings, relevant case law, and copyright law, rejected the contention: "[i]n short, there is no legal support for the proposition that temporary works do not come within VARA's embrace." *Cohen II*, at \*22.

The court then turned to damages. Focusing on "recognized stature" under § 106A(a)(3)(B), the court adopted and adapted the Second Circuit's instruction to "use common sense and generally accepted standards of the artistic community in determining whether a particular work' is a work of visual art," *Cohen II*, at \*29 (quoting *Carter v. Helmsley-Spear, Inc.,* 71 F.3d 77, 83 (2d Cir. 1995)), applying it to the question of whether a work of art is of "recognized stature." It concluded that the plaintiffs' evidence at trial—numerous exhibits and credible testimony, including that of an art expert—easily settled the issue. According to the court, forty-five of the forty-nine works at issue in this litigation achieved recognized stature. *See Cohen II*, at \*32, \*35. Because of VARA's damages framework and the court's refusal to award actual damages, subsequent application of § (3)(A) to those forty-five works would be academic. *See Cohen II*, at \*36. The court therefore considered only whether § (3)(A) was a pathway to damages for the remaining four works of art, and decided it was not. *See id.* at \*36-37.

In assessing damages, the court rejected plaintiffs' contention that they are entitled to damages for emotional distress under VARA, and declined to award actual damages with

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respect to any of the destroyed works because plaintiffs failed to establish a reliable market value for them. Considering Wolkoff's behavior—failing to give the artists ninety days' notice so that they could try to salvage their art, per § 133(d)(2), and, significantly, whitewashing 5Pointz ten months before demolition in what the court concluded was an act of "pure pique and revenge for the nerve of the plaintiffs to sue to attempt to prevent the destruction of their art []", *Cohen II*, at \*44—the court concluded Wolkoff acted with "the epitome of willfulness." *Id.* Based on additional relevant factors—Wolkoff's state of mind, the profits he gained, (including a \$160 million increase in land valuation as a result of a variance obtained), revenue lost by the artists, the deterrent effect on Wolkoff and similarly placed third parties, and the parties' conduct and attitude—the court awarded the maximum \$150,000 for each of the forty-five works, for a total statutory damage award of \$6,750,000.

Naomi Sosner is MLRC's 2017-18 Legal Fellow. Plaintiffs were represented by Eric Baum and Andrew Miller, Eisenberg & Baum LLP, NY. Defendant was represented by David G. Ebert and Mioko Tajika, Ingram Yuzek Gainen Carroll & Bertolotti, LLP, NY.



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### West Virginia Court Dismisses Mine Owner's Defamation Case Against John Oliver, HBO

A West Virginia federal district court dismissed a high-profile libel suit brought by coal mine owner Robert Murray against comedian John Oliver and HBO. <u>Marshall County Coal et</u> al. v. Oliver et al., No. 17-C-124 (W.Va. Cir. Feb. 23, 2018).

At issue was a segment on Oliver's show *Last Week Tonight* criticizing President Trump's coal industry policy and promise to bring back coal mining jobs. The segment ended with a lengthy and scathing critique of Murray who had sent the show a cease and desist letter after being contacted to comment on the issues.

Describing Murray as resembling a "Geriatric Dr. Evil," Oliver reviewed his company's worker health and safety record, a recent deadly accident in Murray's Utah mine, and his own statements saying that coal jobs are not coming back. Oliver acknowledged that Murray would

likely sue the show given his history of litigiousness. The segment ended with the appearance of a giant squirrel named "Mr. Nutterbutter" holding a large check paid to the order of "Eat Shit, Bob!" in the amount of three acorns and eighteen cents.

On February 23, West Virginia Circuit Judge Jeffrey Cramer informed the parties by letter that he was dismissing the complaint for failure to state a claim for the reasons raised in defendants' brief. The judge described those reasons as wellfounded and appropriate. A separate motion to dismiss based on lack of personal



jurisdiction was therefore moot. The judge directed the defendants to prepare an order of dismissal, including findings of fact and conclusions of law supporting dismissal.

The defendants' <u>brief to dismiss for failure to state a claim</u> raised numerous defenses to Murray's complaint. Among them, that statements about the deadly mine accident were true and/or a fair report; that other statements sued upon were hyperbole or opinion; and that Murray failed to plead facts to support actual malice.

An <u>amicus brief from the West Virginia ACLU</u> had more fun with the issues and asked the court to sanction Murray. The ACLU's brief argued, inter alia, that "All of John Oliver's Speech Was Protected by the First Amendment. You Can't Sue People for Being Mean to You, Bob."

John Oliver and HBO were represented by Kevin Baine and Thomas Hentoff, Williams & Connolly, LLP, Washington, D.C. Plaintiff was represented by Michael Barrie and William Alleman, Jr., Benesch, Friedlander, Coplan & Aronoff, Wilmington, DE.

### **Court Halts War of the Experts Arising Out of ABA Judges' Journal Article**

Dismisses Defamation, False Light and Related Unfair Competition Claims with Prejudice

By Steven P. Mandell, Stephen J. Rosenfeld and Danielle N. Twait

The American Bar Association publishes *The Judges' Journal*, a quarterly compilation of articles written by practitioners in various fields of study of interest to the judiciary. The *Journal's* Summer 2015 issue focused on the judiciary's gatekeeping function with respect to forensic scientific evidence. In the issue, Thomas Vastrick – a prominent forensic scientist – wrote essentially a "how-to guide" for judges tasked with qualifying expert witnesses in cases involving handwriting comparison and forgery. Specifically, Vastrick wrote about the qualifications that judges should consider to adequately fulfill their gatekeeping function in assessing expert witness qualifications. Framing his article in terms of "what to look for" versus "what to look out for," Vastrick contended that a key differentiator between a "true

professional" and a "lesser-qualified candidate" was his or her training. He contended that judges should look for forensic document examiners who have completed their training on a full-time, on-the-job basis and who (like himself) are certified by the American Board of Forensic Document Examiners (the "ABFDE") as opposed to other certifying organizations.

One such "other certifying organization" is the Board of Forensic Document Examiners (the "BFDE") which claims to be a competitor of the ABFDE. The BFDE and eight of its members - most of whom have completed their training on a part-time and off-site basis in the private sector - took offense at Vastrick's article and his criteria. They sued Vastrick, the ABFDE, the ABA which published the article and sitting Erie County, Pennsylvania Judge Stephanie Domitrovich (who edited the article) in the Northern District of Illinois for defamation, false light, conspiracy and violations of the Lanham Act and eight state unfair competition laws. Judge Chang's decision is significant for its thorough consideration of the many thorny procedural and choice of law issues that arise in a defamation case brought by multiple plaintiffs residing in many different states.

Defendants moved to dismiss the claims arguing, among other things, that the allegedly defamatory statements were not "of and concerning" the plaintiffs and were constitutionally protected opinions. On February 22, 2018, the United States District Judge Edmond E. Chang issued a <u>24-page memorandum opinion and order</u> granting defendants' motion to dismiss with prejudice.

Judge Chang's decision is significant for its thorough consideration of the many thorny procedural and choice of law issues that arise in a defamation case brought by multiple plaintiffs residing in many different states. The case involved eight plaintiffs from eight different states, requiring the Court to first answer the complex threshold question of "which state's law applies to which claim, and indeed, [which law applies to] which issue" under

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Illinois choice-of-law rules and the doctrine of dépeçage. The Court determined that in the event of a conflict of the eight different state laws, the Court must apply the law of each of the plaintiff's domicile to his or her claims. Under the doctrine of dépeçage, the Court analyzed whether there was a conflict on an issue-by-issue basis and, with one exception, found no conflict and applied Illinois law to the "of and concerning" issue and defendants' opinion defense. The only exception was as to one plaintiff who resided in New York. Unlike Illinois law, New York law allows a plaintiff to offer extrinsic facts to establish whether a statement is "of and concerning" a plaintiff.

As to the merits of plaintiffs' claim that the Article contained defamatory statements, the Court held that the statements were not "of and concerning" the plaintiffs. It was undisputed that the Article did not specifically identify any of the plaintiffs by name. Moreover, the Court rejected plaintiff's group defamation theory finding that the statements could be referring to any forensic document practitioner – not just the twelve that are certified by BFDE. And, even under New York law, which allows for the use of extrinsic evidence to show that a statement is "of and concerning" a plaintiff, the Court found the existence of extrinsic evidence still "does *not* mean that a reasonable reader somehow has access to all that information and thus would interpret the statement to target him."

Despite concluding that plaintiffs could not meet the "of and concerning" element of their defamation *per se* claims, the Court also determined that the statements at issue were "constitutionally protected expressions of *opinion*, rather than factual assertions." In making this determination, the Court carefully analyzed the overall context in which the statements were made including the fact that it was a "scholarly" journal, which "sets the stage for the article as an opinion piece. . . ." The Court pointed to cues within the Article including: Vastrick was offering "suggestions" for judges and used phrases such as "if I might respectfully suggest"; Vastrick specifically gives examples of "What to look for" and "What to look out for"; and Vastrick even used the word "Tips" in the title of the article, all of which conveys to a reader that what follows is the author's opinion.

In view of its conclusion that plaintiffs' defamation claim failed as a matter of law, the Court also dismissed on the same grounds plaintiffs' claims for false light invasion of privacy. Finally, noting that the Lanham Act and state unfair competition laws prohibit "false or misleading" descriptions or representations "of fact," the Court dismissed plaintiffs' claims under those statutes based on its determination that the statements in Vastrick's article were non -actionable opinions as opposed to assertions of fact. Significantly, Judge Chang dismissed all claims, with prejudice, reasoning that "Plaintiffs have already amended the complaint once, and there is no reason to think that the allegations can be amended again to overcome the barriers identified in this Opinion."

Plaintiffs Board of Forensic Document Examiners, Inc., M. Patricia Fisher, Lynda Hartwick, Andrew Sulner, J. Michael Weldon, Emily J. Will, Vickie L. Willard, and Robin D. Williams were represented by Ariel Weisssberg and Devvrat Vikram Sinha of Weissberg & Associates, Ltd. and Andrew Sulner of Law Office of Andrew Sulner; Defendants American Bar Association, Thomas Vastrick, Stephanie Domitrovich, and the American Board of Forensic Document Examiners were represented by Steven P. Mandell, Stephen J. Rosenfeld, and Danielle N. Twait of Mandell Menkes LLC and David Korzenik of Miller Korzenik Sommers LLP.

### Actor's Right of Publicity Lawsuit Over Simpsons Character Fails

To Be 'Simpsonized'' Is to Be Transformed

A California Court of Appeal panel affirmed dismissal of an actor's right of publicity lawsuit over the alleged use of his likeness to create a character in the cartoon show *The Simpsons*. Sivero v. Twentieth Century Fox Film Corporation, No. B266469 (Cal. App. Feb. 13, 2018) (unpublished) (Bensinger, Perluss, and Zelon, JJ). Affirming an anti-SLAPP motion to strike, the court held that even if the cartoon character resembled plaintiff, it contained significant transformative content other than plaintiff's likeness.

#### Background

Frank Sivero, an actor best known for playing mafia men in *The Godfather Part II* and *Goodfellas*, contended *The Simpsons* based one of its minor characters on Sivero's *Goodfellas* role. Sivero filed suit against Twentieth Century Fox, which produces *The Simpsons*, for, among other things, infringing his right of publicity and misappropriating his name and likeness. Fox filed a special motion to strike under California's anti-SLAPP law, which the trial court granted and the Court of

Appeal affirmed.

In 1989, Sivero lived across the hall from two *Simpsons* writers in Sherman Oaks, California. According to the complaint, they allegedly knew that Sivero was developing a mafioso character "Frankie Carbone" for *Goodfellas*. Two years later, in October 1991, *The Simpsons* debuted the character Louie, a mafia henchman who resembled Sivero's Frankie Carbone character. Louie appeared in fifteen other episodes of the



Left: Frank Sivero as Frankie Carbone in Goodfellas; right: Louie from The Simpsons

television show and in a movie and video games based on the show.

Sivero filed suit against Fox on October 21, 2014, alleging causes of action for (1) common law infringement of right of publicity; (2) misappropriation of name and likeness; (3) misappropriation of ideas; (4) interference with prospective economic advantage; and (5) unjust enrichment. He sought \$250 million in damages. Fox filed a motion to strike under California's anti-SLAPP statute, Code of Civil Procedure 425.16, arguing that Sivero's complaint arose from protected activity and that Sivero could not show a probability of prevailing on any of his claims. (Fox also argued that the Copyright Act preempted Sivero's claims. The trial court rejected the argument; the California Court of Appeal declined to reach it. *See Sivero v.* 

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*Twentieth Century Fox Film Co.*, Cal. Ct. App. B266469 (Feb. 13, 2018) (unpublished), at 5 n.3, 26 n.12.)

The trial court granted Fox's motion. *See Sivero v. Fox Television Studios, Inc.*, Cal. Super. No. BC561200, Tentative Order dated August 6, 2015. Analyzing Sivero's complaint under the two-step anti-SLAPP framework, the court determined that Sivero's claims arose from protected activity and that he failed to establish a probability of prevailing on them.

#### **Court of Appeal Opinion**

The Court of Appeal affirmed, first noting that all of Sivero's claim arose from activities in furtherance of the constitutional right of free speech. Because Sivero did not challenge the trial court's ruling that he failed to establish a probability of prevailing on his third, fourth, and fifth causes of action, the Court of Appeal limited its analysis of the second anti-SLAPP step to Sivero's first and second claims: common law right of publicity and misappropriation of name and likeness. *Sivero*, at \*16 n.8. The court ruled that transformative use doctrine provides a complete defense to both. *Id.* at \*29. (Sivero brought his second cause of action under California Civil Code 3344, which establishes a statutory right of publicity that adds two elements to the common law right of publicity: the defendant's knowing use and a direct connection between the defendant's use and the commercial purpose. *See Sivero*, Cal. App. B226469, at 16.)

The Court framed the question of transformative use in right of publicity claims as follows:

...the First Amendment is an affirmative defense to a cause of action based on the right of publicity to the extent that the challenged work 'contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame.

### *Id.* at \*19 (quoting *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal. 4th 387, 407)).

Fox had "Simpsonized" Sivero's likeness, the Court ruled, and "to be 'Simpsonized' is to be transformed by the creative and artistic expressions distinctive to *The Simpsons*." *Id.* at \*26. Louie would not be a "satisfactory substitute" for a depiction of Sivero, and, therefore, Louie does not significantly undermine Sivero's right of publicity. *Id.* 

The court's transformative use analysis is of particular interest to those waiting for the California Court of Appeal's decision in *FX Networks, LLC v. De Havilland*, No. B582629. Actress Olivia de Havilland filed suit over her depiction in the FX Network series *Feud: Bette and Joan*, for violations of her privacy and right of publicity. The trial court rejected FX's anti-SLAPP motion, ruling that de Havilland has shown a minimal probability of prevailing on the merits of her claims—reportedly in part because FX's depiction of her was realistic and therefore not transformative.

Twentieth Century Fox Film was represented by Robert H. Rotstein, Aaron M. Wais and Daniel A. Kohler, of Mitchell Silberberg & Knupp, Los Angeles. Sivero was represented by Alejandro H. Herrera, Hess, Hess & Herrera, Santa Monica, CA.

### **CNN Request Spurs Court to Unseal Clinton-Starr Grand Jury Documents**

#### **By Drew Shenkman**

Documents from Ken Starr's 1998 grand jury inquiry into President Clinton's relationship with White House intern Monica Lewinsky <u>have been unsealed in response to a request from</u> <u>CNN</u>. The request also uncovered that, through an unexpected series of oversights from the clerk's office, prosecutors, and the court, many of the dockets and records of the utmost public interest and historical significance regarding the American presidency weren't available thought the branch of government that originated them.

On February 12, Chief Judge Beryl Howell of the U.S. District Court for the District of Columbia unsealed eight miscellaneous dockets and related documents that were attached to or mentioned in Starr's famed report to the House of Representatives. The court ordered the Department of Justice to respond with its view on whether the remaining documents can be unsealed, and gave the relevant grand jury witnesses an opportunity to weigh in. Days later,

former President Clinton intervened in the

<u>case</u> to "present his position" about the records of his own grand jury subpoena, including a grand jury leak investigation not initially requested by CNN.

CNN's request came after its journalist <u>Katelyn Polantz looked to Starr's 1998</u> <u>grand jury investigation</u> for the last time an independent prosecutor investigated a sitting president, and to compare that to Special Counsel Robert Mueller's ongoing investigation into Russian meddling and the Trump Campaign. In the appendices of the Starr Report, Polantz analyzed a series of letters and documents exchanged



between Starr and Clinton's legal team over his would-be grand jury testimony, and the interplay of attorney-client privilege and executive privilege. Polantz's reporting showed the roadmap Mueller might take when negotiating with President Trump for his eventual interview or testimony.

But Polantz's research hit a snag when she discovered that at least eight dockets remained completely sealed in the D.C. federal courthouse. Neither the name of the action nor interested party was publicly available. That led to <u>CNN's letter request to Chief Judge Howell</u> asking for the unsealing of the dockets and all non-core grand jury information found inside. CNN principally argued that unsealing was appropriate due to the 20-year passage of time, the intense media coverage of the proceedings, the resulting public judicial opinions, including at the U.S. Supreme Court, and the prior disclosures found within the Starr Report appendices. CNN also

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argued that the Independent Counsel long ago concluded its investigation, and that the office no longer exists as due to the lapse of the independent counsel law.

In granting CNN's request, and in a somewhat surprising turn and troubling development for transparency advocates, the court noted the D.C. Circuit had previously unsealed the material found in the Starr Report, but that such unsealing never actually took place in the Clerk's Office. The court also disclosed that then-Chief Judge Johnson had previously entered orders unsealing, in full or in part, certain other documents, but those orders too were not carried out.

In Chief Judge Howell's order, the court directly the clerk to expeditiously unseal the dockets and documents previously ordered by the court to be disclosed.

Turning to CNN's CNN's request for the disclosure of the remaining non-core grand jury material, the court ordered DOJ to provide its view, as well as to provide notice to the recipients of the grand jury subpoenas at issue and give an opportunity for their view. The court's order suggests that it may entertain privacy concerns these individuals may have *in camera* and *ex parte*.

Interestingly, when President Clinton moved to intervene, the former president suggested in a filing that he may seek the unsealing of additional dockets related to an unlisted leaks investigation. Polantz's reporting showed the roadmap Mueller might take when negotiating with President Trump for his eventual interview or testimony.

The court granted President Clinton's motion to intervene on February 16, and the parties have agreed to a March 22 deadline for DOJ, President Clinton, and any other interested parties to respond.

Drew Shenkman is Senior Counsel for CNN in Atlanta, and filed the letter request with Chief Judge Beryl Howell on behalf of CNN and reporter Katelyn Polantz; Chuck Tobin, Adrianna Rodriguez, and Max Mishkin of Ballard Spahr in Washington, D.C. represent CNN in the pending miscellaneous action.

### Judge Refuses to Seal Bulk of Documents in High Profile Kidnapping Trial

Defendant Argued Online Publicity Required Sealing

#### By Jennifer A. Mansfield

On February 2, 2018, Florida Circuit Judge Marianne L. Aho issued a written ruling denying a request to seal most of the documents produced by the State to a defendant being prosecuted for kidnapping, and granted closure for only a handful of the 1,000+ pages of documents the defendant sought to have sealed. *State v. Williams*, Case No. 16-2017-CF-00539.

Defendant Gloria Williams is accused of kidnapping a newborn baby girl in Jacksonville, Florida, and transporting her to South Carolina where she raised her as her own child. Eighteen years later, law enforcement authorities tracked down the child and arrested Defendant Williams. Williams now faces trial in Jacksonville, Florida.

The defense filed a motion seeking to seal all 1,000+ pages of documents the defense obtained from the State, until the jury had been seated in the case. In Florida, all discovery

materials released to a defendant are public records, and before an order can be entered to seal those records, the defense must prove (1) an imminent danger to her right to a fair trial, (2) other methods of protecting the fair trial rights won't be effective, and (3) sealing the materials would be effective at preventing the harm sought to be avoided.

This case was unusual because Williams' defense attorney took the very rare step of requesting and conducting an evidentiary hearing to show the amount of news reports. Although Florida law requires an evidentiary showing before sealing court or public records, it is actually rare for a defense attorney to request such an evidentiary hearing. Williams' defense attorney took the very rare step of requesting and conducting an evidentiary hearing to show the amount of news reports.

Here, the defense put on the testimony of a private investigator, who spend 4 ½ days searching the Internet for reports about the Williams case. He found two closed-groups on Facebook devoted to the case and 235 news articles, "many of which were duplicative of content but that included unique comments." Defense counsel then characterized the coverage as "saturated," and argued that media coverage has changed significantly since the time when the case law establishing Florida's closure standard was established, because of the pervasiveness of the Internet. Thus, defendant's motion was a full assault on the established standards for closure of records released to a defendant.

The judge was very cognizant of the competing constitutional rights at issue, and at the first hearing held that the blanket order of protection for all the documents did not meet the legal standard for closure. She required the defense to narrow the documents sought to be sealed and to make specific objections as to why each should be sealed. She then scheduled a second hearing, where the defense and media attorneys presented argument on the narrowed scope of the closure requests.

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Ultimately, the judge ruled in favor of releasing the vast majority of items. She only temporarily sealed personal medical bills, medical records, social security numbers, and school records of the alleged victim, as well as documentation of an unrelated criminal offense from which the alleged victim in this case may have been an alleged victim in another case as a minor, and portions of video and audio of witness interviews that contain confessions or admissions by the defendant. For all other materials the judge denied the motion to temporarily seal.

The judge rejected defendant's argument that the Internet reports would have a greater impact that traditional media. "After review of the evidence, the Court finds that there has been extensive publicity surrounding this case; however, Defendant has not established that such publicity has been, thus far, overwhelmingly adverse." The judge also held that the defendant had not shown how members of the two private Facebook groups could not be identified through traditional voir dire.

The sealed materials, other than medical records and social security numbers, will be opened once defendant trial or legal proceedings are completed.

Jennifer A. Mansfield of Holland & Knight LLP's Jacksonville office represents Intervenor Multimedia Holdings Corporation d/b/a WTLV/WJXX First Coast News, Edward L. Birk of Marks Gray, P.A. represents Intervenor Graham Media Group, Florida, Inc. d/b/a WJXT-TV4 and NEWS4JAX.COM, Rachel E. Fugate and Giselle M. Girones of Shullman Fugte PLLC represents Intervenor Cox Media Group Jacksonville, owner of WJAX-TV, Diana L. Johnson of Johnson and Lufrano, P.A. represents Defendant Gloria Williams; Alan S. Mizrahi, Office of the State Attorney, represents the State of Florida.



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### MLRC MediaLawLetter

### Ten Questions to a Media Lawyer: Steve Mandell





Firm founders Steve Mandell and Bruce Menkes in 2001

Steven P. Mandell is a partner at Mandell Menkes LLC in Chicago.

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

It has been a progression and hopefully an inspiration for anyone who feels like they are stuck in an area of law they don't love. I started my career in 1982 as a commercial litigator at a mega-firm, doing mostly insurance cases. In the late 80s, I was serendipitously brought in (by an entertainment lawyer cousin) to defend a rock band professionally known as Enuff Z' Nuff, which at the time was signed to Atlantic Records but hopelessly embroiled in a dispute with their business manager.

That case introduced me to Peter Parcher, who was not only Atlantic Records' outside counsel, but one of the most well-respected entertainment litigators in the country. Peter gave me an entree into more entertainment litigation and, in the early 90s, I became involved in a number of high-profile cases, most notably the Milli Vanilli class action litigation (involving 27 class actions in state and federal courts across the country) and a similar lip-synching case for Paula Abdul.

My work in the music industry took me to some interesting places including handling trademark litigation for the Grateful Dead and Tom Petty and the Heartbreakers and being the "lawyer on call" for the Rolling Stones Soldier's Field concert in Chicago. Having established myself somewhat in this new area, I left my big firm (in 1994) to form what is now Mandell Menkes LLC.

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Mandell profiled in 2014

Within weeks of starting our new firm, I got involved in my first privacy case, representing Acclaim Entertainment, Nintendo and Sega in the defense of right of publicity claims and a motion for a TRO filed by martial artists whose likenesses were used in the wildly successful video game known as *Mortal Kombat*. But it was probably my attendance at the inaugural meeting of ABA Forum on Communications Law twenty-four years ago that opened up a new frontier for me in terms of becoming a "media lawyer" and paved the way for my first real first amendment case.

In that case, I represented Spelling Entertainment and CBS in defending against defamation claims arising out of a docudrama entitled *Precious Victims*. The movie told the story of Paula Sims who was convicted of murdering her two baby girls after unsuccessfully raising the "post-partum depression" defense. Paula's husband, who although never charged or arrested was suspected of having some involvement in the crimes, filed the defamation suit based in part on the docudrama's dark portrayal of him.

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

What I like most: First, I love that my cases most often involve fascinating people in fascinating situations, all against the backdrop of a rapidly-evolving area of the law. They have provided some interesting experiences including the opportunity to depose people like Michael Jordan, the Chief Justice of the Illinois Supreme Court and the "Muhammed Ali of Japan" and hang out with the Grateful Dead and Paula Abdul. Second, in those cases that involve free speech or access issues, it's very gratifying to feel that your work is not only benefiting your client but also the public at large.

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What I like the least is how economics have affected the practice. The rising cost of litigation (and particularly discovery) has forced too many litigants to abandon their ideals because of the cost of fighting to protect their principles. The business of the practice then overtakes the actual legal work and our interactions with our in-house counterparts. Budgets, bills, audits, blech!

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

Two blunders come to mind. First, I allowed an industrious associate to send subpoenas to a number of television stations that included a request for outtakes. Second, I was representing a large, well-respected if not old-fashioned company in a trademark tarnishment case against a soft-porn graphic artist who had used the company's name in a, shall we say, "provocative" way. When deposing the artist (all on video), I asked a question regarding his "artwork." The question came out in a seventh-grade school boy kind of way. I cracked up, to the extent that if I had been drinking soda, it would have come through my nose. But the artist was shrewd, and he very appropriately mocked me for acting immaturely in a professional context.

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

I've had my share of high profile cases, but I'll go with my two most challenging jury trials taking on two Chicago icons. I tried a defamation case against the Chief Justice of the Illinois Supreme Court, who was also a placekicker for the Chicago Bears and Notre Dame Fighting Irish. He sued a small suburban paper for defamation based on an op-ed piece in which a columnist speculated that he had engaged in political "shimmy shammy" involving the exchange of political support in exchange for "going light" on a county prosecutor whose ethics case was before the Supreme Court.

In the second case, Michael Jordan sued our client for using his name and number to promote its grocery brand on a tribute page in a collector's edition sports magazine published upon

Jordan's induction into the hall of fame. Liability was admitted because a coupon was incorporated into the tribute, but I tried the right of publicity damages issue before a Chicago jury. Don't try this at home!

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

*The Andy Griffith Show – The Complete Series.* Seasons 1 through 8. My co-workers gave this to me recently as a birthday gift (together with a 5-Disc set for *The Little Rascals*). They know that I grew up in the 60's and spent a fair amount of time in front of the television set. I kind of remind myself of the main character in the HBO series *Dream On* who would recall scenes from old television shows and movies or



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parts from songs that would influence how he would react to a given situation. The *Andy Griffith Show* is one of my all-time favorites – heartwarming stories, always with a positive message. Please look online for <u>Barney Fife's recitation of the Preamble to the Constitution</u> ("We the People"). I think it is one of the greatest comedy bits of all time. As Barney said, "Once ya know it, ya know it."

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

The New York Times website - always followed by websites that cover my Badgers!

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

I say "Go!" unless there's something else that you know would make you more content. Law school builds skill, self-confidence and provides a pathway to many alternative opportunities. But don't settle for or get stuck in the first, or even the second thing that comes your way.

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

I would look for opportunities to try to improve and refine the skills necessary to represent the media, whether that be as a litigator, as a vetting lawyer or in operations. Media companies will always have these needs. Those opportunities could come working for a small law firm, a large law firm or a media company. I would look for a place that offers some opportunity to work with copyright law, advertising law (because the line between commercial speech and protected expression can be thin), media company operations or, of course, defamation or privacy. As you learn, always keep an eye out for an opportunity to reach your goal.

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

Case deadlines, clients, firm management, kids in college, kids out of college, college tuition, home repair, things I am supposed to do, things I gotta do and kids. I don't sleep much.

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

I would have been either a corporate finance person (I was a finance major in college), a landscaper (I love gardening, trees and flowers) or a chef.

If you'd like to join this series, let us know: <u>medialaw@medialaw.org.</u>