

MILRC *Media
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MEDIA LAW LETTER

Reporting Developments Through July 27, 2019

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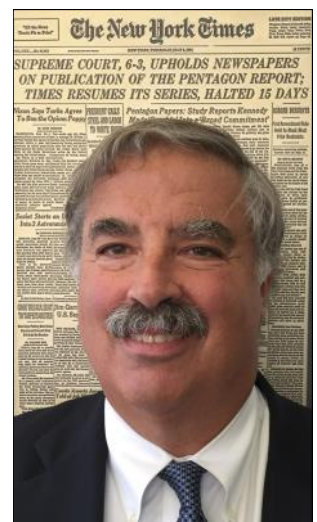
From the Executive Director's Desk

London Conference Preview: Breyer, Assange and a Bloody Brilliant City



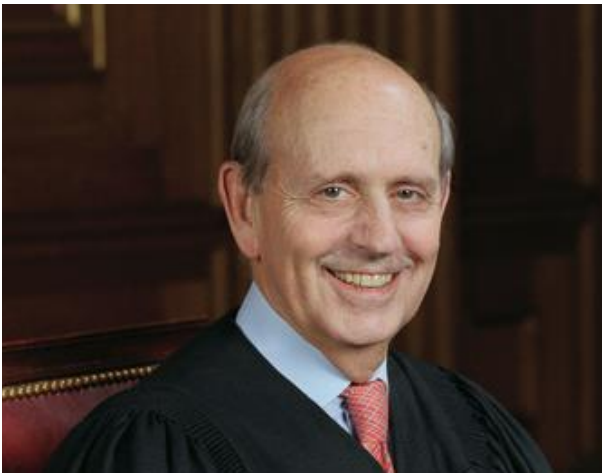
Our [London Conference](#) (Sept. 15-17) is happening in little more than a month – and it looks to be our best one ever. The bookends of the program will be spectacular: we will begin the proceedings Monday morning with a session starring Justice Stephen Breyer of the U.S. Supreme Court and end the Conference Tuesday afternoon with a hypothetical trial of Julian Assange.

But before I go on to give you the details about these and other programs, I really want to give a shout-out to the City of London. Two years ago when many of you were nice enough to congratulate me and Dave Heller for a great Conference, I often deflected the praise by saying that much of the credit goes to London, our host. The energy and classic environment of London added huge intangibles and boosted the enjoyment and success of our programme. I am sure that will remain the case this September. Albeit the UK is suffering political turmoil – sound familiar? – the packed streets backing upon elegant architecture, the teeming crowds spilling out of pubs and restaurants, the diversity of people and languages seen and heard in the parks and streets, the venerable sights of Parliament and Big Ben on the River Thames, the historic sites such as Churchill War Rooms, the British Museum and The Tower, the black cabs and red double-decker buses – I could go on – all make London a great place to be when you're not enjoying the lively discussions at The Law Society.



George Freeman

Back to the program. As far as my memory goes – and I have been in this Bar for 43 years – no MLRC or ABA media law program has ever before been honored with a sitting Supreme Court justice. Justice William Brennan, in whose name we give our prestigious Award, and Justice Harry Blackmun, an early recipient of that Award, both appeared at separate Annual Dinners, but in both cases after they had stepped down from the Bench. And Justice John Paul Stevens,



The Conference will begin with a conversation with Justice Breyer, above left, and end with a mock trial of Julian Assange

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who sadly passed just a few week ago, was interviewed at a ABA Forum “Boca” Conference a few years ago, but, again, as a retired justice.

We invited Justice Breyer to speak in London in part because of all the justices, he has emphasized learning and taking from the laws of other countries – a position sometimes strongly decried by others – but totally in line with the goals and mission of our international Conference.

Of course, I expect Justice Breyer will talk about that, but a lot more too: whether First Amendment theories and the “marketplace of ideas” still work in our bifurcated digital age; why SCOTUS hasn’t considered a media defamation case in about 30 years (and perhaps Justice Thomas’ recent anti-Sullivan opinion); relevant to our being in the UK, the ramifications of the SPEECH Act, essentially dissing UK libel law as heinous; his concurring opinion in *Bartnicki* (and perhaps how it might apply to Julian Assange); whether European balancing approaches work better than our strict scrutiny and other more absolute tests; and whether the divides between European and American law on privacy and hate speech regulation are irreconcilable.

Talking about hate speech, the following program will be a debate about hate speech regulation between Nadine Strossen, former head of the ACLU, and Prof Gavin Phillipson, a British university professor. Nadine was a former law school classmate of mine (though I unfortunately didn’t know her back then owing perhaps to the huge classes and the rather impersonal law school environment), and is one of the most dynamic and engaging speakers in our media law world. I am confident listening to her debate – you can probably guess which side she is taking – will be a treat.

Monday afternoon will feature a session on leaks, whistleblowers and the practical issues in defending sources for disclosing sensitive, classified information to journalists. Among the

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Mark Stephens will host a Sunday brunch at his offices overlooking London Bridge and within sight of the Tower Bridge, above.

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panelists will be Jim Risen, who has been through many a trying leak case, as well as other lawyers for leakers in some current notorious cases.

Tuesday morning will start with a session entitled “European Responses to Fake News, Disinformation, Violent Material and the Responsibility of Tech Companies.” Among the speakers will be a Member of Parliament who is exploring legislation to regulate fake news, and Delphine Meillet, a lawyer who has worked against similar legislation in France. It is an intriguing, difficult and timely subject.

Later on Tuesday there will be a panel on MeToo# reporting around the globe. It will discuss whether MeToo# stories are less likely to come out because of the more restrictive libel and privacy laws elsewhere than in the U.S., and the effect of NDAs internationally.

Finally, to cap the Conference, we will be presenting a hypothetical trial of Julian Assange. It will be based on hypothetical facts, simple (since we have limited time and an unwillingness to get bogged down into the weeds of the expected case) but similar to the real thing. We have lined up two star litigators to give closing arguments in the case: renowned barrister Geoffrey Robertson to represent Assange and our own charismatic Chip Babcock to be the prosecutor.

We intend to have a lay London jury of people David and I run into over the weekend in town – and perhaps a smattering of non-lawyers from our member firms in London. I am currently laboring over the hypo, the jury questions and the jury instructions, but they probably will focus

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on whether Assange's "encouragement plus" leads to guilt under Bartnicki; whether publishing sensitive national security information totally passively received leads to guilt under Bartnicki and its forerunners; and whether the jury might nullify a clear breaking of the law by hacking into a government website if it leads to a good result which is in the public interest.

And I am not even giving details on a number of other top-flight programs: one on press freedoms under siege in trouble spots all over the world, from Myanmar to Latin America; another on whether the changes in the British Defamation Act has actually affected what can be published and the practical decisions of UK publishers; and one on the troubling and weird media law developments in Australia, including the censorship of reporting about the Cardinal Pell case and a police raid on ABC Australia's newsroom similar to what occurred recently in San Francisco.



The National Gallery, scene of the signature Hiscox reception, hard by Trafalgar Square.

Last but hardly least are the social gatherings which come with attendance at the Conference. As in past years, Mark Stephens will host a Sunday brunch at his offices overlooking London Bridge and within sight of the Tower Bridge. Later Sunday evening Bloomberg will host a reception at its brand new European headquarters, which happen to be built over some Roman ruins. Needless to say, good food and drink will be offered at both these parties, as well as at our reception Monday evening at the National Gallery hosted by Hiscox. Of course, it is centrally located right above Trafalgar Square, and I understand we will have access to a different wing of the museum than we had the last time we were there.

Finally, as in each London conference since my period at the MLRC, David and I are planning to lead a crowd of 20 or so on Saturday afternoon to an English soccer – that is, football – game. Our research has shown that only one London English Premier League team is playing at home the weekend we are there, and that is Tottenham, in a new and uninteresting stadium very remote from downtown, and whose tickets are very difficult to acquire. So instead we are planning to go to a Fulham v. West Brom game at Fulham, two teams who recently have been relegated from the Premier League to the Championship League. But it should be classic as Fulham plays at Craven Cottage, the oldest soccer pitch in London, built in 1896 and located

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George Freeman and Dave Heller will lead a group of 20 to the Fulham v. West Brom soccer match on a pitch at Craven Cottage, on the banks of the Thames and built in the 19th century.

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hard by the Thames near Chelsea, a short hop from central London. Tickets may go fast, so if you're interested, please let me know. Being on top of the list will be your reward for reading my column down to its end.

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

New & Recently Published

MLRC Digital Review

The FTC settles with Facebook and Equifax | WIPO launches a secret database of infringing websites | Significant Section 230 decisions from the Second and Third Circuits | Manipulated images in false advertising cases | The Second Circuit weighs in on Twitter, Trump, and conceptual public forums | The CJEU rules on "Like" buttons under GDPR

MediaLawLetter June 2019

Roundtable on the Espionage Act Prosecution of Julian Assange; Supreme Court Holds Public Access Channel Operator Not a State Actor; Colorado Adopts Anti-Slapp Statute; How Many Public Facts Does It Take to Create A Privacy Interest?; 10 Questions for the Guardian's Gill Phillips and more

An Invitation to Join the MLRC State Legislative Committee

The focus of the State Legislative Affairs Committee is to track and collaborate on the best strategies to deal with legislation impacting First Amendment interests. The Committee advocates for the advancement of laws that further First Amendment concerns and access to government information, including building coalitions and creating work product in support of this advocacy. By sharing successful defensive strategies, it also assists attorneys and organizations in fighting laws that minimize First Amendment rights or decrease access to government information.

The Committee meets once a month by teleconference, including some months over the summer, depending on legislative activity. The monthly calls allow members to keep each other informed about what is going on in the various states, identify emerging trends, and share successful strategies. Between monthly meetings, members exchange emails with inquiries, draft legislation, and calls to action.

Some of the areas of legislation the Committee regularly monitors and discuss are: Reporter's Privilege, body-cams, Drone regulation, "ag-gag", anti-SLAPP, open records, open meetings, public notices, right of publicity/survival, and more. The Committee's website page reflects many of the areas of legislation it regularly monitors and discusses, and under each topic you will find a variety of information including: summaries of bills passed; proposed legislation; talking points; letters to legislators and other resources.

In addition to the monthly conference calls and updating the website, the Committee collaborates with other substantive law committees in producing joint publications, such as the 2018 Joint Committee Report, "Drones: Regulations and Practices." The committee is also collaborating with the anti-SLAPP Committee in preparing a database of prior briefs defending the constitutionality of such statutes, and advocating for the application of state anti-SLAPP laws in federal court. In 2015, the Committee prepared the "MLRC's Model Policy on the Retention of and Public Access to Police Body-Worn Camera Footage." Committee members also contribute articles to the Media Law Letter discussing recent state legislative victories and "lessons learned" that can inform other such battles in the future.

Currently, the Committee is Co-Chaired by Leita Walker (Ballard Spahr), Eric Kemmler (Connecticut Broadcasters Association) and the Vice-Chair is Joseph Martineau (Lewis Rice).

The Committee invites anyone with an interest in such topics to join; simply contact Liz Zimmerman at the MLRC - lzimmermann@medialaw.org.

If you are not a member, but become aware of legislation that minimizes First Amendment rights or decreases access to government information, please alert the Committee by emailing medialaw@medialaw.org.

The San Francisco Police Department vs. Bryan Carmody

By Thomas R. Burke and Dan Laidman

San Francisco police made national news on May 10 when officers burst into a journalist's house using sledgehammers and kept him handcuffed for hours while they ransacked his home and office. It was a shocking attack on the free press that one might expect in a banana republic, not one of the nation's most liberal cities. But as it turned out, the events of May 10 were just the tip of the iceberg.

While investigating the leak of information about the mysterious death of the city's popular Public Defender, Jeff Adachi, the San Francisco Police Department ("SFPD") secured and executed *five* search warrants aimed at veteran journalist Bryan Carmody. Officials secretly monitored Mr. Carmody's electronic communications for months, and FBI agents joined the SFPD in trying to interrogate him about his sources.

This unprecedented conduct prompted an outcry from the national media and many prominent politicians, leading to a public apology by San Francisco's Chief of Police on May 24. On July 22, a San Francisco Superior Court Judge quashed the first search warrant, recognizing that the SFPD clearly violated California and federal law by targeting Mr. Carmody in this manner.

This article summarizes how the SFPD aggressively went after Mr. Carmody, the legal protections that SFPD brazenly violated, and how, months later, important questions remain unanswered as judges in San Francisco hear motions to quash the five warrants and unseal the affidavits that San Francisco police used to obtain them.

SFPD Pressured to Investigate Release of Report on Death of Public Defender Jeff Adachi

San Francisco is one of the few localities in the country with an elected public defender, and Jeff Adachi held the office since 2002. A one-time mayoral candidate, Adachi was a prominent San Francisco political figure known for his clashes with law enforcement. Therefore, after Adachi unexpectedly died at age 59 in February 2019, many blamed the SFPD when lurid details of his death were disclosed to the media.

The SFPD came under immediate scrutiny by Adachi's supporters, who vehemently complained that SFPD intentionally released a police report about the circumstances of Adachi's death. Joe Eskenazi, with *Mission Local*, a popular San Francisco news website,

San Francisco police made national news on May 10 when officers burst into a journalist's house using sledgehammers and kept him handcuffed for hours while they ransacked his home and office.

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described the situation this way: “Photographs of an unkempt pied-à-terre and a sheetless bed and all manner of speculation about Adachi’s home life were splayed about the Internet; details normally considered private and confidential were divulged to selected media sources. Adachi had a contentious relationship with the San Francisco Police Department, and it appears this was reciprocated by sullyng him on the way out. Kicking a man when he’s dead, so to speak”

Politicians sought to hold the SFPD accountable for the disclosure and demanded an investigation. But instead of looking inward the SFPD responded by investigating the press, focusing on a freelance reporter who did not have the benefit of institutional support from a major media organization.

Bryan Carmody – Veteran Bay Area Journalist

Bryan Carmody has worked full-time as a journalist since the early 1990s. As the founder and owner of North Bay News, Mr. Carmody and his associates report breaking news stories and distribute their reporting and video footage on a freelance basis to local, national, and international print, broadcast, and online media outlets. His work focuses on law enforcement and public safety issues and regularly appears on Bay Area television news broadcasts and print publications. Typically, Mr. Carmody works during night hours covering stories that the local media lack the resources to cover. He sells “packages” that include video and still footage of news events, along with public records and interviews conducted with news sources.

Importantly, Mr. Carmody has held an official press pass issued by the San Francisco Police Department for more than 16 years. When San Francisco Police had search warrants issued against him, Mr. Carmody possessed a 2019 SFPD press pass.

Mr. Carmody began investigating the death of San Francisco Public Defender Jeff Adachi on February 22, 2019 – the day Mr. Adachi died. In the course of his reporting, Mr. Carmody was given a copy of a San Francisco police report about Mr. Adachi’s death from a confidential source. Mr. Carmody did not ask the source to provide him with the document, nor did he pay the source (or anyone else) for it. Consistent with standard journalistic practices, Mr. Carmody agreed not to reveal the source’s identity, and despite enormous pressure and intimidation from the SFPD as well as the FBI, he has not done so. Mr. Carmody prepared a news report about Mr. Adachi’s death based on interviews that he conducted, video footage that he shot, and documentary materials including the police report, and placed the package with three Bay Area television stations for broadcast to the public.

Two months later, on April 11, two San Francisco Police Department officers came to Mr. Carmody’s home and asked him to identify the source who allegedly gave him the police report concerning Mr. Adachi’s death. Mr. Carmody refused to provide information about his sources, prompting the officers to threaten him that they would come back with a “federal grand jury subpoena.” Mr. Carmody steadfastly refused to disclose his source’s identity, and the officers

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left. Mr. Carmody did not have any further contacts with law enforcement for nearly a month until the morning of May 10, when nearly a dozen armed officers used sledgehammers to enter Mr. Carmody's home, and once inside, handcuffed and detained him for several hours while officers searched the premises and seized his belongings.

During the search of his home, two individuals who identified themselves as FBI agents took him into a separate room and, with no SFPD officers present, repeatedly asked him to reveal his confidential source. Mr. Carmody refused to do so. While searching his home, officers learned of Mr. Carmody's news office and obtained a second search warrant; they drove Mr. Carmody to his office on Fulton Street in San Francisco where they searched while Mr. Carmody remained in handcuffs. As a result of both searches, San Francisco Police confiscated 68 items, including multiple laptops, computers, cellphones, tables, hard drives, thumb drives, cameras, and reporters notebooks. Essentially, SFPD confiscated information and footage of every news investigation that Mr. Carmody had ever worked on in the past three decades.

May 11 Search Was, as it turns out, Last of Five Warrants Against Carmody

Coverage of San Francisco Police officers breaking into Mr. Carmody's home with sledgehammers to search his home became national and international news within days after the raid. However, unbeknownst to Mr. Carmody and the public at the time, shortly after Mr. Adachi's death – and several weeks *before* the raid of his home and office, SFPD secretly obtained the first of *three* search warrants to access Mr. Carmody's cell phone records. Three different San Francisco Superior Court Judges issued search warrants (on March 1, 13 and April 16) (collectively the "Communications Warrants") to Verizon and AT&T, who each provided cell phone service to Mr. Carmody.

Essentially, SFPD confiscated information and footage of every news investigation that Mr. Carmody had ever worked on in the past three decades.

Indeed, in a situation in which the SFPD was desperate to learn the identity of Mr. Carmody's confidential news source, the Communications Warrants present arguably an even more egregious violation of Mr. Carmody's constitutional rights than the brazen raid and search of his home and news office many weeks later. Without notice to him, the Communications Warrants allowed the SFPD to discover the telephone numbers of every individual that Mr. Carmody contacted (or who called him) through any of his cell phones as well as any text messages exchanged immediately after Mr. Adachi's death. They also gave the SFPD cell tower data, which the SFPD could have used to track Mr. Carmody's physical movement while he used his cell phones.

Warrants Were Barred by California and Federal Law

California Penal Code Section 1524(g) unequivocally provides that "[n]o [search] warrant shall issue for any item or items described in Section 1070 of the Evidence Code." (Emphasis

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added.) Evidence Code § 1070 contains California’s statutory journalist’s Shield Law, which is virtually identical to the Constitutional provision. *See* Evid. Code §§ 1070; Cal. Const., art. I, § 2(b). The Shield Law provides that a journalist “shall not be adjudged in contempt for refusing to disclose any *unpublished information* obtained or prepared in gathering, receiving or processing of information for communication to the public.” Cal. Const., art. I § 2(b); Evid. Code § 1070 (italics added).

The purpose of the Shield Law is “to safeguard the free flow of information from the news media to the public, one of the most fundamental cornerstones assuring freedom in America.” *In re Willon*, 47 Cal. App. 4th 1080, 1091 (1996) (quotation omitted). The California Supreme Court has recognized that the Shield Law is necessary in light of “the press’ unique role in society,” explaining that, “[a]s the institution that gathers and disseminates information, journalists often serve as the eyes and ears of the public. Because journalists not only gather a great deal of information, but publicly identify themselves as possessing it, they are especially prone to be called upon by litigants seeking to minimize the costs of obtaining needed information.” *Miller v. Superior Court*, 21 Cal. 4th 883, 898 (1999) (quotations omitted). Not only is this burdensome, but using the power of the state to compel journalists to become investigative arms of one side of a legal dispute undermines their editorial independence and erodes the trust of their sources, which frustrates their ability to gather information to the ultimate detriment of the public. In recognizing this dynamic, the Supreme Court specifically noted that the “threat to the autonomy of the press is posed as much by a *criminal prosecutor* as by other litigants.” *Id.* (original emphasis).

The Communications Warrants present arguably an even more egregious violation of Mr. Carmody’s constitutional rights than the brazen raid and search of his home and news office.

Indisputably, the materials that the SFPD forcibly seized from Mr. Carmody fit squarely within the scope of the Shield Law, which renders the search warrants invalid under Penal Code § 1524(g). By its plain terms the Shield Law broadly applies to *any and all* unpublished editorial materials. As the California Supreme Court explained in *Delaney v. Superior Court*, 50 Cal. 3d 785 (1990):

The language of article I, section 2(b) is clear and unambiguous The section states plainly that a newsperson shall not be adjudged in contempt for ‘refusing to disclose *any* unpublished informa-tion.’ ... The use of the word ‘any’ makes clear that article I, section 2(b) applies to all information, regardless of whether it was obtained in confidence. Words used in a constitutional provision ‘should be given the meaning they bear in ordinary use.’ *In the context of article I, section 2(b), the word ‘any’ means without limit and no matter what kind.*

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Id. at 798 (emphasis added; internal citations omitted); *accord New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 461-62 (1990) (unpublished photographs of public event protected).

The Shield Law thus immunizes from compelled disclosure *any* information received, or materials generated or compiled, during the newsgathering process that have not actually been published or broadcast. *Id. Accord Miller*, 21 Cal. 4th at 897 (“the shield law applies to unpublished information whether confidential or not”); *Fost v. Superior Court*, 80 Cal. App. 4th 724, 735 (2000) (“the shield law explicitly provides that unpublished information remains protected ‘whether or not related information has been disseminated’”).

Mr. Carmody enjoys *absolute* protection under the Shield Law against the warrants executed by SFPD. The California Supreme Court made clear in *Miller* that the *only* interest to be balanced against a journalist’s Shield Law rights is the right of a *criminal defendant* to a fair trial; in all other instances the Shield Law is absolute. *See Miller*, 21 Cal. 4th at 896-97 (Shield Law is absolute for a non-party reporter subpoenaed by the People in a criminal case and is not balanced against any competing interest of the prosecution); *People v. Vasco*, 131 Cal. App. 4th 137, 158 (2005) (“[t]he prosecution has no due process right to overcome a newsperson’s shield law immunity and force disclosure of unpublished information, even if the undisclosed information is crucial to the prosecution’s case”); *New York Times*, 51 Cal. 3d at 461 (Shield Law absolute for non-party reporters in civil litigation).

Because the San Francisco Police Department sought unpublished information from Mr. Carmody (*e.g.*, the identity of the confidential source who gave him the SFPD report) to assist with a criminal investigation and potential prosecution, there is no countervailing interest capable of overcoming his rights, and the Shield Law is *absolute*. *See Miller*, 21 Cal. 4th at 896-97.

SFPD obtained the Communications Warrants by materially misleading the judges who issued the three cell phone warrants. The notices – which Mr. Carmody only learned of many weeks after the warrants were executed – purport to describe the “[n]ature of [the] investigation” but do not contain *any* mention that Mr. Carmody is a journalist or that the police report at issue was obtained and disseminated to the public in the course of news reporting. SFPD Chief Bill Scott’s official statement on May 24, 2019 appears to confirm that SFPD omitted this key information when it sought these warrants. (“I am specifically concerned by a lack of due diligence by department investigators in seeking search warrants and appropriately addressing Mr. Carmody’s status as a member of the news media.”).

In obtaining the Communications Warrants the SFPD also flouted a California law that specifically ensures that journalists receive notice *before* their editorial materials are disclosed by a third party such as a phone carrier. *See C.C.P. § 1986.1*. The statute expressly states that “a party issuing a subpoena in any civil or *criminal* proceeding to a third party that seeks the records of a journalist shall” provide notice “at least five days *prior* to issuing the subpoena”

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except in certain limited exigent circumstances. C.C.P. § 1986.1(b)(2) (emphasis added). The notice must include specific information including “why alternate sources of information are not sufficient.” *Id.* None of these procedures were followed. No exigent circumstances exception is available since the SFPD obtained these warrants over a period of six weeks in March and April, then waited another month to execute the home and office searches on May 10.

In addition to the absolute protection offered by the Penal Code and California’s Shield Law, Mr. Carmody also is protected under the privilege created by the First Amendment to the U.S. Constitution and Article I, Section 2(a) of the state constitution, which California courts recognize as an independent ground for rejecting compelled disclosure of unpublished editorial information. *See Mitchell v. Superior Court*, 37 Cal. 3d 268, 277-279 (1984). Like the Shield Law, the reporter’s privilege protects against the compelled disclosure of both confidential and non-confidential information. *See Shoen v. Shoen*, 5 F.3d 1289, 1294 (9th Cir. 1993) (“*Shoen I*”). The reporter’s privilege ensures that “compelled disclosure from a journalist must be a *last resort* after pursuit of other opportunities has failed.” 5 F.3d at 1297-98 (emphasis added).

That Mr. Carmody is a freelance journalist is of no moment. In California, it has been settled law for nearly 30 years that the Shield Law applies to freelance journalists like Mr. Carmody. In *People v. Von Villas*, 10 Cal. App. 4th 201 (1992), the Shield Law defeated a subpoena seeking a freelance writer’s notes and interview tapes in connection with articles that he wrote for Hustler and Los Angeles Magazine. *Id.* at 228. The court held that the “constitutional provision plainly encompasses [his] position as a freelance writer,” and it rejected an argument that the Shield Law should apply only to information that he gathered after entering into a contract to sell his article to one of the magazines. *Id.* at 231-32. The court explained that the journalist “had been a reporter or freelance writer for some 13 years prior to his involvement with the instant articles. The clear language of article I, section 2, subdivision (b) provided him with newsperson’s shield protection *both before and after* the execution of the written Hustler contract.” *Id.* at 232 (emphasis added). *See also, O’Grady v. Superior Court*, 139 Cal. App. 4th 1423 (2006) (broadly interpreting the Shield Law to include an online blogger who wrote about Apple products in litigation in which Apple attempted to force the blogger to reveal his sources).

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Search Warrants Also Violated Federal Law Enacted After *Zurcher v. Stanford Daily*

The seizure of Mr. Carmody’s editorial materials also violated the federal Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa *et seq.* (the “PPA”). Like California’s Penal Code § 1524(g), the PPA creates a “subpoena-first rule” for government searches directed at journalists which “generally prohibits government officials from searching for and seizing documentary materials

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possessed by a person in connection with a purpose to disseminate information to the public.” *Morse v. Regents of the Univ. of Cal.*, 821 F. Supp. 2d 1112, 1120-21 (N.D. Cal. 2011) (quotation omitted). The statute broadly applies both to editorial “work product” and any other “documentary materials,” and it applies whenever the target of a search is “reasonably believed to have a purpose to disseminate to the public” information in a “newspaper, book, broadcast, or other similar form of public communication.” 42 U.S.C. §§ 2000aa(a)-(b).

This federal law, which applies to state and local officials, “presents a straightforward statutory scheme for protecting those engaged in information dissemination from government intrusion by prohibiting searches and seizures of documentary materials except where government officials have a reasonable belief that a statutory exception applies.” *Citicasters v. McCaskill*, 89 F.3d 1350, 1355 (8th Cir. 1996) (local prosecutor could be held liable under PPA based on seizure of videotape from television station); *Morse*, 821 F. Supp. 2d at 1121 (journalist whose camera was seized could bring PPA claim against chief of UC Berkeley police department); *see also Smith v. Fair Employment & Hous. Comm’n*, 12 Cal. 4th 1143, 1236 n.11 (1996) (recognizing the PPA’s effect of “restricting the ability of government investigators to obtain documents from the media”).

Quashing the Warrants and Unsealing Affidavits Supporting Issuance of Warrants

On July 18, San Francisco Superior Court Judge Rochelle C. East quashed the first of the three Communications Warrants that were issued involving Mr. Carmody, rendering any information SFPD learned through the warrant unavailable for any purpose. During the hearing on the motion to quash, Judge East revealed that she was not made aware when she signed the search warrant that Mr. Carmody was a journalist or that he possessed a current San Francisco Police press pass, noting that “the warrant should not have been issued.”

On August 2, three other San Francisco Superior Court Judges – Judges Christopher C. Hite (who issued one of the three cell phone warrants), Gail Dekreon (who issued the warrant for Mr. Carmody’s home and personal cell phone) and Victor M. Hwang (who issued the final warrant for Mr. Carmody’s office) – individually and collectively granted Mr. Carmody’s motion to quash each of these warrants. Following Judge East, relying on California Penal Code § 1546.4, each of them also ordered the SFPD to destroy and not to use any and all information obtained by the warrants. Addressing SFPD’s insistence that the original copy of the disputed SFPD report not be returned to Mr. Carmody without first redacting certain information that SFPD insisted was protected by statute, after an *in camera* inspection, Judge Hwang also ordered the original report returned to Mr. Carmody without any redactions.

At the July 18 hearing, San Francisco Judge East also granted a motion by several free speech organizations to unseal the affidavit SFPD submitted to her to support the issuance of the warrant. The Court redacted only a single paragraph of the affidavit after SFPD insisted (without irony) that if disclosed, it would identify a confidential police informant. Had SFPD fully disclosed Mr. Carmody’s status as a journalist and the context surrounding the disclosure

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of the report to the San Francisco Superior Court judges who issued these warrants, they clearly would have been barred as a matter of law by Penal Code § 1524(g) and the federal PPA. There can be no doubt under the circumstances that SFPD's material omissions were recklessly inaccurate at best, and deliberately false at worst. *See People v. J'ouvert*, 118 Cal. App. 3d 637, 650 (1981) ("[I]f the omission was intentional with the purpose of deceiving the magistrate or if the affiant recklessly disregarded the accuracy and completeness of the affidavit, the warrant is quashed automatically").

The evening before the August 2 hearings, the *San Francisco Chronicle* published the full paragraph that Judge East had ordered redacted. The *Chronicle* noted that nothing within the redacted portion identified the name of any individual. It did however show that the SFPD Chief's spokesman told investigators that Mr. Carmody had sold television stations copies of the disputed police report. This disclosure prompted SFPD to ask Judges Dekreon, Hite and Hwang to conduct their own *in camera* hearings. Ultimately, each of them also ordered to be unsealed, the vast majority of the SFPD affidavit that each of them reviewed to support the search warrants they originally approved.

Unsealed, the 11-page affidavit made no mention of Mr. Carmody's possession of a current SFPD press pass. Moreover, San Francisco Police Officer Joseph Obidi deceptively described Mr. Carmody as a "Freelance Videographer/Communications Manager," adding, "Bryan Carmody is not currently employed by any of the news organizations that obtained the death investigation report." Later versions of this same affidavit will soon be released – based on the orders of Judge Dekreon, Hite and Hwang – and will likely shed more light on SFPD's actions during the months of March through May.

Many Unanswered Questions Remain

Although more information about SFPD's actions may continue to emerge as the fifth and final search warrant is reviewed by San Francisco Superior Court Judge Joseph Quinn on August 16, until then, the San Francisco Police Department's unprecedented actions present several unanswered questions.

For one, when San Francisco Police first visited Mr. Carmody at his home – a month *before* they came back with sledgehammers to execute the search warrant – why did they threaten to return "with a federal grand jury subpoena" as Mr. Carmody specifically recalls? Why the emphasis on a federal inquiry by San Francisco police? Relatedly, why did *FBI agents* question Mr. Carmody about the identity of his confidential source as he sat handcuffed in his home on May 11th? Did the U.S. Attorney General approve of this conduct – or did the Justice Department ignore the Department's guidelines regarding its conduct with journalists? These important questions – and others – remain currently unanswered.

Thomas R. Burke is a partner in the San Francisco office of Davis Wright Tremaine LLP. Dan Laidman is Counsel with the firm in its Los Angeles Office. They represent Bryan Carmody regarding the search warrants issued by the San Francisco Police Department.

Vermont Supreme Court Unseals Decision Quashing Subpoena Under State's New Reporter's Shield Law

By Chad R. Bowman

The Vermont Supreme Court on July 19 reversed a lower court's sealing decision and made public the first judicial decision applying the state's new shield statute. The underlying subpoena decision arose out of newsroom subpoena issues in an "inquest"—a Vermont criminal procedure akin to a grand jury—and had remained under seal for seventeen months, unavailable as authority for journalists or media companies.

The Vermont press thus received two good precedents through one ruling: The original subpoena decision, which quashed the inquest subpoena for raw television news footage under the state shield law, and a strong Vermont Supreme Court ruling that such judicial decisions, even in criminal inquests, should presumptively be available to the public.

The Vermont Supreme Court decision is [In re VSP-TH/1-16-18 Shooting](#), 2019 VT 47, 2019 WL 3242789 (Vt. July 19, 2019). The underlying subpoena decision is not yet available on Westlaw, LEXIS, or *The Media Law Reporter*, [but the slip opinion is available online here](#). ("Slip Op.").

Vermont Shield Law

Vermont has long recognized a privilege under the First Amendment for journalists to protect confidential sources. *See, e.g., State v. St. Peter*, 132 Vt. 266, 270 (1974). In a pair of more recent decisions, however, the Vermont Supreme Court interpreted the privilege narrowly. The Court excluded non-confidential newsgathering documents and information from its ambit, thus limiting the privilege to the protection of confidential sources. *Spooner v. Town of Topsham*, 937 A.2d 641 (Vt. 2007). As most relevant here, the Court also found the privilege inapplicable in "inquest" proceedings. *In re Inquest Subpoena (WCAX)*, 890 A.2d 1240 (Vt. 2005).

An inquest is a Vermont state criminal proceeding "designed to determine whether sufficient evidence exists to prosecute a criminal matter." *In re D.L.*, 669 A.2d 1172, 1177 (Vt. 1995). A judge overseeing an inquest can subpoena and hold witnesses in contempt. It thus "has been likened to the proceedings before a grand jury," albeit with an investigative function—and without jurors.

The Vermont Supreme Court reversed a lower court's sealing decision and made public the first judicial decision applying the state's new shield statute.

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The 2005 case involved an inquest subpoena to WCAX-TV for about 45 minutes of unpublished news footage of a campus riot at the University of Vermont following a Boston Red Sox playoff series victory over the New York Yankees. A state's attorney sought the footage to identify possible criminal perpetrators. Analogizing inquests to federal grand jury proceedings held outside a First Amendment privilege in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Vermont Supreme Court found that “no privilege, qualified or otherwise, excuses WCAX from furnishing the videotape of the riot.” 890 A.2d at 1241-42.

Following these decisions, media groups turned their attention to the Vermont Legislature. Ultimately, in May 2017, lawmakers passed a broad shield law to protect journalists, which the governor then signed into law. Vt. Law 2017, No. 40, eff. May 17, 2017 (codified at 12 V.S.A. § 1615). *See, e.g.*, Erin Mansfield, *Scott Signs Shield Law for Journalists*, VT Digger (May 17, 2017), <https://vtdigger.org/2017/05/17/scott-signs-shield-law-journalists/> (quoting Secretary of State saying that the two Vermont Supreme Court rulings had “alarmed” him).

The shield law distinguishes between two types of information that journalists receive or gather: confidential and non-confidential. 12 V.S.A. § 1616(b). Information received or gathered by a journalist in confidence is entitled to absolute statutory protection. By comparison, the law established a robust, though qualified, privilege for non-confidential information. For such materials, a litigant seeking disclosure can overcome the privilege by demonstrating, with “clear and convincing evidence,” that a three-part test can be met. The test is a familiar one to media lawyers across the country:

- i) the news or information is highly material or relevant to a significant legal issue before the court or other body;
- ii) the news or information could not, with due diligence, be obtained by alternative means; and
- iii) there is a compelling need for disclosure.

Id. at (b)(2).

Montpelier Shooting and 2018 Subpoena

In January 2018, a suspected bank robber fled from police on foot onto the snow-covered grounds of Montpelier High School, where police surrounded him. After a prolonged standoff in which the suspect brandished what appeared to be a handgun, police officers fired more than 20 shots and killed the man—who, it turned out, was armed with a BB gun.

During the standoff, journalists from WCAX-TV, owned by Gray Television, arrived on a street bordering the school and set up a news camera at least 100 yards away, outside a police line. Their camera was too far to hear any conversation, but captured video footage of the

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shooting from across a railroad track, parking lot, and football field. WCAX-TV then broadcast several segments relating to the robbery, the shooting, and the subsequent investigation. [The broadcasts are available online](http://www.wcax.com/content/news/Robbery-suspect-cornered-at-Montpelier-High-School-469552973.html): <http://www.wcax.com/content/news/Robbery-suspect-cornered-at-Montpelier-High-School-469552973.html>.

Law enforcement officials announced that same day that Vermont State Police would be conducting an investigation of the incident. The state's attorney opened an inquest the next day, and immediately served a subpoena on WCAX-TV for "[a]ny and all raw video (unedited) and audio (unedited) recordings pertaining to the police shooting that occurred at Montpelier High School on January 16, 2018."

WCAX-TV moved to quash the subpoena under the months-old shield law, arguing that the state could not satisfy the test for compelled production of non-confidential unpublished news material. WCAX-TV argued that the subpoena to the press came at the outset of the investigation rather than as a last resort; that the key footage had already been publicly broadcast and made available online; and that dozens of law enforcement officers and others witnessed the same events (and indeed were much closer to them).

Subpoena Decision

Superior Court Judge Howard E. Van Benthuyssen held a hearing on February 13, 2018 on WCAX-TV's motion to quash. Over WCAX-TV's objection, the judge closed the hearing at the request of the state's attorney, who argued that such "inquests were secret and investigatory in nature." Slip Op. at 1 n.1.

The hearing included the direct testimony and cross-examination of Detective Sergeant Tyler Kinney, of the Vermont State Police Major Crimes Unit, about the status of the investigation, followed by oral argument on the application of the privilege. Judge Van Benthuyssen's now-public decision summarized the testimony. *Id.* at 3. According to Sgt. Kinney, police interviewed roughly 70 witnesses, about half of whom saw the actual shooting, and most of which were much closer to it than WCAX-TV's camera. Although some of the police officers had body-worn cameras, apparently none captured the shooting. However, police collected at least one amateur video.

Prosecutors admitted to the Court that they had not yet read any of the witness statements, and Sgt. Kinney "testified that he thought it would be helpful to the investigation to have the video taken by WCAX before the shooting and opined that what they had 'might be relevant.'" *Id.*

In a February 16, 2018 decision, Judge Van Benthuyssen quashed the subpoena. He noted that the case involved "the first invocation by a journalist or journalism organization of Vermont's

WCAX-TV moved to quash the subpoena under the months-old shield law, arguing that the state could not satisfy the test for compelled production of non-confidential unpublished news material.

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newly enacted (2017) journalist privilege statute.” *Id.* at 3. The court recognized that the new statute sought to overrule precedent and “replace it with a far more stringent and comprehensive set of journalistic privileges”—privileges that establish “nearly insurmountable standards for disclosure.” *Id.* at 4.

The court also acknowledged that the privilege applies to non-confidential materials like raw news footage, and that it is not waived through selective disclosure. *Id.* at 5-6.

The court then considered the three-part test to compel production of non-confidential newsgathering materials, citing New York authority under a similar test as persuasive. *Id.* at 6. Finding no dispute over the first prong, that the requested footage was “highly material or relevant,” the court found the State failed to demonstrate the second prong, *i.e.*, exhaustion of alternate sources. *Id.* at 6-7. Although the court expressed sympathy for an argument that video evidence is a “best source” of evidence, it nevertheless found that “the State cannot successfully argue that it lacks alternatives to the Channel 3 video when the prosecutors themselves have no idea what is, in fact, in their own investigative materials.” *Id.* at 7.

Because the State failed to meet the second prong of the test, the court did not reach the final prong of the test, compelling need. *Id.* at 8.

Citing the need for secrecy, the decision also provided that “this decision should, in its entirety, be sealed and not available to the public unless indictments or informations result from this inquest.” *Id.* at 1 n.1; *see also id.* at 8.

On April 17, 2018, Vermont Attorney General TJ Donovan held a press conference to announce the findings of his investigation, and that no officers would face charges for the shooting. *See, e.g.*, Stephen Mills, [Report Clears Police Officers in Giffin Shooting](https://www.timesargus.com/articles/report-clears-police-officers-in-giffin-shooting/), The Barre Montpelier Times Argus (April 17, 2018), <https://www.timesargus.com/articles/report-clears-police-officers-in-giffin-shooting/>.

Following the end of the inquest, WCAX-TV moved to unseal the subpoena decision so that it could serve as a precedent.

The Unsealing Motion

Following the end of the inquest, WCAX-TV moved to unseal the subpoena decision so that it could serve as a precedent.

WCAX-TV argued that the Vermont Rules for Public Access to Court Records (“PACR”), established in 2001, “provide a comprehensive policy on public access to Judicial Branch records. . . [and] [t]hey shall be liberally construed in order to implement the policies therein.” Vt. Pub. Acc. Ct. Rec. Rule 1. Because there is no general exception to public access for inquest proceedings, a judge was required to support any sealing by “a finding of good cause specific to the case before the judge and exceptional circumstances.” *Id.* Rule 7(a).

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Alternately, WCAX-TV argued that the First Amendment access right requires public disclosure as a constitutional matter, citing a series of Vermont Supreme Court decisions adopting the U.S. Supreme Court’s “experience and logic” test under *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 8 (1986), widely known as “*Press-Enterprise II*.”

The Superior Court denied the unsealing motion, highlighting the investigative and secret nature of an inquest and citing the state’s Access to Public Records Act (“PRA”) for agency records. The court did not consider constitutional access arguments. WCAX-TV appealed to the Vermont Supreme Court.

Unsealing Decision

The Vermont Supreme Court’s July 19 decision found the subpoena decision to be a judicial record subject to court rules rather than the state’s open-records law:

We conclude that the record at issue here—a decision by the trial court on a motion to quash a subpoena in the context of an inquest—is a court case record. We reject the notion that the ruling is not a court case record because the inquest proceeding is executive rather than judicial in nature.

In re VSP-TH/1-16-18 Shooting, 2019 VT 47, ¶ 19. As such, the Court considered whether the “good cause” and “exceptional circumstances” rest of PACR Rule 7(a) had been satisfied—and found that “no basis in the record” for sealing. *Id.* ¶ 33. The investigation was publicly announced and complete, and nothing in the subpoena decision “could pose a threat to effective law enforcement or individual privacy or safety.” *Id.* ¶ 34. As such, no remand was necessary, and the Court unsealed the decision. *Id.* ¶¶ 33, 35.

Because the Court found sealing to be improper under the PACR, it did not need to reach a constitutional access right, *id.* ¶ 9, n.1, although it recognized an existence of such a right in Vermont, *id.* ¶ 8 n.3.

Retired Associate Justice Dooley, sitting by designation, penned a concurrence emphasizing that “secret decisions are a hallmark of an authoritarian government” and that only the most compelling reasons in a rare case should allow a judicial decision to be withheld from public view. *Id.* at ¶¶ 37-38. He also took issue with the characterization of inquests as secret proceedings, urging that this is a relic of the law that has been superseded by law and history—a point he had made in a prior decision. *Id.* at ¶¶ 40-45.

That concurrence is sure to be cited in the future by counsel for Vermont journalists and others seeking access to inquest proceedings.

Gray Television, Inc. was represented by Chad R. Bowman of Ballard Spahr, LLP, and by Robert B. Hemley and Erin R. Moore of Gravel & Shea PC. The State was represented by Rory T. Thibault, Washington County State’s Attorney.

Second Circuit Vacates Blanket Sealing Order in *Giuffre v. Maxwell* Case

Urges Media to Exercise Restraint in Covering Potentially Defamatory Allegations

By Sanford L. Bohrer and Christine N. Walz

Earlier this month, the Second Circuit reaffirmed the presumption of access to judicial documents. In an appeal filed by the *Miami Herald* and its reporter Julie Brown (as well as Alan Dershowitz and Michael Cernovich), the Second Circuit vacated a blanket sealing order that had the effect of shielding documents concerning litigation related to the investigation into a sex-trafficking operation allegedly run by financier Jeffrey Epstein and his associates. [Brown v. Maxwell](#), No.18-2868 (July 2, 2019) (Cabranes, Pooler, Droney, JJ.).

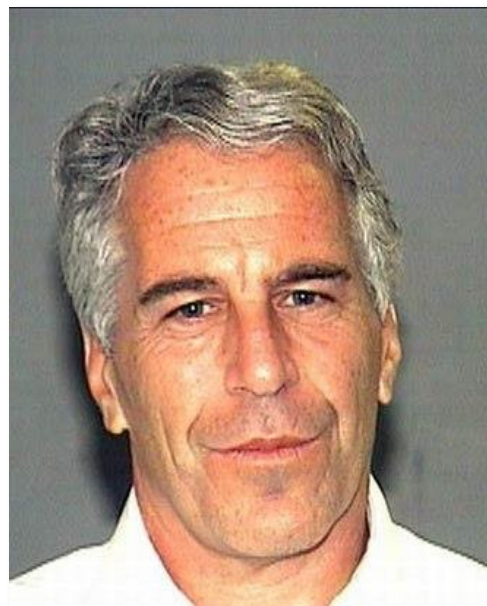
Background

This case involves the court records from the 2015 libel lawsuit brought by Virginia Giuffre, an alleged victim of Epstein, against Ghislaine Maxwell, an associate of Epstein's. The underlying lawsuit concerned Giuffre's allegations that Maxwell had defamed her by calling her a liar. (This case was [previously summarized](#) in detail after the oral argument.) In that case, the District Court issued a protective order that allowed the parties to unilaterally designate material as "Confidential." The protective order required that any party seeking to file confidential information submit a motion to seal. In the months that followed, the parties filed numerous motions to file documents under seal, and the District Court granted each one.

In August 2016, the District Court entered a more extensive sealing order that allowed the parties to file any document under seal *without* first filing a motion to seal in order "[t]o reduce unnecessary filings and delay." More than one hundred and fifty separate filings were submitted under seal or redacted. The sealed documents include motions and memoranda of law, court orders, and hearing transcripts, among other documents.

Second Circuit Decision

The Second Circuit held that the District Court failed to conduct the requisite particularized review when ordering the sealing of the materials at issue. As a result, it decided to unseal the



Epstein's 2006 mug shot

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summary judgment documents (with limited redactions) and to remand the case to the District Court for a particularized review of the remaining sealed materials.

The *Miami Herald* has covered Jeffrey Epstein, his alleged victims, and the prosecution of his alleged crimes for over four years. The on-going investigation seeks to determine whether Epstein's victims were heard by prosecutors and whether Epstein escaped more serious consequences because of his wealth and political connections. In connection with this investigation, the *Miami Herald* and investigative reporter Julie Brown intervened in the District Court and moved to unseal the entire docket on April 6, 2018. This motion was denied. The District Court had also previously denied the earlier unsealing motions filed by Alan Dershowitz and Michael Cernovich. The sealing order issued by the District Court emphasized, in broad strokes, the privacy interests of the litigants, notwithstanding recognition that the alleged victim – Ms. Giuffre – consented to unsealing.

The *Miami Herald* (as well as Dershowitz and Cernovich) appealed the order, arguing that public and press had a right to the documents under the common law and the First Amendment. The *Miami Herald* also argued that, at minimum, the documents should be remanded to the District Court for a document-by-document analysis.

The Reporters Committee for Freedom of the Press filed an *amici* brief, on behalf of itself and a coalition of 32 news media organizations. That *amici* brief again emphasized the significant public interest in access to the sealed summary judgment records and argued that the District Court erroneously dismissed that interest. In addition, the *amici* brief argued that generalized privacy interests, such as those relied upon by the District Court, cannot support the sealing of the summary judgment records.

The Second Circuit urged the media to exercise restraint in covering potentially defamatory allegations” and “caution[ed] the public to read such accounts with discernment.”

In the opinion of the Court, written by Judge Cabranes, the Second Circuit:

- Reiterated that “documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment” and that “continued sealing of the documents may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim;”
- Clarified that judicial documents are those documents that “would reasonably have the tendency to influence a District Court’s ruling on a motion or in the exercise of its supervisory powers, without regard to which way the court ultimately rules or whether the document ultimately in fact influences the court’s decision” and that “all documents

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submitted in connection with, and relevant to, such judicial decision-making are subject to at least some presumption of public access;”

- Found that the District Court erred in assigning a lesser presumption of access to the summary judgment materials because summary judgment was denied by the Court and because it based its sealing order on generalized statements about the record as a whole, rather than an individualized review of the documents at issue;
- Ordered the release of a minimally redacted version of the summary judgment record be made accessible on the Court of Appeals docket (upon the issuance of the mandate); and
- Ordered that the District Court conduct an individualized review of the sealed materials and unseal all documents for which the presumption of public access outweighs any countervailing privacy interests.

Additionally, the Second Circuit included in its opinion a “cautionary note” about statements made in the records to be unsealed in which it “urged the media to exercise restraint in covering potentially defamatory allegations” and “caution[ed] the public to read such accounts with discernment.” It is unclear from the decision whether this note was made based on the Court’s specific concerns about the documents to be unsealed, in response to concerns raised by the parties in the underlying litigation about allegedly defamatory statements contained in the record, or based on a more generalized concern about false statements made in court filings and press reports about those statements.

Judge Pooler concurred in the opinion except to the extent it ordered the immediate unsealing of the summary judgment record without remand.

Ghislaine Maxwell has filed a [petition for rehearing](#) by the panel and *en banc*. Those petitions are pending before the Court.

Sanford L. Bohrer and Christine N. Walz of Holland & Knight LLP represent Miami Herald and Julie Brown. Marc Randazza and Jay Marshall Wolman of Randazza Legal Group, PLLC represent Michael Cernovich. Andrew G. Celli Jr. represents Alan M. Dershowitz. Paul G. Cassell of S.J. Quinney College of Law, University of Utah, Salt Lake City, UT and Sigrid S. McCawley of Boies Schiller Flexner LLP represent Plaintiff-Appellee Virginia L. Giuffre. Ty Gee and Adam Mueller of Haddon, Morgan and Foreman, P.C. represent Defendant-Appellee Ghislaine Maxwell. The Reporters Committee for Freedom of the Press filed an amici brief on behalf of itself and a coalition of 32 news media organizations.

Sixth Circuit Affirms Dismissal of Cancer Researcher's Libel Suit Against The New York Times

By Al-Amyn Sumar

On July 17, 2019, the Sixth Circuit Court of Appeals affirmed the dismissal of a libel suit brought against The New York Times Company ("The Times") by Dr. Carlo Croce, a prominent cancer researcher at Ohio State University. [Croce v. The New York Times Co.](#)

Importantly, the decision affirms the right of publishers to report on important public controversies without fear of liability, and it recognizes the innocent-construction rule as entrenched in Ohio law.

Background

Dr. Croce's lawsuit centered on a March 2017 article in *The New York Times* titled "Years of Ethics Charges, but Star Cancer Researcher Gets a Pass." The article described significant allegations of academic misconduct by Dr. Croce, including claims of falsified data and plagiarism, which had been advanced by others in the scientific community and had led several journals to issue notices about his papers. As the story noted, the University had not penalized Dr. Croce for any misconduct, and he strenuously denied any wrongdoing.

Two months later, Dr. Croce sued The Times and several of its employees in the Southern District of Ohio for defamation, false light, and intentional infliction of emotional distress. As the basis for his claims Dr. Croce cited the article and 21 of its statements, as well as related social media posts, a letter sent to OSU prior to publication by *Times* reporter James Glanz, and a subsequent radio interview with Glanz about the story.

In November of 2018, the district court granted The Times's motion to dismiss the lawsuit. The court noted that Ohio does not recognize the neutral report privilege, but nonetheless held that the statements in the article were not defamatory because they were no more than "an accurate and balanced report of the allegations made by others." The court also found various statements non-actionable on the grounds that they were subject to an innocent construction, protected opinion, or simply true. (The court held that one statement in the OSU letter survived The Times's motion, but Dr. Croce dropped his claim as to that statement in order to appeal the decision immediately.)

The decision affirms the right of publishers to report on important public controversies without fear of liability, and it recognizes the innocent-construction rule as entrenched in Ohio law.

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On appeal, Dr. Croce challenged the court's ruling only as to some statements in the article and on social media.

Sixth Circuit Affirms Dismissal

In a published opinion issued July 17, 2019 – less than four weeks after argument – the Sixth Circuit affirmed the district court's dismissal of the suit. Like the district court, it concluded that the *Times* story was not defamatory because it conveyed allegations made by others about Dr. Croce without adopting their truth. As the court put it, “a reasonable reader would construe the article as a standard piece of investigative journalism that presents newsworthy allegations made by others, with appropriate qualifying language.” The court emphasized that the story did not say or suggest that Dr. Croce was actually guilty of the misconduct, and that it in fact contained statements favorable to Dr. Croce. In the court's words, a reasonable reader would understand the article to be “presenting two sides of [a] controversy.”

Alternatively, and for similar reasons, the court held that the article and its statements were subject to the innocent construction rule. It did so despite Dr. Croce's contention that the innocent construction rule is not firmly established in Ohio law. The import of the rule, as the court explained, is that if a statement can be reasonably read as either defamatory or non-defamatory, the court must adopt the latter, “innocent” construction of the statement.

In this case, the court found that the article is “easily susceptible” to an innocent construction: “Yes, Dr. Croce has been the subject of criticisms and allegations, resulting in some corrections to his work, but no findings of deliberate misconduct have been made against him, he denies these allegations, and he is otherwise a successful cancer researcher.” The court also found two specific challenged statements to be substantially true, and it dismissed Dr. Croce's tag-along claims for false light and intentional infliction of emotional distress.

The decision recognizes that responsible investigative journalism on a matter of public concern cannot form the basis of a defamation claim.

The Sixth Circuit's decision is jurisprudentially significant for at least two reasons. First, building on Ohio and Sixth Circuit law, the decision recognizes that responsible investigative journalism on a matter of public concern cannot form the basis of a defamation claim. The decision makes space for journalists and publishers to inform their readers about the existence of important public controversies and allegations of wrongdoing without taking a side in the controversy or adopting the truth of the allegations. Second, the decision confirms the vitality of the innocent construction rule in Ohio law. The immediate benefit is to media litigants in Ohio, but the opinion could also prove useful to defendants in states where the status of the rule remains an open question.

Al-Amyr Sumar is the First Amendment Fellow at The New York Times. The Times was represented by Jay Ward Brown, Michael Sullivan, and Matthew Kelley of Ballard Spahr LLP.

Eleventh Circuit Reinstates Haitian Businessman's Defamation Claims

Facebook Comments Not Pure Opinion

By Sarah Brewerton-Palmer

The Eleventh Circuit reinstated a Haitian businessman's defamation case, holding that defendant's Facebook post accusing plaintiff of illegal conduct could be actionable. [Deeb v. Saati](#), No. 18-12577, 2019 WL 2537730 (11th Cir. June 20, 2019) (Rosenbaum, Branch, Fay JJ.) (unpublished). The court noted that while the bulk of defendant's post was opinion – e.g., “stream-of-consciousness sermonizing about values, character, and reputation” – statements accusing plaintiff of money laundering and other misconduct could imply false facts.

Background

In 2017, prominent Haitian businessman Reynold Deeb sued Georges Saati for two counts of defamation *per se* under Florida law. Saati owned and operated a website called Moun.com, which he described as the “WikiLeaks of the Caribbean.” The first count of defamation was based on an article Saati published on Moun.com in 2015. The headline of the article was originally written in French and translated to “Deeb brothers arrested, other [sic] waiting their turn.”

The article—written by someone other than Saati and originally published in the local newspaper the Haiti Observateur—accused Deeb of being “‘implicated in a series of illicit activities,’ including undisclosed money transfers, arms trafficking in exchange for cocaine, falsified travel documents, and embezzlement.”

Two years after its publication, Deeb demanded that Saati remove the article from Moun.com and post a retraction and apology. Deeb threatened a defamation suit if Saati did not comply. Saati's actions in response to the demand letter form the basis for Deeb's second count of defamation. The day after receiving the letter, Saati posted on Facebook that “Moun has just received a new letter of intimidation and threats of lawyers of the ‘big’ Entrepreneur, ‘big’ Financier, the famous ‘Nonol’ either Mr. Reynold Deeb,”

Saati then proclaimed that “the so-called Barons of the bleaching of the city, better known as owner of ‘dry cleaning’ will be handcuffed and en route to the American prisons.” The next day, Saati stated in a comment on his original post that “[o]nly in a poor nation like Haiti, Can ‘The Truth’ Disrupt alleged money launderers” and “[t]he same gangsters, white collar criminals can hire a lawyer to go after you, to intimidate you, to threaten you.”

Deeb filed his defamation claims shortly after these Facebook postings. On a motion for summary judgment, the district court concluded that Saati's statements did not support a

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defamation claim because they were either pure opinion or hyperbole. On appeal, the Eleventh Circuit reversed.

Eleventh Circuit Decision

The Court began its analysis with a general discussion of defamation law. In Florida, a claim for defamation requires proof of five elements: “(1) publication; (2) of a false statement of fact about the plaintiff; (3) that is defamatory; (4) “with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person”; and (5) that results in actual damages.” *Id.* at *3 (citing *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018)). In the Court’s view, “[t]he primary dispute in this case [was] whether Saati’s statements can reasonably be construed as actionable false statements of fact about Deeb.” *Id.*

With regard to the Facebook posts, the Eleventh Circuit agreed with the district court that most of Saati’s statements were “the sort of ‘loose, figurative, or hyperbolic language’ that no reasonable reader would believe presented facts.” *Id.* at *4 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)). However, Saati’s posts also contained some statements that were more factual in nature, such as statements that Deeb was an “alleged money launderer” and a “Baron [] of the bleaching city” that would soon be “handcuffed and en route to the American prisons.” *Id.* at *5.

Even the rambling and impassioned nature of the posts could not negate, as a matter of law, the impression that “Deeb had committed or been accused of the crime of money laundering.” *Id.* The Court rejected Saati’s argument that his statements were not defamatory because he did not explicitly call Deeb a money launderer. The Court held that the context of the posts permitted the conclusion that Saati’s money launderer comment referred to Deeb.

The Court also held that Saati’s statements were not pure opinion. Instead, a reasonable factfinder could determine that the statements were mixed expressions of fact and opinion. *Id.* Perhaps most notably, the Eleventh Circuit rejected Saati’s argument that the facts underlying his opinion were known to his audience. Saati primarily relied on *Hay v. Independent Newspapers, Inc.*, 450 So. 2d 293 (Fla. Dist. Ct. App. 1984), which concerned a letter to the editor of a local newspaper calling the plaintiff a crook and a criminal.

The Court distinguished *Hay* on the ground that Saati’s posts were made not in a local newspaper, but on an open Facebook page accessible to all Facebook users. In the context of such a widely accessible platform, yielding a “numerous and diverse” audience, the Court

The analysis in *Deeb* regarding the nature of a Facebook audience could be used to bolster future defamation claims, particularly in a world where such claims frequently concern statements published online and in social media.

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“[could not] say that the factual foundation of Saati’s comments were either known to or assumed to exist by Saati’s Facebook audience.” *Id.* at *6.

The analysis in *Deeb* regarding the nature of a Facebook audience could be used to bolster future defamation claims, particularly in a world where such claims frequently concern statements published online and in social media. With regard to allegedly defamatory statements published on open pages, it may become increasingly difficult to assume that an audience will be familiar with the factual basis for a mixed expression of opinion and fact.

Sarah Brewerton-Palmer is an associate at Caplan Cobb in Atlanta. Plaintiff is represented by Gary S. Betensky and Adam M. Myron, Day Pitney LLP, West Palm Beach, FL. Defendant is represented by Jason Bloch and Thomas Ronzetti.



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You Can't Cry "Fake News!" in a Crowded Theater...and Get Away With It

By Reid K. Day

While "Fake News!" continues to be a rallying cry for too many powerful political figures, *The Kansas City Star* recently won a favorable ruling under Kansas' three-year-old anti-SLAPP statute when Kansas State Senate Majority Leader Jim Denning—and Denning's aspiring politician/lawyer—attempted to bring claims of "Fake News" into a court of law. *Denning v. Cypress Media, LLC, et al.*, No. 19CV00496, Tenth Judicial Circuit, Johnson County, Kansas.

Background

Denning, one of Kansas' most powerful and visible Republican politicians, sued *The Star* for defamation following the January 2019 publication of an editorial column by Steve Rose, a long-time freelancer, titled: "Why hasn't Kansas expanded Medicaid? This GOP leader has a long list of excuses." Rose's column outlined the reasons Denning opposes expanding Medicaid to cover an additional 150,000 Kansans as part of the Affordable Care Act, or "Obamacare."

Denning never refuted the gist of the article—he proudly admits he opposes expanding Medicaid—but took issue with Rose's use of various statements that implied the conversation described in the column occurred in the recent past as opposed to several years ago. Denning also accused Rose of fabricating several statements which Rose attributed to him in the article. In other words, Denning conceded that while he opposed Medicaid expansion, he contended the column falsely stated the reasons why he opposed it.

Denning sued *The Star* and Rose on Monday, following the publication of the column on Saturday, and without ever contacting the paper and seeking a correction or retraction. Instead, Denning—and his lawyer, who was in the middle of his own campaign to be elected the Chair of the Kansas Republican Party—issued numerous press releases, gave radio interviews and tweeted about "Fake News," with Denning even retweeting a tweet containing a long-nosed Pinocchio.

The Star immediately moved to strike Denning's claim under Kansas' anti-SLAPP statute, which (ironically) Denning had voted for just three years earlier.

Anti-SLAPP Motion

The Star immediately moved to strike Denning's claim under Kansas' anti-SLAPP statute, the Public Speech Protection Act, which (ironically) Denning had voted for just three years earlier. *The Star* made two arguments: First, Rose's column was substantially true in stating Denning's opposition to Medicaid expansion. Second, Denning would be unable to present evidence of actual malice on *The Star*'s part.

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As to the argument the column was true, *The Star* attached numerous media reports and other documents in which Denning had gone “on the record” to oppose Medicaid expansion. As to its actual malice argument, *The Star* submitted an affidavit by Pulitzer-prize winning editor Colleen McCain Nelson detailing her role in editing the article prior to publication and stating she had no reason to doubt that Rose properly attributed the statements in his column to Denning—given Denning’s well-known opposition to Medicaid expansion.

In response, Denning made several legal arguments. As to the question of truth, he submitted a self-serving affidavit in which he vaguely claimed to have never said the exact words printed in the column (even the column never used quotation marks). As to actual malice, he argued that even though Rose was a freelancer, Rose’s (alleged) knowledge that he (Rose) had fabricated the statements in the column should be attributed to *The Star*. He also argued *The Star* acted with actual malice in not verifying the information in the column—when its contract with Rose expressly gave the paper the right to do so.

In granting *The Star*’s motion from the bench following oral argument, the Court sidestepped the issue of truth, finding instead that Denning failed to come forward with the required “substantial competent evidence” of actual malice. Specifically, it found *The Star* had no reason to doubt the truthfulness of the column, given Denning’s well-known opposition as to Medicaid expansion. It also found that Rose—who wrote his columns without compensation of any sort—was a true independent contractor whose knowledge was not attributed to *The Star*.

Accordingly, the Court struck the allegations against *The Star*, and ordered Denning to pay, consistent with the Act’s mandatory fee provision for prevailing parties, *The Star*’s attorney fees, which are in the \$40,000 range.

The Star’s successful defense of Denning’s claims is another positive step for the First Amendment and application of strong anti-SLAPP statutes in Kansas and throughout the country. While “Fake News!” will likely continue as a rallying cry for some politicians, crying “Fake News” is not enough to bring a defamation claim based on unfavorable but truthful coverage of a politician’s policy positions. Critically, *The Star* utilized the Act’s speedy procedural remedy to raise the issue before the court, and its favorable ruling and award of attorney’s fees should make any attorney or potential plaintiff review any applicable anti-SLAPP statute and think twice before filing a meritless defamation claim.

Reid K. Day is an associate at Lathrop Gage LLP in Kansas City, MO. The Kansas City Star was represented by Bernard J. Rhodes of Lathrop Gage LLP; Sen. Denning was represented by Michael J. Kuckelman and Michael T. Crabb of Kuckelman Torline Kirkland, Overland Park, KS.

While “Fake News!” will likely continue as a rallying cry for some politicians, crying “Fake News” is not enough to bring a defamation claim based on unfavorable but truthful coverage of a politician’s policy positions.

Let's Get Metaphysical: Second Circuit Defines Public Fora in Digital Space

By Jeff Hermes

In [Knight First Amendment Institute at Columbia University v. Trump](#), No. 18-1691 (2nd Cir. July 9, 2019) (Parker, Hall, Droney, JJ.), a panel of the U.S. Court of Appeals for the Second Circuit unanimously affirmed a judgment of the Southern District of New York, holding that the 45th President of the United States violated the First Amendment rights of Twitter users whom he “blocked” from his @realDonaldTrump Twitter account based on his dislike of the viewpoints they expressed. The opinion addressed complex questions about the ability of public officials to control their interactions with members of the public in privately operated digital spaces.

Background

A significant portion of the Second Circuit’s opinion was dedicated to the specific mechanics of Twitter and the effect of one user “blocking” another on the platform. As described by the court, when User A blocks User B, User B’s functionality is limited while logged into his/her account as follows: User B cannot see User A’s timeline or tweets; User B cannot reply to, retweet, or like any of User A’s tweets, preventing such responses from appearing in the “comment thread” associated with User A’s tweet; User B’s tweets will not be seen by User A; and User B cannot trigger a notification to User A by mentioning User A in a tweet.

The court identified “workarounds” of varying burdensomeness that could enable a blocked user to accomplish many of these functions and participate in the comment thread following a tweet by the blocking user; these solutions involved either temporarily logging out of one’s account or creating a new account. Only creating a new account (which would not have any of the blocked user’s existing followers associated with it) would enable the blocked user to post tweets visible to the blocking user, and the new account could be blocked in the same manner as the old account.

The @realDonaldTrump Twitter account was launched in March 2009 and has been maintained since by defendant Trump. It was undisputed that following Trump’s inauguration, he used the account “as a channel for communicating and interacting with the public about his administration;” the court also found that the account is “one of the White House’s main vehicles for conducting official business.” Since the inauguration, the home page associated with the account has featured language and imagery depicting Trump in his official capacity,

The core argument asserted by Trump and Scavino on appeal was that the @realDonaldTrump account was operated by Trump as a private citizen, not in his official capacity.

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and the National Archives have treated tweets on the account as official records that must be preserved under the Presidential Records Act.

The current case was filed in the U.S. District Court for the Southern District of New York in July 2017. The plaintiffs in the case included several named individuals whose accounts were blocked in May and June of 2017 as well as the Knight First Amendment Institute at Columbia University, which asserted a First Amendment interest in hearing from the blocked users on the affected comment threads. The defendants included Trump, White House Director of Social Media Daniel Scavino, former White House Press Secretary Sarah Huckabee Sanders, and former White House Communications Director Hope Hicks. The defendants conceded that the individual plaintiffs were blocked for replying to tweets from the @realDonaldTrump account with comments critical of Trump and/or his policies.

On May 23, 2018, the district court entered summary judgment for the plaintiffs against defendants Trump and Scavino, holding that the “interactive space of the tweets” associated with the @realDonaldTrump account was a designated public forum and that Trump and Scavino had engaged in unconstitutional viewpoint discrimination. *Knight First Amendment Institute at Columbia University v. Trump*, 302 F. Supp. 3d 541, 580 (S.D.N.Y. 2018). Claims were dismissed against defendant Sanders for lack of standing, and dismissed against defendant Hicks due to her resignation. *Id.*

The individual plaintiffs were unblocked from the account following the district court ruling, but defendants Trump and Scavino nevertheless appealed.

“[T]he fact that any Twitter user can block another account does not mean that the President somehow becomes a private person when he does so.”

Presidential or Private Discrimination?

The core argument asserted by Trump and Scavino on appeal was that the @realDonaldTrump account was operated by Trump as a private citizen, not in his official capacity. Specifically, the defendants argued that the account was created by Trump as a private citizen and will remain under his control as a private citizen after he leaves office.

The Second Circuit gave these arguments short shrift, pointing to the “overwhelming” evidence—in the appearance and content of the account, in Trump’s own statements, in the statements of White House staff, in the treatment of the account by the National Archives, and more—that Trump uses the @realDonaldTrump account for official activity. Opinion at 17-19. The fact that Trump was exercising the same powers as other Twitter users are granted did not matter, said the court: “[T]he fact that any Twitter user can block another account does not mean that the President somehow becomes a private person when he does so.” *Id.* at 19. Nor, held the court, did the private origin, ownership, or future status of the account change the

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analysis, given that “[t]emporary control by the government can still be control for First Amendment purposes.” *Id.* at 17.

Nevertheless, the court was careful to note that “not every social media account operated by a public official is a government account,” and that the determination in other cases would turn on a “fact-specific inquiry” into “how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account.” *Id.* at 20-21.

Delineating the Forum

Notwithstanding the primary focus of the appellate argument on how Trump used the @realDonaldTrump account, a more interesting issue was the definition of the “public forum” in which Trump was held by the district court to have engaged in viewpoint discrimination. Trump argued that the @realDonaldTrump account was not a forum unto itself, but the privately-controlled channel by which he participated in Twitter’s larger privately-operated forum.

The court, however, noted that by design the account had “interactive features open to the public, making public interaction a prominent feature of the account” and supporting a finding that the account was not a private construct. *Id.* at 20-21. Recognizing that forums can include “metaphysical” spaces, *id.* at 22 (citing *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995)), the court held that such spaces become public forums when they are opened by the government “for indiscriminate use by the general public,” *id.* at 23 (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 47 (1983)). On those principles, the court held that the @realDonaldTrump account and its accompanying interactive features were a public forum. *Id.* at 23.

The court recognized that regardless of whether a forum created by the government is public or nonpublic, the government may not discriminate against speakers in the forum on the basis of viewpoint.

Burdening the Plaintiffs’ Speech

The court recognized that regardless of whether a forum created by the government is public or nonpublic, the government may not discriminate against speakers in the forum on the basis of viewpoint. *Id.* at 23. And, the court held, acts of replying, retweeting, and liking burdened by the defendants’ blocking of the plaintiffs on Twitter were expressive acts protected by the First Amendment. *Id.* at 23-24. Therefore, concluded the court, the defendants’ blocking of the individual plaintiffs violated their First Amendment rights. *Id.* at 24.

The court’s opinion thus adopted something of a belt-and-suspenders approach. As noted above, the court found both that the @realDonaldTrump account was a public forum and that the defendants engaged in viewpoint discrimination. However, the former holding would make

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it less relevant that viewpoint discrimination was involved, because exclusion from a public forum for any reason is presumptively a First Amendment violation. Meanwhile, the latter holding would make it unnecessary to find that the forum was public because viewpoint discrimination is a First Amendment violation in any government forum.

The court also rejected the defendants' argument that "the only material impact that blocking has on the individual plaintiffs' ability to express themselves on Twitter is that it prevents them from speaking directly to Donald Trump by replying to his tweets on the @realDonaldTrump web page," finding that blocking also imposes a significant burden on talking *about* Trump's tweets with other members of the public on the platform. *Id.* at 24. The court noted (as did the district court below, *see* 302 F. Supp. 3d at 576-77) that it might be a different story if Trump had merely taken steps to prevent his personal receipt of messages he did not want to see. *Id.* at 25 n.7.

It was also irrelevant, held the court, that workarounds existed for blocked users to interact with other Twitter users with respect to Trump's tweets, because requiring speakers to use burdensome alternatives can also violate the First Amendment. *Id.* at 25-26. (Although the court did not go into this level of detail, it is worth recognizing that requiring a Twitter user to create a new account to evade a block can significantly limit the reach of the user's tweets. Such tweets will likely not reach others who followed the original account but not the new account, and who rely on the "follow" function for notification about new tweets.)

Whose Speech Is It, Anyway?

The defendants' final argument was that if the @realDonaldTrump account is controlled by the government, all speech subject to those controls must be treated as government speech. Thus, they reasoned, the government could censor speech on that channel to conform the overall content to the government's preferred point of view.

However, the court found that there was no evidence that the account had ever been controlled in that sense, and that replies and retweets of Trump's tweets were presented as originating from other users, not Trump. Thus, while Trump's own tweets were clearly government speech, the speech of the third parties was not. *Id.* at 27-28. The court repeated the Supreme Court's caution about overextending the government speech doctrine to suppress private individuals' viewpoints. *Id.* at 28-29, citing *Matal v. Tam*, 137 S.Ct. 1744, 1758 (2017).

Further Implications

This case has been closely watched not only for its implications for Trump's Twitter habits but for any effect that it might have on social media sites' ability to exercise control over their

This case has been closely watched not only for its implications for Trump's Twitter habits but for any effect that it might have on social media sites' ability to exercise control over their users' content.

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users' content. In that sense, it is similar to the Supreme Court's recent decision in *Manhattan Community Access Corp. v. Halleck*, No. 17-1702 (June 17, 2019), about which I wrote last month. Indeed, industry [groups](#) representing the interests of digital companies filed amicus briefs in both cases seeking to avoid results that would limit platform control of their own sites.

However, *Halleck* dealt with (and rejected) the notion that a private company becomes subject to First Amendment limitations imposed upon state actors merely by opening a forum for speech to the public. This case, in contrast, was watched for any hints regarding the more nuanced question of whether a public official's decision to venture onto a social media site somehow compromises the site's ability to moderate content within the "metaphysical space" of the public official's presence on the site.

(The idea that Trump's decision to use Twitter should somehow result in Twitter being treated as a state actor seems nonsensical to me. Private owners do not become state actors—even if they voluntarily open their property to the public under specified conditions—just because a public official wanders onto their property and starts talking. If the conditions placed upon access to private property result in individuals being denied rights of access to a public official's speech, the violation is logically the official's for choosing to speak in a restricted space.)

Analyzing the case through the public forum doctrine may prove to be confusing and unhelpful for future cases.

Fortunately or not, the Second Circuit expressly avoided that question in its decision. Opinion at 4. Nevertheless, the manner in which the court defined the forum in this case (i.e., as being limited to the "interactive features" associated with the @realDonaldTrump account) suggested that it was taking pains not to issue a ruling that would define the entirety of Twitter as a public forum.

But there is an analytical weakness in how the Second Circuit went about this, inasmuch as the breadth of the putative forum found to have been opened by Trump has no practical limit. There are no boundaries on what an individual might discuss in a reply to one of Trump's tweets, or the direction the subsequent comment thread might turn. If Twitter *were* held to be bound by the First Amendment in its moderation decisions within this "metaphysical space," users who wished to engage in hate speech or any other communications falling into the gap between constitutional protection and Twitter's terms of service could simply conduct those conversations within a thread started by a public official. The "metaphysical space" would consume the whole of the site.

This is not to say that the ultimate determination that Trump and Scavino violated the First Amendment is incorrect, but analyzing the case through the public forum doctrine may prove to be confusing and unhelpful for future cases. It might have been wiser for the Second Circuit to avoid this approach entirely, and upon determining that Trump was acting in his official

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capacity to hold that (1) members of the public have a First Amendment right as listeners, with which government officials may not interfere, to receive the official public statements of the President, and (2) the First Amendment forbids the government from actively interfering with private individuals' discussion of matters of public interest, certainly when motivated by viewpoint discrimination and regardless of the context or the tools used to accomplish that interference.

Those two statements seem unremarkable (if perhaps only to me), keep the focus on acts of government officials, and do not depend on characterizing the space in which the interference takes place as any kind of government-operated constitutional "forum." If anything, the First Amendment problem is arguably easier to see if the case is understood as involving the government interfering with citizens' speech in a space owned by private parties. After all, we do not permit the government to interfere with our discussion of the President's statements in our homes or places of business (which are certainly not public fora); the same should apply to Twitter.

Jeff Hermes is a Deputy Director of MLRC.

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To join, email medialaw@medialaw.org

TV Journalists Who Were Tear-Gassed in Ferguson May Proceed to Trial

By Danielle N. Twait

Three former Al Jazeera America television journalists filed a federal civil rights action against St. Charles County, Missouri, and St. Charles Deputy Michael Anderson alleging they had been purposefully shot at and tear-gassed during their coverage of protests in Ferguson, Missouri on August 13, 2014, following the shooting death of teenager Michael Brown by a Ferguson police officer.

In [*Quraishi, et al v. St. Charles County, Missouri, et al*](#), No. 4:16-CV-1320 (E.D. Mo.), the court granted the County's motion for summary judgment, but denied Defendant Anderson's motion for summary judgment, ruling that a jury must determine whether the evidence supports a finding that Anderson violated Plaintiffs' First and Fourth Amendments.

Background

Following the fatal shooting of Michael Brown in Ferguson, Missouri, on August 9, 2014, the Al Jazeera America television news network (which at the time was the US branch of the international network) sent veteran TV journalists Ash-har Quraishi, Marla Cichowski, and Sam Winslade to Ferguson to report on developments in the Brown killing, including the ongoing protest activities. After spending a day reporting on the protests in Ferguson, the Al Jazeera America news crew parked their SUV more than a mile away from where the earlier protests had occurred. Even though the Plaintiffs were nowhere near any illegal activity, officers shot a rubber or similar bullet at Plaintiffs without warning. Plaintiffs immediately identified themselves as members of the news media. Despite having identified themselves as journalists, Anderson then used a shoulder-fired rifle to fire a tear gas cannister directly at Plaintiffs. After the tear gas cleared—and while Plaintiffs were attempting to retrieve their equipment—Plaintiffs were again shot at by a police officer using a rubber or similar bullet.

The Court found Defendants' contention "absurd" because the undisputed facts showed that Plaintiffs were engaged in newsgathering—a clearly protected activity under the First Amendment.

Unaware of the fact that the SWAT teams' attack on Plaintiffs was filmed by several other news crews, St. Charles County repeatedly denied any attacks by the SWAT Team on the Plaintiffs and the SWAT team members continued to make false statements regarding the events that occurred that night.

The Lawsuit

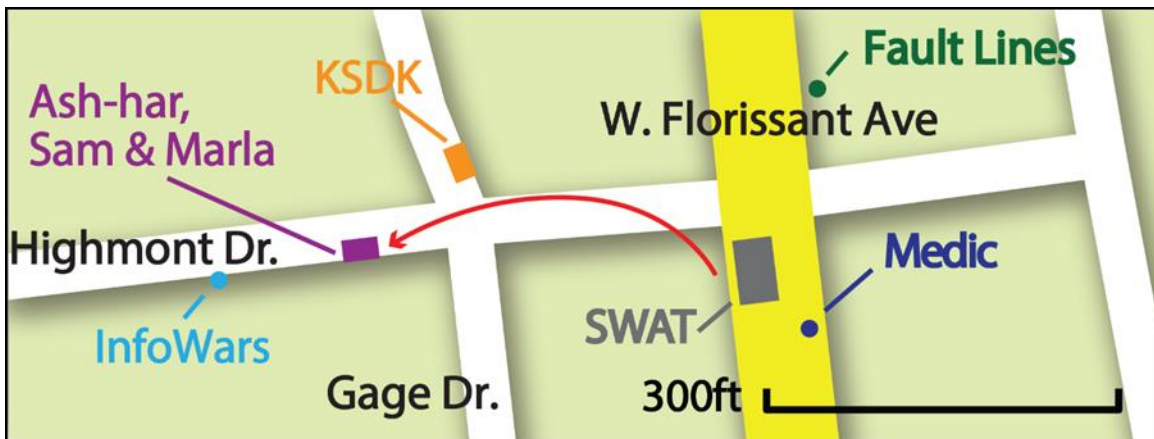
Plaintiffs filed suit against St. Charles County, Missouri and Deputy Anderson. In their [First Amended Complaint](#), Plaintiffs asserted seven causes of action. Counts I and II alleged that

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Anderson and St. Charles County violated Plaintiffs' First Amendment rights. Counts III and IV alleged that Anderson and St. Charles County violated their Fourteenth Amendment rights to due process. Counts V and VI alleged that Anderson and St. Charles County unlawfully seized and detained Plaintiffs in violation of the Fourth Amendment. Finally, Count VII alleged that Deputy Anderson committed common law battery against Plaintiffs.

The Defendants moved for summary judgment on all counts. In seeking summary judgment as to Plaintiffs' First Amendment claim, Anderson argued that the Plaintiffs were not engaged in a protected activity. The Court found Defendants' contention "absurd" because the undisputed facts showed that Plaintiffs were engaged in newsgathering—a clearly protected activity under the First Amendment. The Court further held it could not determine as a matter of law Anderson's motive for firing the tear gas round at Plaintiffs, finding that there were "significant and multiple genuine issues of material fact present." Specifically, the Court noted that "the video recordings of the incident, from various vantage points, raise doubt about Deputy Anderson's version of events."

These various videos were key to the Court's ruling. As shown in this map used by Plaintiffs in their response to the summary judgment, you can see that numerous cameras captured the assault on Plaintiffs.



Importantly, none of the videos showed any rioting (or even protests) occurring in the area and—equally important—none of the videos supported Anderson's claim that he had issued a warning to Plaintiffs before tear-gassing them.

In Count III, Plaintiffs asserted that Defendant Anderson illegally seized them in violation of the Fourth Amendment when he fired tear gas directly at Plaintiffs "intending to terminate or restrain their freedom to remain in their location and continue their newsgathering and reporting." In its ruling the Court agreed with Plaintiffs and held as a matter of law that "[f]iring tear gas, pepper spray, or other chemical agents at someone can constitute a seizure under

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the Fourth Amendment.” The Court further held there was a genuine issue of facts as to whether Defendant Anderson’s use of tear gas was unreasonable.

Defendant Anderson argued that even if Plaintiffs could establish constitutional violations, Plaintiffs’ claims fail as a matter of law on the grounds of qualified immunity. In rejecting this argument, the Court held summary judgment on this issue is “not appropriate, because there are significant disputes regarding material facts precluding summary judgment for Plaintiffs’ First and Fourth Amendment claims against Anderson.”

Finally, Anderson argued that Plaintiffs failed to state a claim for battery. For the same reason as the other claims, the Court denied summary judgment finding “[t]here is a genuine dispute of material fact regarding Anderson’s intent; therefore, this claim must go before a jury.”

In response to Plaintiffs’ Fourteenth Amendment claim for violation of their right to due process regarding Anderson’s deployment of tear gas at them, the Court granted Defendants’ summary judgment on this claim, reasoning that Plaintiffs’ claims “are best reviewed under the First and Fourth Amendment jurisprudence.” The Court also granted St. Charles County, Missouri’s summary judgment on all of Plaintiffs’ claims against it, finding Plaintiffs failed to establish a policy or practice on the part of the County to violate journalists’ First Amendment rights.

Defendant Anderson recently filed an interlocutory appeal with the Eighth Circuit on the question of qualified immunity.

Plaintiffs are represented by Bernard J. Rhodes of Lathrop Gage LLP; Defendants are represented by Holly E. Magdziarz, Beverly E. Temple, Rory P. O’Sullivan, and John R Watson from the Office of the St. Charles County Counselor

Defendant Anderson recently filed an interlocutory appeal with the Eighth Circuit on the question of qualified immunity.

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Australia: Media Responsible for Third-Party Facebook Postings

By Peter Bartlett and Dean Levitan

The Supreme Court of New South Wales has reached a landmark decision in Dylan Voller's defamation case against three media companies: [Voller v Nationwide News; Voller v Fairfax Media Publications; Voller v Australian News Channel](#) [2019] NSWSC 766.

The Court decided that media companies are now considered the 'publisher' (in a legal sense) of third-party comments on their public Facebook pages and can be held liable where those comments are defamatory. This decision has alarming and profound consequences for media companies, who are now required to monitor comments posted in response to posts on their Facebook page.

To reduce the risk of being sued for defamation as a consequence of allegations made in the comments section, it may be necessary for media companies to change the settings on Facebook posts to enable the comments to be meticulously vetted before becoming publicly available. This will significantly impact the way social media is used and will invariably restrict freedom of speech in Australia.

Background

Dylan Voller is a former youth detainee at Darwin's Don Dale Youth Detention Centre. His mistreatment at the facility was the subject of an ABC Four Corners program in 2016 that sparked a Royal Commission to be called within 36 hours by then-Prime Minister Malcolm Turnbull.

There was extensive media coverage of these events as they unfolded. This included articles being posted on Facebook, of which, many members of the public then commented on. Some of the comments contained allegations against Mr Voller that included that he had brutally bashed a Salvation Army officer who visited him in detention, had committed a carjacking, and beaten and raped an elderly woman.

It is the substance of these third-party comments that are the allegedly defamatory imputations that have given rise to Mr Voller's law suit against the media entities. Mr Voller had not notified the respective media companies of the comments.

The Judgment

The preliminary question in this trial was, "Whether the plaintiff has established the publication element of the cause of action of defamation against the defendant in respect of

The Court decided that media companies are now considered the 'publisher' (in a legal sense) of third-party comments on their public Facebook pages and can be held liable where those comments are defamatory.

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each of the Facebook comments by third-party users?” Put simply, Voller was required to prove that the media companies are 'publishers' of comments posted by third parties on their Facebook posts.

Justice Rothman decided that Voller had established that the media companies are the publishers of comments written by third-parties (such as readers) on their Facebook posts.

The Court heard from witnesses from each of the media entities who testified as to the operation of their public Facebook pages.

Justice Rothman made a number of factual conclusions following this evidence, including:

- The public Facebook page of each of the media defendants is published for a number of purposes associated with the success of the company and its media publications, including: promulgation of summaries of articles of interest; exciting the interest of Facebook users; increasing the number of subscribers to the digital media publication or newspaper; and increasing the profile of the public Facebook page and the initial media publication, which affects advertising revenue;
- The existence and number of comments (including “likes” and “shares”) from third-party users is an important (and, more probably than not, the most important) aspect of the public Facebook page, as it affects the Facebook algorithm and increases the profile of the Facebook page and the consequential popularity of the Facebook page, thereby increasing readership in the digital newspaper/broadcast and augmenting advertising sales on both the Facebook page and the digital newspaper/broadcast;
- It is possible to hide comments that contain particular words or triggers upon which the program operating the public Facebook page would operate to hide the whole comment;
- By using a list of extremely common words, which any comment would be difficult to avoid, it is possible to hide, in advance, all, or substantially all, comments;
- The defendants could, if sufficient staff resources were allocated, monitor comments, whether published or hidden, and hide, delete or “un-hide” those comments;
- Certain initial posts by the media outlet would be expected to excite adverse comment about a person who is the subject of the post, including comment that is unreasonable, factually incorrect and damaging to the reputation of the person involved; and
- The publications of these relevant original posts by the media companies (i.e. posts to which the comments alleged to be defamatory relate), if any assessment were to have been made (which it was not), would have been assessed as likely (i.e. more probably than not) to give rise to nasty and defamatory comments. [90]

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Ultimately, the Court was satisfied, on the balance of probabilities, that the defendant media companies were a first or primary publisher, because they are the owners of their public Facebook pages, stand to commercially benefit from engagement on their Facebook posts and have the ability to allow the public to access comments authored by a third-party user.

Justice Rothman acknowledged that 'it is the third-party user that places the comment on the page' [212] but stated that:

'...it is not the compiling of a message that amounts to the publication of the message; it is the placement of the message in a form that is comprehensible and able to be downloaded and the consequence that it is the ownership of the public Facebook page that attracts a reader.' [212]

Through not hiding all comments subject to later approval, the media companies allowed the comments to be published on their public Facebook page posts. It was on this basis that Justice Rothman found, 'in relation to each reader of the public Facebook page, who is not the Administrator or a Facebook friend of the third-party commentator, the defendant media company is the first and only publisher of the comment' [214].

This means that through operating public Facebook pages, media companies 'assume the risk that comments made on that page will render it liable under various laws that may prevent, render unlawful, or render actionable in damages various statements' [232].

In concluding, Justice Rothman stated:

'That risk may be ameliorated by the suggestion, given during the course of submissions and evidence, that all comments be hidden, in the manner described in these reasons for judgment, and "un-hidden" after it has been monitored. Given that the comments about which complaint is made in these proceedings are comments on an initial post that was more likely than not to give rise to defamatory comments, there seems to be no public policy reason why liability should not be sheeted home to the media company that is the defendant in each of the proceedings, at least, if it be a subordinate publisher, for its general readership (i.e. excluding the Facebook friends of the commentator).' [233]

Through operating public Facebook pages, media companies 'assume the risk that comments made on that page will render it liable under various laws that may prevent, render unlawful, or render actionable in damages various statements.'

What's Next?

The Court answered the preliminary question of "Whether the plaintiff has established the publication element of the cause of action of defamation against the defendant in respect of each of the Facebook comments by third-party users?" in the affirmative.

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Now that Voller has satisfied this preliminary question, the Court will hear the remainder of the defamation case, including whether the media companies are capable of defending the alleged defamatory imputations.

What Should Media Companies Do Now?

In light of this decision, media companies are required to be on high alert about potentially defamatory comments posted on their Facebook posts. This poses a challenge as comments on a public Facebook page cannot be entirely disabled.

While this decision still stands, media companies should consider the following options to mitigate against the risk of being sued in similar circumstances:

- Before posting, assess the nature and subject matter of the content and whether it will be a high or low risk of eliciting comments that could be defamatory.
- There are then two key approaches to moderating comments:
 1. Hide one-by-one: Monitor the comments as they are posted and 'hide' those that contain potentially defamatory allegations. This will keep it hidden from everyone except the person who wrote the comment and their friends. This means they won't know that the comment is hidden. Alternative options to this one-by-one approach are to 'delete' the comments, which means it will be permanently removed, or 'report' the comment to Facebook, which you could do as well as hiding the comment.
 2. Block words: Facebook settings allow you to block certain words from appearing on your page. This means that comments containing the words would need to be 'unhidden' to appear publically. As suggested above, it is possible to use this tool to hide substantially all comments that contain commentary through blocking a list of extremely common words. The comments can then be monitored and allowed to be published following an assessment that they do not contain potentially defamatory material. This is the more proactive approach.

There is also a 'profanity filter' that can be turned on to block different degrees of profanity from appearing on your page. This is measured by Facebook according to the most commonly reported words and phrases marked offensive by the community, and could assist in the early stages of implementing a comment moderation strategy.

Peter Bartlett and Dean Levitan are lawyers with Minter Ellison in Sydney, Australia.

Supreme Court: “There are a great many immoral and scandalous ideas in the world...and the Lanham Act covers them all.”

By Dori Hanswirth, Roberta L. Horton,
Theresa M. House, Jesse Feitel and Michael E. Kientzle

Erik Brunetti is a Los Angeles-based artist. In 1990, he created the streetwear brand FUCT with professional skateboarder Natas Kaupas, and for the last 29 years the label has been producing the sort of outré clothing its name suggests. The company's website displays an example: a hooded sweatshirt displaying the phrase “FUCT Los Angeles.” Unlike most other long-lived clothing labels, however, Fuct has never secured a federal registration for its mark.

That may soon change. On June 24, 2019, in [*Iancu v. Brunetti*](#), the Supreme Court struck down, on First Amendment grounds, the section of the Lanham Act that prohibited the registration of “immoral” or “scandalous” marks. Writing for a six-Justice majority, Justice Kagan opined that the “immoral or scandalous” bar constituted impermissible viewpoint discrimination and therefore violated the First Amendment.

The Court’s decision will likely lead to federal registration for many other trademarks that incorporate objectionable or subversive phrases or images. It is less clear, however, what the future holds for marks like FUCT. Several Justices mentioned the possibility that a statute more narrowly tailored to bar registration based on the *mode* of expression, without regard to the speaker’s perspective – i.e., barring registration of marks that contain profanity, racial epithets, or other vulgarities – might be permissible under the First Amendment.

Writing for a six-Justice majority, Justice Kagan opined that the “immoral or scandalous” bar constituted impermissible viewpoint discrimination and therefore violated the First Amendment.

The Court Strikes Down The “Immoral Or Scandalous” Bar

This legal dispute started when Mr. Brunetti tried to register FUCT in connection with athletic, children's and infant's apparel. The United States Patent and Trademark Office (PTO) denied registration, finding that FUCT violated Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), because it “comprise[d] immoral or scandalous matter.” The Trademark Trial and Appeal Board (Board) affirmed, relying in part on the Urban Dictionary's definition of the word “fuct” as “slang and literal equivalent” of the past tense of the word “[***],” and Brunetti's use of the mark on clothing to convey “misogyny, depravity, [and] violence.”

Mr. Brunetti appealed to the United States Court of Appeals for the Federal Circuit. Before the Federal Circuit issued its decision, the Supreme Court decided *Matal v. Tam*, 137 S. Ct. 1744

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(2017). *Tam* involved a related provision of Section 2(a), which barred the registration of marks that tend to disparage any individual, institution, or belief. The Supreme Court ruled that the disparagement bar violated the First Amendment, because it constituted discrimination on the basis of the trademark owner's viewpoint. Relying on *Tam*, the Federal Circuit reversed the Board's denial of registration, holding that the “immoral or scandalous” bar, like the disparagement bar, discriminates based on viewpoint and is therefore also unconstitutional under the First Amendment.

The Supreme Court affirmed. Justice Kagan's majority opinion emphasized that the Court's First Amendment jurisprudence has consistently overturned government restrictions that discriminate based on the viewpoint of a speaker because “[t]he government may not discriminate against speech based on the ideas or opinions it conveys” or because the Government “disapprov[es] of a subset of messages it finds offensive.”

To the majority, “immoral” and “scandalous” could only be understood to refer to the “ideas or opinions” of the mark owner seeking registration:

When is expressive material “immoral”? According to a standard definition, when it is “inconsistent with rectitude, purity, or goods morals”; “wicked”; or “vicious.” ... So the Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. And when is such material “scandalous”? Says a typical definition, when it “giv[es] offense to the conscience or moral feeling”...

In sum, Section 2(a) “allows registration of marks when their messages accord with, *but not* when their messages defy, society's sense of decency or propriety.” The facially discriminatory nature of the “immoral or scandalous” bar was reflected in the PTO's application of the statute in practice, according to the Court. For instance, the PTO had registered SAY NO TO DRUGS—REALITY IS THE BEST TRIP IN LIFE while denying registration to marks suggesting opposing views about the same topic, including YOU CAN'T SPELL HEALTHCARE WITHOUT THC and BONG HITS 4 JESUS.

The government argued that the Court should avoid the First Amendment issue by interpreting the immoral or scandalous bar to only include “marks that are offensive or shocking to a substantial segment of the public because of their *mode of expression*, independent of any views that they may express.” The Court refused. The Court recognized that the PTO itself does not parse the separate meanings of “immoral” and “scandalous,” but instead applies the bar as a

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“unitary provision.” Moreover, the Court held that neither “immoral” nor “scandalous” were ambiguous, and therefore the Court could not give the terms the meaning the government suggested. As the majority explained, “[t]o cut the statute off where the government urges is not to interpret the statute Congress enacted, but to fashion a new one.”

While every Justice agreed that the “immoral” portion of the “immoral or scandalous” bar could not be interpreted in the limited manner the government proposed, Chief Justice Roberts and Justices Breyer and Sotomayor each dissented in part to opine that the “scandalous” portion of the bar could be. Justice Sotomayor presented the most detailed analysis of this issue, arguing that “scandalous” is ambiguous because it may refer to either the content of speech, or the mode in which the speech is expressed. If the latter, “scandalous” is a permissible “viewpoint-neutral form of content discrimination.” Although Chief Justice Roberts did not join Justice Sotomayor in her reasoning, each of the dissenting Justices agreed that “scandalous” may be interpreted in this manner, and that such a restriction on the *mode* of expression—rather than the underlying idea expressed by the mark—would be permissible under the First Amendment.

No Resolution Of Proper First Amendment Framework

As it did with respect to the disparagement bar in *Tam*, the Court struck down the “immoral or scandalous” bar without resolving, as Chief Justice Roberts put it, “how exactly the trademark registration system is best conceived under our precedents.” In other words, the majority’s opinion does not turn on the treatment of federal trademark registration as “government speech,” “commercial speech,” or the like. To the Court, that the law discriminated on the basis of viewpoint was sufficient to strike it down without resolving these questions of categorization.

Justice Breyer wrote separately to argue that a “category-based approach to the First Amendment” would not be useful in this context.

Justice Breyer wrote separately to argue that a “category-based approach to the First Amendment” would not be useful in this context. He proposed – as he has in other First Amendment cases – replacing the Court’s First Amendment framework with a simple proportionality question: does the regulation at issue cause disproportionate harm to First Amendment interests in light of the objectives the regulation addresses? Under that analysis, a broad prohibition on registering “immoral” marks would not survive First Amendment scrutiny, but a narrower prohibition focusing on the “scandalous” *mode* of expression would.

Only Justice Sotomayor attempted to fit the federal registration system within a particular First Amendment framework, and even she did not argue for one in particular. She explained that, “[w]hen the Court has talked about government initiatives like [the registration system], it has usually used one of two general labels ... a limited public (or nonpublic) forum ... [or a] “government program[] or subsid[y].” Under either framework, she argued, the Court has

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generally permitted “viewpoint-neutral content discrimination.” Like Justice Breyer’s, Justice Sotomayor’s analysis would permit narrow restrictions on the registrability of marks incorporating particular “scandalous” modes of expression.

Implications For Future Applications To Register “Immoral” Or “Scandalous” Marks

The holding in *Brunetti* will likely lead to new applications to register trademarks that would have previously been subject to a refusal under the “immoral or scandalous” bar. Justice Sotomayor twice identifies the “coming rush to register” “marks containing the most vulgar, profane, or obscene words and images imaginable[,]” which she says is a result that is “eminently avoidable” if the majority agreed with her narrower view of the statute.

Presumably, the forecasted uptick in applications for marks that might otherwise have been deemed immoral or scandalous reflects a common understanding about the importance of securing federal trademark registration. As the majority recognized, federal trademark registration confers “valuable benefits”:

For example, registration constitutes “prima facie evidence” of the mark’s validity. [15 U.S.C.] § 1115(a). And registration serves as “constructive notice of the registrant’s claim of ownership,” which forecloses some defenses in infringement actions. [15 U.S.C.] § 1072.

The “rush to register” will, additionally, not only include new applications, but also pending applications that the PTO had suspended pending the outcome of *Brunetti*. Many of the marks subject to suspension under the “immoral or scandalous” bar dispense with *Brunetti*’s coy use of homonym and use profanity directly, including: I’M NOT GOING TO F[***] YOU and F[***] CHILD SUPPORT. The decision may also open the door to the federal registration of marks referring to marijuana, which have previously been refused under the “immoral or scandalous” bar. (However, to the extent that applicants seek registration for such marks in connection with marijuana *products*, they may still face refusal for failure to demonstrate lawful use in commerce, as long as marijuana products themselves remain illegal under federal law.)

Possibly, the registration of marks previously subject to the “immoral or scandalous” bar will prompt a legislative response. If so, the dissenting opinions’ discussion of the constitutionality of a narrow “scandalous” bar may provide guidance for crafting a statute that would survive constitutional scrutiny by limiting its application to particularly vulgar or obscene modes of expression. The majority’s decision does not expressly rule out the permissibility of such a

Justice Alito, who joined the majority but also wrote a separate concurrence, seemed to invite new legislation, writing that “[o]ur decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas.”


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restriction under the First Amendment, and Justice Alito, who joined the majority but also wrote a separate concurrence, seemed to invite new legislation, writing that “[o]ur decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas.”

Should Congress pass such a law, it may not be long before Mr. Brunetti, or another applicant like him, raises a new First Amendment challenge. Until then, Mr. Brunetti and his decades-old clothing brand can likely look forward to a time in the near future when FUCT appears on the Principal Register.

Dori Hanswirth, Roberta L. Horton, Theresa M. House, Jesse Feitel and Michael E. Kientzle are lawyers with Arnold & Porter.



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‘Nothing Compares 2’ a Warhol

Andy Warhol Foundation for the Visual Arts v. Goldsmith

By Wesley Lewis

This July, a federal district court in New York granted the Andy Warhol Foundation’s motion for summary judgment in a copyright dispute between the non-profit foundation and music photographer Lynn Goldsmith. [The Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith](#), No. 17-cv-2532 (S.D.N.Y. July 1, 2019).

Background

At the center of the lawsuit was a series of sixteen distinct artistic works depicting the recording artist Prince, which Warhol based on one of Goldsmith’s photographs of the enigmatic musician. In a 35-page Opinion and Order, United States District Judge John Koeltl conducted a thorough fair use analysis, ultimately holding that Warhol’s “Prince Series” of works was subject to fair use protection. The decision relied heavily on the transformative nature of the allegedly infringing works, noting that Warhol transformed the reference photo “into something new and different” that was “immediately recognizable as a ‘Warhol.’”

In 1981, Goldsmith photographed Prince in her New York City studio on assignment for Newsweek Magazine. According to the record on summary judgment, Goldsmith applied makeup and selected the photographic equipment, film, and background for the shoot. Goldsmith stated that her artistic choices resulted in photographs that portrayed Prince as a “vulnerable human being” and “not a comfortable person.”

Approximately three years later, Condé Nast licensed one of Goldsmith’s photographs from that 1981 session for use as an artist’s reference for artwork for an upcoming issue. Warhol used that photograph to create a full-color illustration of Prince to accompany an article in a 1984 issue of Vanity Fair Magazine. Later that year, Warhol created the Prince Series of sixteen distinct works based on that same photograph.

After Warhol’s death in 1987, AWF obtained ownership of the Prince Series, and the foundation has continued to license the works to third parties for use in books, magazines, and for other purposes. When Prince died in 2016, Condé Nast once again displayed one of Warhol’s Prince Series works in the magazine—this time licensing the work through AWF. Upon learning of this, Goldsmith informed AWF that she believed the photograph infringed on her original work and obtained copyright registration of her original photograph—a prerequisite

Judge John Koeltl conducted a thorough fair use analysis, ultimately holding that Warhol’s “Prince Series” of works was subject to fair use protection.

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to bringing a copyright infringement claim. AWF brought an action seeking a declaratory judgment of non-infringement, and Goldsmith countersued for copyright infringement.

Both parties moved for summary judgment. AWF argued that the Prince Series works were not substantially similar under “ordinary observer” test employed in the Second Circuit and additionally, even if the two works were substantially similar, that the works were sufficiently transformative to constitute fair uses of the Photograph. Goldsmith argued that the Prince Series impermissibly appropriated protectible elements of her photograph and that the Warhol pieces were not fair uses of her work. (AWF also argued that the Copyright Act’s three-year statute of limitations barred Goldsmith from asserting an infringement claim based on alleged acts that occurred more than three years prior to bringing her claim. Goldsmith responded by focusing on AWF’s license of the work to Condé Nast in 2016, which fell within the relevant statute of limitations, as well as AWF’s ongoing practice of licensing the Prince Series works. The Court determined that certain actions were time-barred but nevertheless treated Goldsmith’s copyright infringement claims as timely to the extent that they involved AWF’s actions within the limitations period, such as the 2016 license.)

Fair Use Analysis

Judge Koeltl began his analysis of the parties’ motions for summary judgment by noting that photographs (like the allegedly infringed work) are typically subject to copyright protection. Although the Court determined that the two works had “probative similarity,” the Court declined to determine whether “substantial similarity” existed, which is necessary to establish that an alleged infringer engaged in ‘improper appropriation’ of protectible elements of a copyrighted work. Instead, the Court determined that an assessment of substantial similarity was unnecessary because it was “plain” that fair use protected the Prince Series works.

The Court determined that an assessment of substantial similarity was unnecessary because it was “plain” that fair use protected the Prince Series works.

Section 107 of the Copyright Act demands that Courts embark on an “open-ended and context-specific inquiry” of assessing “whether copyright law’s goal of ‘promot[ing] the Progress of Science and useful Arts would be better served by allowing the use than by preventing it.” Upon consideration of the four statutory fair use factors, the Court concluded that it would.

The first factor, the purpose and character of the use, strongly favored AWF. Although the works were commercial in nature, the Court found Prince Series works were highly transformative, thereby “dilut[ing]” the “import of their (limited) commercial nature.” Unlike Goldsmith’s original work, which portrayed Prince as “vulnerable” and “not ... comfortable,” the Court interpreted Warhol’s works as having “an aesthetic and character different from the original,” transforming the musician into “an iconic, larger-than-life figure.” Furthermore,

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Judge Koeltl noted, each work in the Prince Series is “immediately recognizable as a ‘Warhol,’” and the works “add something new to the world of art and the public would be deprived of this contribution if the works could not be distributed.”

The second factor, the nature of the copyrighted work, favored neither party. Although the allegedly infringed work was a creative work subject to protection, the Court determined that the factor was “of limited importance” because of the highly transformative nature of the Prince Series works.

The third factor considers the amount and substantiality of the portion used in relation to the copyrighted work as a whole. 17 U.S.C. § 107(3). In addressing this factor, the Court looked to two recent photography fair use case, *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 757 (7th Cir. 2014) and *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013), for guidance. In *Kienitz*, the Court of Appeals held that the third factor favored the alleged infringer where the use “removed so much of the original that, as with the Cheshire Cat, only the smile remains.” And, in *Cariou*, the court held that, although the allegedly infringing work took significant portions of the plaintiff’s photographs, the transformative nature of the work nevertheless counseled in favor of fair use. Here, because Warhol’s alterations “wash[ed] away the vulnerability and humanity Prince expresses in Goldsmith’s photograph,” the third fair use factor favored AWF.

Finally, the Court held that the fourth fair use factor also favored AWF. Here, the existence of the Prince Series did not usurp the market for direct sales of her Prince photograph or for any derivative markets. The Court reasoned that the licensing market for the Prince Series works was “distinct from the licensing market for photographs like Goldsmith’s,” because “the licensing market for Warhol prints is for ‘Warhols.’” Thus, the fourth factor favored AWF.

Considering these four factors together, all but one decisively favored AWF. Based on a “holistic weighing” of the factors, the Court held that the Prince Series works were protected by fair use and granted summary judgment in favor of AWF.

Judge Koeltl’s decision is a testament to the importance of the transformative nature of an allegedly infringing work in a fair use analysis. Indeed, the transformative nature of the Prince Series informed every step of the Court’s fair use analysis to some extent. Certainly, it tilted the first factor strongly in AWF’s favor, but the Court’s analysis did not stop there. The Court found that the Warhol’s transformation of the Goldsmith photograph rendered factor two neutral and tipped the balance of factor three in AWF’s favor because it “washed away” the protectible elements of the original work. Additionally, because the works were so distinct, AWF was able to establish that it occupied a different licensing market from the original work. Thus, the transformative nature of Warhol’s use of the original photograph pervaded every element of the analysis. Copyright attorneys litigating fair use should consider this decision when assessing potential liability for claims arising from works that substantially transform the originals.

Wesley Lewis is an associate at Haynes and Boone in Austin.

Hot Topics Roundtable

Music Copyright and the “Stairway to Heaven” Case

*If You Listen Very Hard, the
Tune Will Come to You at Last*

Music is an essential part of entertainment today – from the recording industry to movies, television and videogames. Some recent high-profile cases have raised important questions for media lawyers about originality and copyright in music. We asked three experts – David Aronoff, Scott Sholder and Kenneth Freundlich – to discuss this issue with a focus on the pending appeal in the copyright infringement case over Led Zeppelin’s iconic rock anthem Stairway to Heaven.

What standards are applied to determine if two music pieces, eg [Led Zeppelin’s Stairway to Heaven](#) and [Taurus’s Spirit](#), are substantially similar? How are Stairway’s different elements – e.g. melody, rhythm, lyrics, and recorded sound – treated by copyright law?

Aronoff: To start with, in the Ninth Circuit the courts generally apply a two-part analysis based on “extrinsic” and “intrinsic” tests. The “extrinsic test” examines the objective criteria of the songs at issue – e.g., the melody, harmony, rhythm, beat, key, structure, lyrics, etc. – to determine if the defendant’s song is substantially similar to original protectable elements of the plaintiff’s allegedly infringed song. Unprotected material in the plaintiff’s song, such as scenes-a-faire, stock elements and unoriginal material, is filtered out of the comparison. The “intrinsic test” examines whether an ordinary, reasonable person would subjectively find the total concept and feel of the two songs to be substantially similar. The extrinsic and intrinsic tests both must be satisfied for a plaintiff to prevail. Additionally, some decisions in the Ninth Circuit modify the “extrinsic test” by holding that a “combination” of otherwise unprotected musical elements in the plaintiff’s song can be protected if they are selected and arranged in an original manner. Several cases hold that such “selection and arrangement” copyrights are “thin” and can only be infringed by “virtually identical” copying, but other cases suggest that “substantial similarity” is all that is required. In addition, when the purported infringement is based on fragmented literal copying rather than non-literal comprehensive copying, a finding of liability in the Ninth Circuit generally requires the defendant’s “exact or nearly exact” copying of a musical element that is a qualitatively important component of the plaintiff’s work. Further complicating matters, several Ninth Circuit music cases hold that there exists an “inverse ratio rule” under which proof of similarity is lowered when the defendant’s level of access to the

In the Ninth Circuit the courts generally apply a two-part analysis based on “extrinsic” and “intrinsic” tests.

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plaintiff's song is high. This so-called "rule" has been criticized by some courts and commentators. Finally, in cases where the defendant cannot be shown to have "access" to the plaintiff's work – i.e., a reasonable opportunity to copy it – infringement can only be shown by "striking similarity." This requires similarities that are so unusual, noteworthy and/or pervasive that they preclude even the possibility of independent creation.

Other Circuits often approach substantial similarity in a different manner.

Freundlich: In New York (Second Circuit), the test for substantial similarity is the "ordinary observer test." This test, in the context of a lawsuit alleging infringement of a musical works, requires that the plaintiff prove that defendant wrongfully appropriated the plaintiff's song by taking from the plaintiff's song so much of what is pleasing to the ears of a lay listeners, who comprise the audience for which such song was composed. The plaintiff must demonstrate that substantial similarities as to the protected elements of the song would cause an average lay observer to recognize the alleged infringing copy as having have been appropriated from the plaintiff's song. Although substantial similarity in the Second Circuit is usually a question of fact for the jury, the Judge can rule against the plaintiff as a matter of law if the alleged similarity concerns only noncopyrightable elements or where no reasonable jury—looking at the copied protectable elements—could find that the two songs are substantially similar.

The important commonality between both tests is that only protectable elements should be considered in the substantial similarity analysis.

It is worth pointing out that the District Court Judge in the Ed Sheeran case—currently pending in a New York federal court—recently put off a jury trial in that matter pending the outcome of the en banc Ninth Circuit Court of Appeals proceedings in the Led Zeppelin case. This is perhaps an indication that the rulings from the Ninth Circuit concerning how to handle similarity in unprotectable elements may play a key role in music copyright cases pending in the Second Circuit.

Sholder: Regardless of the applicable test, any or all of the various elements of a song could be treated as protectable if they exhibit a minimum threshold of originality. This is a very low bar that excludes ideas, abstract concepts, and the basic building blocks of music. For instance, a basic scale or rhythm is not copyrightable, but an independently created arrangement of notes in an original way is. Melody and lyrics are more likely to be subject to copyright protection because they go beyond the mere stock elements that comprise any song, and the necessary elements that inform any particular genre (more on that below).

Rulings from the Ninth Circuit concerning how to handle similarity in unprotectable elements may play a key role in music copyright cases pending in the Second Circuit.

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There are thousands of songs based on identical or nearly identical musical structures – for instance “Louie Louie” and “Wild Thing” or a classic “blues.” How do we evaluate meaningful differences?

Sholder: There are only so many ways to express an idea (and ideas are not copyrightable). Playing blues requires specific notes or chords to be played in specific sequences for specific reasons; in other words, there is not an unlimited number of ways to make a pure blues song. Likewise, certain genres of heavy metal will inherently include elements like distorted minor guitar chords, tremolo picking, and double-bass drums, but those are not, themselves, copyrightable; they are merely signature elements of a musical genre. These “stock” components are considered “scenes a faire,” which basically means they are fair game because they are necessary elements of a particular form of expression.

Evaluation of the differences between songs can be difficult, but this is where the two-step analysis comes in, at least in the Ninth Circuit as it relates to the Led Zeppelin case. Once the basic tropes of a song are stripped away – by the court and typically with the assistance of an expert witness – a fact finder can compare the boiled down original expressions side by side. Think of it as sifting away the sand to try to find the gold. The gold nuggets are the original riffs, phrases, lyrics, or arrangements, and those are the pieces of evidence that will decide the case.

Aronoff: Certain musical motifs have been used so ubiquitously over the course of many years that they are not original and are generally considered to be in the public domain. For example, the classic I-IV-V-IV chord pattern, which is the readily recognizable basis for “Louie Louie,” “Wild Thing,” “La Bomba,” “Twist and Shout,” “Get Off My Cloud,” and many other songs, is often said to be unoriginal and unprotectable. That said, although the chords of a new I-IV-V-IV based song might be largely unprotectable as a composition, the song could still be protected as to any new and original expressive elements that are added to the chords. Thus, song lyrics and any material new original musical embellishments, such as a distinctive extended guitar solo, that are added to the basic I-IV-V-IV chords would be subject to copyright protection. In addition, a new I-IV-V-IV song would also be subject to protection as a sound recording copyright. Thus, distributing such a recording without a license, or digitally copying and using the recording without authorization, for example in a TV commercial or motion picture soundtrack or as a sample in another song, would be infringing.

Freundlich: This depends on what you mean by “musical structures.” More rigorous terminology is required than that. The musicologists I represent believe that without substantial similarity in melody, there should never be infringement. As I wrote in my brief on their behalf

Once the basic tropes of a song are stripped away – by the court and typically with the assistance of an expert witness – a fact finder can compare the boiled down original expressions side by side.

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in the pending Led Zeppelin en banc proceeding in the Ninth Circuit, musical works are built from a common vocabulary of fundamental elements like pitch, duration, meter, key and timbre. Using these basic elements, composers build more complex structures like chords and melodic and rhythmic motifs, which they further develop and combine to create the rhythmically structured melodies and underlying harmonic progressions that constitute the original backbone of a musical work. The most important parts of a musical composition are its melody, harmony, and rhythm.

One of the basic tenets of copyright law is that copyright protects originality of expression. So, the question regarding your example above – the classic “blues” - you are referring to is something that is so ubiquitous and elemental that nobody gets to claim it as their own. Consider the 1-4-5-1 progression that you hear in a plethora of 50’s era songs. Nobody would claim that the chord progression there may be monopolized by any one songwriter.

The descending bass line similar between “Stairway to Heaven” and “Taurus” is another example of a commonplace elements that indeed is traceable to the Baroque period of music and appears in so many other compositions since then including Purcell’s “When I am Laid in Earth” (Dido’s Lament) (1689) to Chopin’s “Prelude in E minor” (1839) through Vic Dana’s recording of “More” (1963) and the Sherman Brothers’ “Chim Chim Cher-ee” (1964) and Beatles’ “Michelle” (1965). This commonplace descending bass also implies how unoriginal is the chord progressions that typically supports it.

What’s the role of the jury in the Zep trial and should they get to hear the recordings at issue?

The descending bass line similar between “Stairway to Heaven” and “Taurus” is an example of a commonplace elements that indeed is traceable to the Baroque period.

Aronoff: The jury fulfilled its role by returning a verdict for defendants. After defendants appealed, an initial panel of the Ninth Circuit reversed the judgment, giving plaintiff an unwarranted “do over.” However, now that defendants’ petition for rehearing en banc has been granted, hopefully the “do over” will be undone. The rehearing en banc has not been set with a firm date, but it is supposed to be calendared during the week of September 23, 2019. As for whether the jury should hear the released recording of Spirit’s song “Taurus,” the answer is no. Plaintiff sued on the registered copyright in the composition, and the deposit copy (as is often the case) consisted only of sheet music setting forth the basic notes, musical notations and lyrics. “Taurus” was registered for copyright in 1967, but it was not until 1976 that the Copyright Act was amended to allow copyrights in compositions to be registered by submitting a recording rather than sheet music as the deposit copy in the Copyright Office. Thus, the only actionable elements of plaintiff’s work were embodied in the registered sheet music. Listening to the recording of “Taurus” – which contained performance elements not included in the sheet music – would have prejudicially influenced the jury’s consideration of substantial similarity. Plaintiff claimed, and the initial Ninth Circuit panel

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surprisingly agreed, that allowing the jury to watch Jimmy Page listen to recordings of “Taurus” should have been permitted on the issue of access (but not substantial similarity) – so that the jury could study Page’s demeanor as he listened to “Taurus” and intuit from his expression whether he was familiar with it when he wrote “Stairway to Heaven.” But this analysis seems farfetched at best (especially given the abuse of discretion standard applicable to review of trial court evidentiary rulings) because the trial judge had required “Taurus” to be played for Page outside the presence of the jury, and the jury was then allowed to observe his demeanor as he responded to questions about whether he had heard it before.

Freundlich: The jury gets to decide substantial similarity based on the Ninth Circuit law described above which involves an “extrinsic test” and an “intrinsic test.” Whether they should hear the recordings is a complex issue. Again referring back to my musicologists’ amicus brief in this case’s pending en banc proceedings, we argue that the sounds of the instruments chosen for a particular recording of a musical composition can have an outsized effect on a jury’s perception of the similarity of two musical compositions by attracting a listener’s attention to the performance as opposed to the composition. *See* Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 Va. Sports Ent. L.J. 137 (2012). This underscores the reason why the “extrinsic test” must be rigorously applied to prevent songs sharing unoriginal elements from ever reaching the jury’s “intrinsic” listening test, which is by its nature so subjective.

One can argue that the jury in the recent case against Katy Perry found her liable not based on similarities of protectable musical expression, but rather because portions of both songs sounded similar.

The problem inherent in having a jury hear sound recordings instead of MIDI generated audio containing purely musical information (and not performance and production elements which are arguably not part of the musical composition), is that the sound recordings are not necessarily limited to the musical compositional elements and the additional sound could skew and juries’ thinking as to whether the underlying musical compositions which are at issue, are infringing.

One can also argue that the jury in the recent case against Katy Perry found her liable not based on similarities of protectable musical expression, but rather because portions of both songs sounded similar. This outcome is the disturbing result of courts allowing musical experts to mislead jurors on the question of similarity of protectable musical expression by testifying about commonalities of unprotectable elements of musical works like motifs, genres, and sounds. This occurred in the widely criticized Blurred Lines infringement verdict against Robin Thicke and Pharrell Williams several years ago and is also at play in claims pending in the Led Zeppelin case as well as a case against Ed Sheeran regarding Marvin Gaye’s “Let’s Get it On.”

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The fact is juries do get to hear the recordings during the “intrinsic test” and this can sometimes be very misleading as to what the musical compositional elements really are versus the production elements which should not be considered in determining substantial similarity between two songs.

This is why I believe judges need to take a much more active role in screening cases at the summary judgment stage, perhaps even with an assist from a Court-appointed musicologist. The Court-appointed musicologist could perhaps evaluate the opposing partisan musicologists’ reports for the Court, thereby preventing cases where there is no substantial similarity of protectable elements from getting to a jury.

Sholder: The jury is the finder of fact and its role is to consider and review all the evidence and render an impartial decision based on the facts and the law as instructed by the court. The issue in the Led Zeppelin case is that, on appeal, the plaintiff claimed (and the Ninth Circuit panel agreed) that the trial court had improperly or inadequately instructed the jury with respect to certain aspects of copyright law that could have significantly changed the jury’s analysis.

With respect to hearing the songs, the plaintiff wanted to play the sound recording of “Taurus” to see if Jimmy Page recognized it in order to prove access to the work, but also to demonstrate substantial similarity. The court declined the request on both counts. The Ninth Circuit agreed to the district court’s decision with respect to the use of the recordings for purposes of proving substantial similarity because, under the 1909 version of the Copyright Act (which would cover both songs at issue), the scope of the “Taurus” copyright was governed by the deposit copy – i.e., the sheet music, not the sound recording (and at that time sound recordings were not protected by copyright). To play the sound recording for the jury when only the musical composition as embodied on paper was at issue would have been unduly prejudicial and potentially confusing. A similar issue arose in the trial concerning Robin Thicke and Farrell Williams’ “Blurred Lines”; it seems counterintuitive but at its core makes sense because the sound recording was not subject to protection and was not the subject of the lawsuit.

As to use of the sound recording for purposes of proving access, while the Ninth Circuit found the district court’s refusal to be an abuse of discretion, it determined that the error was harmless because the jury found that Led Zeppelin had access to “Taurus” notwithstanding the court’s refusal to play the sound recording.

In sum, no, I don’t believe the jury should have heard the sound recording, but perhaps there were compromises available. For instance, in the “Blurred Lines” case the trial court had allowed Robin Thicke to play, live in court, piano medleys of certain songs, including snippets from the compositions at issue, so hearing Jimmy Page play guitar in court would not have been unheard of (and certainly would have been a treat for all in attendance).

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What is the difference between an infringement claim for a musical composition versus a claim for infringement of a sound recording?

Aronoff: An infringement claim based on allegations that two songs sound too much alike, such the claim that “Stairway to Heaven” sounds too much like Spirit’s “Taurus,” is based on the compositions of the songs, that is the notes, melody, lyrics, etc. Such compositions – as embodied in the sheet music containing notes and musical notations and lyrics – have always been protected by copyright. In contrast, sound recordings of compositions are treated differently. In fact, sound recordings historically were not even protected by copyright. Instead, they were protected under state law, and many states passed statutes against bootlegging or pirating of music records. Thus, claims based on the unlicensed sale, distribution, copying or other use of a plaintiff’s sound recording had to be redressed under state law, if at all. It was not until 1972 that Congress, in an amendment to the Copyright Act, recognized that recordings are creative works entitled to copyright protection. However, that amendment was not retroactive, so pre-1972 sound recordings were not copyright protected until the passage of the Music Modernization Act in 2018 – which extended most federal copyright protections to pre-1972 sound recordings.

Freundlich: The musical composition claims should be limited to the musical compositional elements which are not necessarily expressed in the sound recording which contains other elements as discussed above that can in fact confuse a jury determining similarity of musical compositions.

A sound recording infringement usually takes the form of sample, *i.e.*, when the actual recording of the song is incorporated into another work. And the case law seems clear that the tiniest sample can result in a cognizable claim of infringement. This is not as difficult to determine and does not involve the pernicious problems juries face when determining substantially similarity of musical works.

Sound recording infringement cases would focus more on the technology of the sound recording and involve experts on audio engineering to determine forensically if the sound recordings are the same or if one is a re-record, which under U.S. Copyright law would not be an infringement of the sound recording (but may be an infringement of the underlying musical composition if the appropriate compositional licenses were not obtained).

Sholder: Every piece of music has two distinct copyrights – think of it as a two-layer cake. One copyright (the bottom layer of the cake) covers the musical composition, including the notes, chords, and lyrics as written by the songwriter. The top layer of the cake covers the specific recording of the performance of those underlying notes and lyrics. Each layer is

Sound recordings historically were not even protected by copyright. Instead, they were protected under state law, and many states passed statutes against bootlegging or pirating of music records.

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protected independent of the other, and while musical compositions have always been protected, sound recordings were not subject to any level of copyright protection until 1972.

Normally the songwriter or music publisher owns the rights to the composition layer and the record label owns the copyright in the sound recording layer (there are of course many permutations of this structure depending on who wrote the music, whether the songwriter is also the recording artist, etc.). Each respective owner would assert the rights in their designated layer. So, in any given lawsuit regarding an allegedly infringing song, the plaintiffs could include music publishers as well as record companies if the allegation is that both the composition and sound recording are infringing, depending on the age of the song. For older songs like “Stairway” or Marvin Gaye’s “Got to Give It Up” (the subject of the “Blurred Lines” case), the sound recording won’t be at issue, hence the dispute over whether to play the recording or rely solely on the lead sheet or sheet music.

Another wrinkle not directly related to the Zeppelin case is that, while plaintiffs may sue for infringement of both the composition and sound recording when it comes to unlawful reproduction or distribution, the issue of unauthorized public performances is more limited. Musical compositions have always enjoyed a public performance right that is exclusive to the copyright holder, but not sound recordings. Sound recording copyright owners only received public performance rights in 1995, and only with respect to certain digital transmissions. In other words, when a song is played on a traditional AM/FM radio, the songwriter is paid but the record label and performing artists are not.

The digital public performance landscape further changed with the passage of the Music Modernization Act in 2018, but that topic is beyond the scope of this discussion.

What is the scope of fair use in music copyright cases?

Aronoff: The scope of fair use has not been fully developed in the case law concerning musical works. Of course, there have been a significant number of parody cases involving songs – such as the *Campbell v. Acuff-Rose* case involving the Roy Orbison song “Pretty Woman” and the *Fisher v. Dees* case involving the song “When Sunny Gets Blue.” But outside the context of parody, the broader defense of fair use not been a major factor in music cases. In part this is because virtually all defendants in infringing composition cases deny any copying whatsoever, which essentially eliminates the argument that the plaintiff’s work was copied for a transformative purpose. Additionally, in sound recording infringement cases involving the defendant’s sampling of the plaintiff’s work – a context in which copying is sometimes undisputed – instead of relying on fair use many such cases invoke principles of de minimis use to rule for defendants.

Freundlich: This is a question that is hard to answer briefly but I will try.

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Fair use is a statutory grab bag of factors which provide a complete defense to acts that would otherwise be considered infringement. It has roots in the First Amendment and Congress' desire to create some exceptions to the Copyright monopoly to assure that copyright law and the First Amendment remain in proper balance.

The U.S. Supreme Court waded into the role of fair use analysis in music in the 1994 case involving Roy Orbison's song, "Oh Pretty Woman," where the Court in a unanimous decision held that parody may constitute fair use. Justice David Souter looked first at the purpose-and-character-of-use prong of the Copyright Act's four-part, fair use test (codified in 17 U.S.C. §107) and wrote: "The central purpose of this investigation is to see ... whether the new work merely 'supersede[s] the objects' of the original creation ... or instead adds something new, with a further purpose or different character altering the first [i.e., underlying work] with new expression, meaning, or message." The marked departure by 2 Live Crew from the Roy Orbison's original "Oh Pretty Woman" made the use a fair use.

Justice Souter based the ruling on a concept of "transformative use" (which is not one of enumerated statutory factors of fair use) to find the 2 Live Crew version a protected parody: "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." . . . "While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree" by taking "the naiveté of the original of an earlier day" and rejecting "its sentiment that ignores the ugliness of street life and the debasement that it signifies."

Fair use remains as an evolving counterweight to claims of infringement, but may not play much of a role in any event in cases such as Led Zeppelin, Blurred Lines or Katy Perry where the uses are alleged to be substantially similar and not in any way parodic or otherwise transformative.

Sholder: The topic of fair use could span an entire book. Suffice it to say it is a notoriously gray area of copyright law that sparks a lot of debate and disagreement. However, the law on fair use in the context of music is not particularly developed. The most famous example of a fair use case in music – and the case that set the stage (pun intended) for fair use cases in general in the modern age – was *Campbell v. Acuff-Rose Music*, a Supreme Court case that dealt with a risqué rap version of Roy Orbison's classic "Pretty Woman." The Court held that 2 Live Crew's crass take on the classic "clean-cut" ballad constituted a parody because it "transformed" the original and didn't impact any legitimate market for the original. Ever since that case, the "transformative" nature of a purportedly fair use has been front and center (with

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the exception of some more recent cases which are now focusing more on the market harm factor again).

What is the role of experts in music copyright cases?

Aronoff: In the Ninth Circuit, the extrinsic test generally requires analytical dissection of musical works through expert testimony. In other words, the experts will identify and evaluate the objective components of each of the songs at issue – e.g., the melody, harmony, rhythm, beat, structure, lyrics, etc. – to evaluate and compare the alleged similarities and differences. In contrast, under the Second Circuit’s approach, no such analytical dissection is proper. Instead, the issue of unlawful appropriation is to be determined by the response of the “ordinary observer.” However, in the Second Circuit experts are allowed to opine as to the separate issue of “copying in fact.” This turns on whether the alleged similarities between the songs are such that the songs could have been created independently or must have been copied – so experts may opine as to whether the purported similarities arise from the plaintiff’s original protectable expression or are based on familiar stock elements or musical scenes-a-faire. In music infringement cases, expert testimony can also be admitted on other issues such as damages and apportionment – i.e., the quantum of defendants’ profits that can reasonably be apportioned to the alleged infringement.

Freundlich: Experts offer expert testimony about similarities between contested musical works, and whether the similarities are musically significant. In the Ninth Circuit in particular, such testimony assists judges and jurors to evaluate the significance of alleged similarities between two musical works for extrinsic similarity.

The problem with the current system in the Ninth Circuit seems to be that parties can provide partisan expert opinions finding similarities that are not musically significant but providing so much volume that judges are overwhelmed by the battling experts and simply punt the case to a jury rather than engaging in the objective analysis they are tasked with engaging in. District Court Judge Kronstadt’s decision in the *Blurred Lines* case does not reflect much, if any, adjudication the musicological issues, but rather focused on that there were competing views by each side’s experts that, the Judge’s view, provided “genuine issues” of material fact—and thus a jury question—as to the extrinsic similarity of the works. Simply because there were two differing expert opinions, the case went to the jury where an arguably incorrect verdict resulted.

I believe the time has come to consider asking judges in these cases to appoint a neutral musicologist for the Court – e.g., as a special master – to wade through the thicket and

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hopefully help judges in their gatekeeping role to weed out unjustified cases before they go to a jury.

Sholder: Music is essentially a foreign language to many people, and sometimes a translator is needed. This is why experts like musicologists are so important in copyright cases. They help the fact-finder understand the significance of various pieces of a musical work and why certain phrases are original (or not) or similar (or not) based on both theory and practice. They also, more generally, can parse the various elements of a song (melody vs. harmony vs. rhythm, etc.) for purposes of an objective comparison.

Expert witnesses are prevalent in Ninth Circuit music cases, which allows for expert testimony during the “extrinsic” similarity analysis. On the other hand, the Second Circuit generally does not allow for expert testimony for purposes of any dissection and analysis, instead relying on an “ordinary observer” standard of substantial similarity and limiting experts to opining on discrete issues like independent creation, scenes a faire, and damages.

What do you think the Ninth Circuit will decide?

Aronoff: It seems highly unlikely that the Ninth Circuit has gone to the trouble of granting rehearing en banc in order to endorse the decision of the initial three-judge panel. As a result, I think the odds are high that the judgment for defendants based on the jury’s verdict will be reinstated. That said, it is very difficult to predict the pathway by which the Ninth Circuit will reach this result. On the one hand, by application of Occam’s Razor, it can be anticipated that the en banc panel will most likely affirm the district court judgment with a narrow decision that largely relies on principles of invited error by plaintiff as to the jury instructions and no abuse of discretion as to the evidentiary issues. On the other hand, it is also possible (if somewhat less likely) that the en banc panel will issue a sweeping decision clarifying the law of substantial similarity and possibly even rejecting the inverse ratio rule.

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Freundlich: I do not like to pontificate on pending cases I am involved in. We are hopeful that whatever the result, it reflects a critical examination of the legal and musicological issues at hand—*i.e.*, what is protectable and unprotectable in music and how judges and juries should view their roles in evaluating alleged music infringement.

Sholder: It’s hard to speculate but a majority of the Ninth Circuit’s non-recused active judges certainly seemed to think there was something to revisit in the three-judge panel’s decision (the en banc panel will consist of 11 judges). En banc review is not granted lightly or often, and Courts of Appeals judges usually won’t grant a full review unless there is a serious issue to discuss and consider. Much will depend, of course, on the briefing and argument (and I do not

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offer any opinion with respect to the substantive issues or merits), but it's certainly possible that the panel could be reversed, and the jury verdict reinstated (Courts of Appeals also are generally hesitant to disturb jury findings).

If Zeppelin loses in the 9th Circuit, how will this change the environment for musicians? Why should media lawyers be interested in this area of law?

Aronoff: The law is already adverse for successful musicians in the Ninth Circuit, so a loss by Led Zeppelin will largely be cumulative. The key development in the Ninth Circuit, in my opinion, was *Swirsky v. Mariah Carey*, 376 F.3d 841 (9th Cir. 2004), a case that made it very difficult for defendants to win summary judgment, and by implication impossible to win a motion to dismiss, in a music similarity cases. This is quite contrary to cases involving the visual arts and dramatic works, in which summary judgments and motions to dismiss for defendants are routine in the Ninth Circuit. The negative effects of *Swirsky* were then compounded in the Ninth Circuit by the decision in the “Blurred Lines” case *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018), which essentially holds that mere stylistic similarities of the kind shared by Pharrell Williams’s and Robin Thicke’s song “Blurred Lines,” on the one hand, and Marvin Gaye’s “Got to Give it Up,” on the other hand, can be protected by copyright even in the absence of any substantial similarities in melody, harmony, lyrics or other concrete musical components. A win by Led Zeppelin in the Ninth Circuit will be a welcome development, but unfortunately it will not undo the ongoing problems created by *Swirsky* and *Williams*.

Composers should be able to freely borrow from the rich tapestry of public domain musical elements. These are not merely theoretical words.

Media lawyers dealing with entertainment-related claims should have familiarity with the law of music infringement because music is a key component of virtually any type of entertainment programming. I’ve not surprisingly defended music infringement claims against recording artists and their music publishers and record companies, which are the typical defendants named in such claims. In addition, however, I’ve also defended music infringement claims alleged against television shows, motion pictures, videogames, and TV commercials. Any context in which music is used regularly can be a target of infringement claims, and because music of one kind or another is used pervasively in virtually all forms of entertainment media, it is useful for media lawyers to be up to speed in this area.

Freundlich: As I wrote in my [amicus brief on behalf of my musicologists](#): if the Ninth Circuit upholds the panel decision to send this case back to trial with a general “selection and arrangement” instruction and no more, *i.e.*, that a selection and arraignment of unprotectable musical elements can be enough for infringement, this will threaten the public domain and cause paralyzing uncertainty for composers. If a jury instruction is given permitting potential infringement verdicts when the similarities are trivial and commonplace, songwriters will be confused as to when originality – and thereby copyright protection – begins and ends. Such an

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instruction would threaten to eviscerate important elements of the public domain and stifle musical creativity. Given the confined set of common elements available to composers, they would understandably be anxious, fearing unwarranted and frivolous copyright lawsuits.

Composers should be able to freely borrow from the rich tapestry of public domain musical elements. These are not merely theoretical words. This morning I had a conversation with my barista who is a musician, and he expressed how worried he and his friends are because they do not know anymore if what they are writing is based on an inspiration or idea from a prior work and they feel inhibited by this recent flood of rulings calling into legal question how a composer writes music.

Sholder: After “Blurred Lines,” the legal environment for musicians was already tense, especially in the Ninth Circuit (*i.e.*, California). Add to this the recent jury verdict finding that Katy Perry copied the underlying beat of a Christian rap song “Joyful Noise” by Flame in her 2013 hit “Dark Horse”; the jury awarded the plaintiff \$2.78M in that case. The Zeppelin appeal will also impact still-pending cases, including a \$100 million case in New York federal court against singer-songwriter Ed Sheeran claiming that his song “Thinking Out Loud” infringed Marvin Gaye’s “Let’s Get It On”; that case’s trial has been stayed until 10 days after the Zeppelin en banc appeal is decided. A Led Zeppelin loss in the Ninth Circuit would likely perpetuate existing concerns and anxiety among songwriters and musicians who are already worried that they could end up being sued without realizing they had done anything wrong (particularly in light of the longstanding doctrine of “subconscious copying,” made famous in the *Bright Tunes Music Corp. v. Harrisongs Music* case pitting George Harrison’s “My Sweet Lord” against the Chiffons’ “He’s So Fine,” and applied by the Ninth Circuit in *Three Boys Music Corp. v. Bolton*).

A Led Zeppelin loss in the Ninth Circuit would likely perpetuate existing concerns and anxiety among songwriters and musicians who are already worried that they could end up being sued without realizing they had done anything wrong.

Media lawyers should be familiar with copyright infringement cases in the music space even if they don’t think they practice in the music space. With the shift from physical music products like CDs to digital streaming services, and the increasing ease with which music can be copied, embedded, and synched with video, music is simply ubiquitous, particularly in digital content. Videos contain background music; podcasts use musical interludes; and social media apps allow video synchronization. Across the spectrum of media platforms, music is there, and even though it is often hypertechnical and complicated, it pays for media lawyers to know the risks involved in order to provide their clients with the most comprehensive copyright advice possible.

David Aronoff is a partner at Fox Rothschild in Los Angeles (and a guitarist in an alternative rock band). Scott Sholder is a partner at Cowan DeBaets in New York. Kenneth D. Freundlich is the founder of Freundlich Law in Encino, CA.

Letter to a Newer Media Lawyer

If a Farm Girl in the Midwest Can Have a Media Practice, So Can You!

By Robin Luce Herrmann

Yep. I was raised a farm girl. Out of respect for my vegetarian and vegan friends, I will spare you the gory details of my chores and activities on my grandfather's farm. (If you are morbidly curious, we can discuss wethers and barrows over drinks.) I practice law in the Midwest – not exactly the epicenter for the media or the practice of media law. And I do have a media practice, indeed we have a media team! So, if you don't practice on "the coast," or have a journalism background, or an already developed media clientele, hopefully my experience and approach will provide some helpful ideas.



Fertile Acreage Is An Advantage, But Not A Must

My path to becoming a media lawyer (like many) was not exactly planned or straight. After college, I earned a paralegal certificate so that I could work in the law before taking the law school plunge. I was hired at Butzel Long as a litigation paralegal. I worked on anti-trust cases, labor and employment cases, breach of contract – any and every kind of litigation I could get my hands on. One of the first cases I worked on involved 60 Minutes in a defamation suit brought by a Michigan doctor. Our team was led by Dick Russell, who was responsible for expanding our media practice beyond representations of local media entities. I admit that I was a bit star struck initially by the thought of representing Ed Bradley, but I didn't actually meet him for years, and in the meantime, working on the case was mostly a lot of pure (and typical) litigation slog.

I certainly benefitted from working with seasoned media lawyers with an established media clientele. But the practice of law has changed tremendously since the 1980s. Few attorneys are "lifers" like me – and clients no longer commit to the same attorney for life. Clients are also increasingly aware and concerned about the diversity of their litigation teams and are routinely evaluating and changing their representation to better fit their corporate goals. Most importantly, the entities needing First Amendment experience have also changed. Then, "media clients" were broadcasters (TV and radio) and print (newspapers, magazines, books). Now, "bricks and mortar" clients need content advice as well. Almost every business and individual is a content provider, whether through their social media accounts, blogs or websites. Over the last decade my team has developed many new clients, including drug companies, hospital/health care companies, educational institutions, and even tooling manufacturers. As a result,

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today when you think “media client,” instead of thinking print or broadcast, think “content provider.” Throughout the rest of this article, when I refer to media clients, I really mean content providers.

When you consider the brick and mortar clients with whom you interact, you may want to think of them differently. Research their on-line presence – what sort of content are they generating? Do they have effective Terms of Use and Privacy policies? Does their social media content raise areas of potential concern? Are they one of those companies that seem to post any photo or video they can access on the internet without any concern for copyright or trademark infringement? If the answer to any of these questions is “yes” then you’ve found some potential media clients. You could offer to do a free lunch time seminar on best practices for on-line content, or publish a client alert on best practices or on a new decision that might be of interest. You can also educate your colleagues, enabling them to issue spot and call on you to help their clients. The point is that the clients in need of this expertise are much more varied today and there are many more of them than in the past. You can use this to build a practice.

Don’t Put All Your Eggs In One Basket

It is extremely difficult for most newer lawyers – particularly those not at a firm with a very robust media practice – to do only media work. And that may be a good thing. Judges usually don’t see many First Amendment cases. And when they get them, they like to hang on to them. Why? Because media cases tend to be more interesting than the run of the mill insurance and breach of contract cases judges usually see. They can be more challenging intellectually and they often generate publicity. Some TV face time can be helpful to a judge facing re-election with limited campaign funds.

Like most states, Michigan has heightened standards for defamation claims and the protections provided by § 230 of the CDA are counter-intuitive to many judges. One of your primary jobs as an advocate is to educate the court (without lecturing) on your client’s behalf and it is very helpful to have some experience in, and understanding of, the more “usual” cases in order to persuade the court that early dismissal is appropriate and warranted in your case.

In addition to general litigation experience, there are other types of cases that can be extremely helpful to a media practice. Early in my career, I worked on a lot of non-compete cases – we were actually developing Michigan law on the subject due to a recent statutory change. This was great training because the cases involved TRO’s, preliminary injunctions (including evidentiary hearings) and were extremely fast paced. This training provided a great foundation for the gag orders, prior restraints and last-minute subpoenas that come with a media practice.

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I also worked on many default judgment cases. Typically, they involved a pro se plaintiff who filed a case and submitted paperwork suggesting that the defendant had been served (they weren't) and the court would then issue a default judgment. Getting these judgments set aside could be a procedural nightmare and neither the plaintiffs nor the judges liked our efforts, but it was helpful experience in dealing with pro se litigants, who we often see in media cases. Another valuable lesson was that even cases with not-so-sexy labels (like "default judgment") can present a valuable opportunity. Because of my expertise in this area, I was asked to work on a case for a communications/advertising client. In that case, our client was dismissed in an initial motion, and the plaintiff subsequently obtained a \$21,000,000 default judgment against an unincorporated subdivision and assumed name of our client, and holding our client liable to plaintiff for the default judgment. Among other things, we had to obtain a stay bond – a very expensive stay bond – which we then attempted to get reduced. Ten years after the case was filed, an appellate court set aside the default.

42 USC § 1983 cases also provide an especially good opportunity for newer media lawyers. They involve constitutional claims which are usually great experience in and of themselves. In addition, prevailing plaintiff's counsel can obtain fees in 42 USC § 1983 cases. This is good experience because obtaining fees is much more complicated than one might initially think and the more practice you can get in this area, the better. Also, judges generally prefer working with an attorney (no matter how inexperienced) than a pro se plaintiff, who can often drive chambers to distraction. These cases provide great opportunities to get yourself before a judge and garner some valuable hands-on experience. As a first-year associate, I represented a three-time incarcerated armed robber who alleged he had been beaten by police. I took the depositions of the police officers involved, interviewed potential expert witnesses, took the case before a mediation panel, briefed and argued all motions. I requested – and obtained – discovery sanctions against the city and ultimately obtained a settlement for my client for the benefit of his young children. These cases are winnable!

Even cases with not-so-sexy labels (like "default judgment") can present a valuable opportunity.

As a newer media lawyer you should seek out these kinds of cases. I found the experience I gained to be tremendously helpful in litigating claims against media clients, and I think you will too.

Take The Bull By The Horns (Be Brave And Confident)

A recurring refrain in these letters to newer media lawyers is to take advantage of all the opportunities presented to you. I couldn't agree more, and I would add to that advice that you should also look to create your own opportunities.

In that 60 Minutes case early on in my career, I started as a paralegal. I took it upon myself to find ways I could contribute above and beyond document management and also learn along the

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way. The pertinent events recounted in the broadcast occurred in 1972, the broadcast was in 1983, and the trial occurred in 1992. Because of the nature of the claim, we were essentially litigating a medical malpractice claim within a defamation claim. As a result, we had to be able to relate in 1992 the state of the applicable medical standards from 20 years earlier. I spent a lot of time in libraries with hard copies of the Reader's Guide to Periodical Literature (Google it) to research various issues because – well, it was before the invention of the internet. Eventually my research led to identifying a medical expert for trial who testified that he had never before appeared as an expert, and did so here only because he was so moved by what had happened to the teenage boy in the case that he could not stand idly by without speaking up. (He testified to this, by the way, while openly weeping – what a great witness!) In addition to factual research, one of my principal responsibilities was to analyze the medical records. After many, many hours of scrutiny, it became clear that there was something seriously off with the records and we successfully presented this evidence at trial. With this case, one of my very first, I established a reputation for being able to handle complex, document-intensive cases and effectively manage a litigation team. As a result, I was from then on asked to be involved in the majority of complex litigation matters within our firm. The lesson is, no matter what your “official” role in a case may be, take the initiative to immerse yourself – you will be a valuable contributor.

And if you haven't been handed a role or responsibilities, you should look for ways to create your own opportunities. On July 13, 1995, about 2,500 employees of Detroit's two primary newspapers (members of six different unions) went on strike. As a new media lawyer, I took it upon myself to start knocking on partners' doors asking to get involved. I saw it as an opportunity to learn more about the business side and to interact with management in a way that I normally would not be able to do. As a second-year associate, I worked on an injunction to protect our client's facility so we could continue to print.

I crossed picket lines and routinely was out interviewing witnesses and obtaining affidavits at two and three o'clock in the morning to document instances of violence, larceny and intimidation. I was the lone female attending weekly security meetings with former Special Forces troops and Marines, as well as the top executives of the client. I ended up managing all of the evidence gathered at multiple facilities – dozens of internal reports, videotapes, and police reports every day – and doling out any of the follow up work I didn't do myself. I coordinated the dozens of cases, both civil and criminal, that resulted from the work and sat second chair at trial on one of those civil cases. Eventually the amassed evidence resulted in our bringing a civil RICO claim with more than 250 predicate acts – and thus my civil RICO practice was born.

Most importantly, I became a familiar face to each of the executives and in-house attorneys for the client and established trusted relationships that continue to this day. (As an added plus, my mom was impressed when she thought she saw me on CNN during a particularly violent and

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harrowing night at our client's printing plant. I actually don't think it was me since I was more likely running away to safety at that moment, but she was very proud!)

Ultimately, actively seeking out work you'd like to do is critical. It might be because you want to work with a particular client, or get experience on a particular kind of case, or perhaps you want to learn from a particular colleague to get the benefit of their experience. Whatever the reason, knock on doors to create the opportunities you want and then seize the opportunities you find.

Achieving a Bumper Crop

In addition to identifying current clients who provide content and may need your expertise, there are other things you can do to build your client base and establish your credentials. Remember that you are always investing in yourself and in your career. The following are some of the things that I and my team have done as part of our media practice.

If at all possible, get involved with and attend MLRC or ABA Forum on Communications Law events (even if you have to fund some or all of it yourself). It can be intimidating at first, walking in to meet a group of people, some of whom have known each other for more than 25 years. But know that this is a relatively small media bar made up of people who have a vested interest in encouraging new members with new energy into our ranks and when you make even a small effort, we are very welcoming. There are special events for first time attendees and mentoring efforts to pair first time attendees with more seasoned members of the media bar. There are also additional opportunities to get involved if you are willing to dig in and contribute: newsletters, webinars, and regional events, etc.

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Closer to home there are very likely other, perhaps less expensive opportunities that you should also pursue. Getting involved with your state and local bar committees can be a great way to enhance your name recognition, lead to speaking and/or writing opportunities, and serve to get the word out about your expertise.

Attend events held by the Society of Professional Journalists (SPJ), Investigative Reporters and Editors, Inc. (IRE), or other journalism events (educational or otherwise) to meet journalists and to learn what issues are top of mind for them. You will meet many freelance journalists who would welcome meeting an attorney they could call on when they have an issue. These organizations also frequently need speakers on legal topics and these connections will help to put you on their radar when they are in need.

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Look for organizations like the Association for Women in Communications and local tech or mobility companies. They regularly look for speakers and authors with expertise on topics related to social media, privacy, Terms of Use and related issues to present to their members. The same is true for trade associations. Organizations like BBB and “crime stoppers” also regularly need legal advice and you could be just who they are looking for.

There are many individual activists who encounter issues attempting to access records/meetings under state sunshine laws. Businesses also encounter issues obtaining public records. The former, in particular, would welcome the assistance of an attorney in these efforts. You could do this pro- or low-bono or, if your state allows the recovery of attorney fees for a successful case, you can obtain your fees after you win.

Be on the look-out for opportunities to lecture or teach at local educational institutions. Most journalism schools have a “law of the press” class and they may welcome a guest attorney lecturer. Writing an amicus brief is another way to establish expertise in the field and can add to your resume while you are learning an issue in detail.

Bring Home the Bacon

No matter where you practice, it is unlikely that a partner will simply fill your plate with the media cases of your dreams, and you will then be set for the rest of your career. Clients change counsel. Colleagues pursue other opportunities. Take the time to invest in yourself, contribute your time and effort to the media bar, pursue opportunities to build your expertise, and seek out non-traditional “content providers” as clients. If a farm girl in the Midwest can build a media practice this way - so can you!

Robin Luce Herrmann is a Shareholder based in Butzel Long's Bloomfield Hills, Michigan office, a former Practice Department Chair of Butzel Long's Litigation practice and the head of Butzel Long's Media group.



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10 Questions to a Media Lawyer

Dori Hanswirth

Dori Hanswirth is a partner at Arnold & Porter, where she co-leads the firm's Technology, Media, and Telecommunications industry group.

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

My first job out of law school was as a Motions Clerk for the US Court of Appeals for the Second Circuit. A few months into that job, I started clerking for Judge Edward Weinfeld of the Southern District of New York. It was 1987. Judge Weinfeld, appointed to the bench by President Eisenhower, was a living legend at the time. I never worked harder and learned more than in that year. Judge Weinfeld's stories and lessons laid the foundation for my entire career.

After the clerkship, I joined what was then considered a medium-sized New York City law firm, where I was the 44th lawyer. All of our names were on the letterhead at Squadron Ellenoff. I chose that firm in part because it had a First Amendment practice.

My first media case came about a year into the job. We represented a photography magazine. The magazine published an advertisers' index at the back of each issue. One of the advertisers was the Giftime Camera shop, but somehow the index referred to them as "Giftime Idiots" - the handiwork of a disgruntled soon-to-be former employee! Hence a defamation lawsuit. Pretty quickly after that, I started working on many defamation cases. I also started working on trademark and copyright issues. I've been practicing law in these areas ever since.



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

I feel an enormous sense of gratitude around my career. I believe in what I do. Defending free speech and upholding the rule of law are bedrock American principles. My work contributes to these ideals and for that reason, it is a pleasure to come to work every day.

But doing what I love is only the second best thing about my work. What I value most about my career are the people. I've been honored to work with some of the most talented and dedicated lawyers and businesspeople – who are not only fine professionals, but more importantly are fine people – and I admire each and every one of them. Some are partners practicing media law at the highest levels at other firms; others are the head lawyers and in-house counsel at major news and publishing companies; some work at tech companies; others in entertainment; others are clerking for federal judges. And of course, some work with me at

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Arnold & Porter.

What do I like least? Timesheets and billing.

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

I waited too long to change law firms. I wish I had done that years before I actually made the move. If you think there's a better place for you to be, you're probably right.

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

Matter of James Holmes v Jana Winter, where the New York Court of Appeals held that it was a violation of public policy to force a New York-based journalist to travel to a different state, where she could be subpoenaed to provide confidential newsgathering information or be jailed for contempt. The Court held that Jana's "reporter's shield" went with her as she covered news outside of New York. Thus, she could not be forced to testify in a state that provided lesser protection to her source relationships.



Hanswirth, right, with her client, journalist Jana Winter

This case required multiple court appearances in Colorado and New York, including being face-to-face with Batman movie theater killer James Holmes four times, in a very small courtroom. There's a picture of Jana and me walking into the New York Court of Appeals, grim-faced, and another one of Jana the day we won the case. We bought her a reporter's shield of her very own!

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

People who know me would hardly be surprised to see just about anything in my office. It's known affectionately as the First Amendment room. I guess you wouldn't think that I have a Rambo First Blood action figure in its original packaging; a set of opera glasses from Judge Preska; a prize from a King Cake; the original cover print from an issue of the New York Review of Books depicting Vladimir Nabokov in a butterfly net; a poster of the characters from Family Guy, signed by the show's animators; or a magnet in the shape of a ticket for Phish's

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2018 Halloween run in Las Vegas – but I do. I also have some cool pro bono awards, including one from WBGO jazz radio, and some of my favorite books. I’ve included a couple of pictures of things in my office.

My favorite office object is a print by Robert Rauschenberg called Washing the Flag. It depicts the Stars and Stripes like a bedsheet going through a washing machine. This work of art speaks to me every day.



6. Favorite sources for news – legal or otherwise?

My industry friends and colleagues are my favorite news sources – they know a lot of stuff and nothing’s better than hearing what they have to say. For legal news - the MLRC Daily! Someone recently recommended the podcast 1A with Joshua Johnson. I think that’s really good. We get The Wall Street Journal at work so I look at that every day on my computer. I also listen to the POTUS, Bloomberg, and NPR satellite radio stations. And I try to read two or three New Yorker articles each week. I have a television in my office and it’s usually tuned into cable news or business news – I look at all of them. For breaking news, it’s always Fox for me.

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

If you want to go to law school, by all means go! But really want it.

8. Favorite fictional lawyer?

[Barry Zuckerkorn](#) – I hear he’s very good.

9. What issue keeps you up at night?

I usually sleep pretty well. But when I’m in the middle of a case, it’s always on my mind.

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

Either gone for a Ph.D. in English literature or become a DJ. Recently I’ve been trying my hand at wedding planning (for my son). But I’m only going to do that one more time (for my other son, if and when asked).