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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through June 27, 2019

MLRC Media Law Resource Center

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Guest Column

Mapping Out a Free Speech Strategy

By Jeff Hermes

George has graciously ceded his usual space in this month's issue to allow me to introduce to you a manuscript on which I've been working for quite a few years now. Entitled *Free Speech from First Principles*, the text collects my thoughts on how the particular reasons that a society values freedom of speech relate to the legal rules that it applies in particular cases. George asked me to explain a bit about why I undertook this project and what it is all about.

When I started practicing law back in the 1990's, I represented newspapers and television outlets. News websites were beginning to crop up more frequently, but they were mostly viewed as adjuncts to print publications. Section 230 had been around for about a year, and *Zeran* was decided a couple of months after I started as a first-year associate; it took people a while to believe that either meant what it said. (I remember having a conversation with a more senior attorney back then about this great new case I'd found, which prompted a kindly but doubtful response along the lines of "Come now, Jeff, you know that's not how republication liability works!")

As such, I was among the last group of lawyers to begin practicing before the digital age and economic turmoil upended the very notion of what it means to fight for freedom of speech. Over the next couple of decades, the sources of information we relied on, the reach of our communication, and the nature of how we spoke to one another changed forever. Living through that time, I had the strong sense—as many of us did—that the way in which free speech law had developed in the United States could leave us unprepared to consider emergent threats to freedom of expression that fell outside of, or crossed the boundaries of, the well-established silos of First Amendment doctrine. Meanwhile, the international nature of online communication made it more urgent to understand how other countries that also value freedom of expression reach such different answers when considering free speech questions.

Entitled *Free Speech from First Principles*, the text collects my thoughts on how the particular reasons that a society values freedom of speech relate to the legal rules that it applies in particular cases.

In 2011, I had the opportunity to step back from the day-to-day crises of a media law practice and to think about some of these issues more deeply, when I took a position at the Digital Media Law Project at Harvard's Berkman Center. My primary task as the director of the DMLP was to think broadly about how to supply legal resources to independent journalists and nascent online ventures. That involved figuring out not only the best ways of getting legal information where it was needed (through online legal guides, attorney referrals, amicus intervention, and other means), but also ensuring that the substance of the assistance that we were providing matched the needs of this constituency.

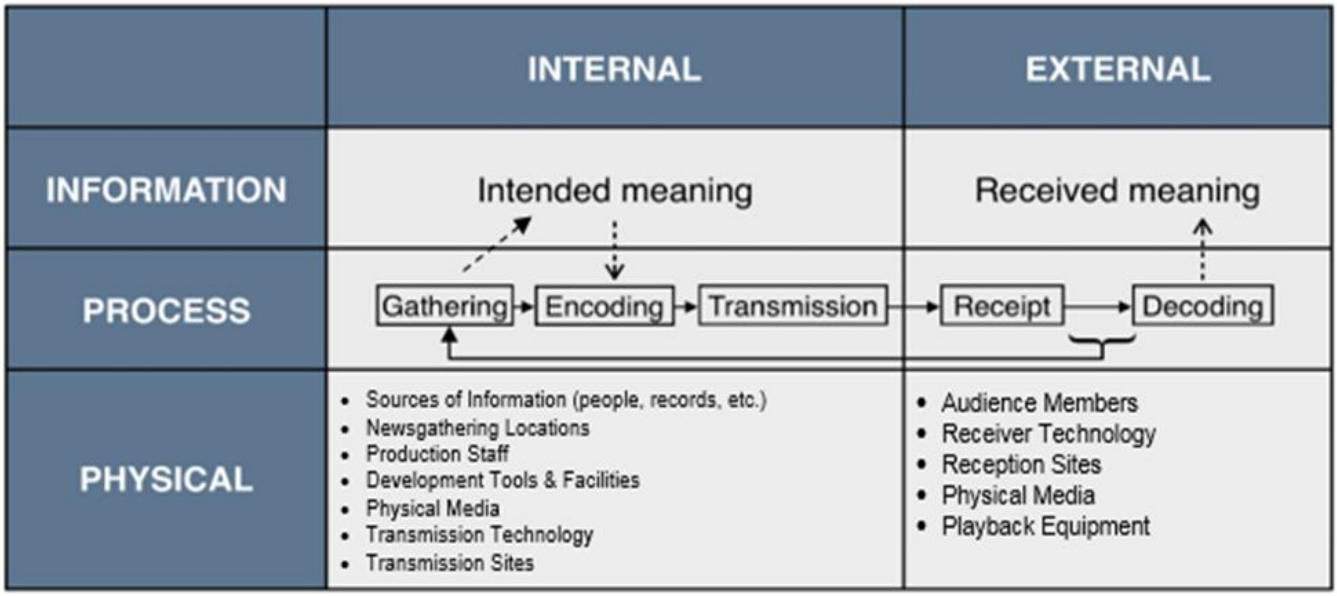
This required a different kind of thinking than I was used to. Rather than responding to particular issues as they arose in the course of representing specific recurring clients, I needed to think about the defense of freedom of speech from a holistic standpoint.

It was more or less the difference between strategic and tactical thinking, and if you're developing a strategy, it helps to map out where the attacks are taking place. There are direct efforts to suppress particular messages, whether phrased in terms of prior restraints, defamation lawsuits, or other content-based regulations. There are restrictions on the process of communication, often considered under the rubric of "time, place and manner" laws. And there are limitations on access to the people, places and things required for speech. So, I sketched out a simple chart that looked like this:

INFORMATION
PROCESS
PHYSICAL WORLD

I started to consider these three concepts—information, process, and physicality—as separate but related "layers" of communication, with each layer representing a different aspect which could be threatened by government action. That helped me to relate different kinds of threats to free speech to one another, and make sure that the resources provided by the DMLP were responsive to issues at each layer. This idea of "mapping the battlefield" stuck with me even as I left the DMLP, uprooted from my home of more than forty years in Massachusetts, and transplanted to the New York area to take up my current position at the MLRC.

I realized that the three layers could be divided depending on whether one is discussing those aspects of communication related to the speaker or those related to the listener (which for various reasons I refer to as the "internal" and "external" sides of the model, respectively). After many iterations, I arrived at the following chart.



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This three-layer chart would serve as the "battlefield map" that I was looking for. Effectively, this is a generalized model of communication: All communications have an intended meaning by the speaker and a received meaning in the mind of the listener; proceed through the same essential phases of the communication process; and manifest in some form in the physical world.

Interestingly, laws and other governmental action can also be mapped in terms of these three layers. Just like communication, a law can be defined by the physical things it governs, the particular conduct or events it involves, and the motives or meanings that are attached. Moreover, if a law regulates a thing, activity, or idea that represents some aspect of speech as shown in the model, it represents a potential limitation on freedom of expression regardless of whether the law is explicitly framed as targeting speech.

Free Speech from First Principles explores the use of the three-layer model as a tool to analyze free speech questions. Recognizing that different societies can have different theoretical foundations for protecting speech, it examines the core interests of speakers and listeners that are implicated by different theories, relates those interests to aspects of the three-layer model, and distinguishes them from non-communicative interests unrelated to the reasons we protect speech. This, in turn, allows for a determination of whether a law serving non-communicative interests threatens freedom of expression by considering whether, when mapped to the three-layer model, the law impairs elements of communication essential to the relevant speaker and listener interests.

Free Speech from First Principles **explores the use of the three-layer model as a tool to analyze free speech questions.**

The analysis does not, however, depend on selection of a "correct" theory for protecting speech, or on the dictates of established case law. Rather, it discusses how the acceptance of particular justifications for defending freedom of speech has implications for the substantive rules that apply in various contexts – copyright, privacy, rights of publicity, "hate speech," and so forth. Because the analysis is not dependent on established precedent, it can serve as an external check on the soundness of judicial decisions. And because the analysis is not limited to a single nation's law, it can be used to explore why nations whose concepts of freedom of speech rest on different foundations can reach results in particular cases that seem inconsistent or illogical to one another.

Or, at least, that's the idea. The text is available here, and I hope you'll take a look at it. This is very much an evolving piece of work, so I welcome thoughts, questions and comments. Thanks, and enjoy the read!

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Roundtable

The Prosecution of Julian Assange

In the May issue of the MediaLawLetter, Executive Director George Freeman wrote about the Assange case and opined that "it's a one-off, which hopefully will not change the calculus of prosecutorial discretion which this or future administrations will bring to the issue." We invited some other experts to weigh in on the case and its implications for the media and freedom of the press.

Our participants: Susan Buckley, Senior Counsel, Cahill Gordon & Reindel; Jim Goodale, Debevoise & Plimpton (retired), former General Counsel New York Times; Lynn Oberlander, EVP and General Counsel, Gizmodo Media Group; and Gabe Rottman, Director of the Technology and Press Freedom Project, Reporters Committee for Freedom of the Press

Is the Espionage Act prosecution of Julian Assange a first step in a plan to prosecute the mainstream media for publishing leaks?

Susan Buckley: If I've learned anything over the course of the last two-and-a-half years, it is that trying to predict the plans of the current administration is a fool's errand. What we *know* is that when the superseding indictment was revealed, the Department of Justice went out of its way to make clear that this was not a first step toward prosecuting journalists. In his remarks announcing the superseding indictment, Assistant Attorney General Demers stressed: "Julian Assange is no journalist." He went on to say that: "It is not and has never been the Department's policy to target [journalists] for their reporting." We also know from the face of the superseding indictment itself that the counts directed at the *publication* of documents concern documents that contained the unredacted names of confidential human sources in war zones who the DOJ claims were exposed to "the gravest of dangers" when their identities were revealed by Wikileaks. Responsible news organizations did not identify those sources.

To suggest that the Assange indictment spells doomsday for all who report the news may be counter-productive going forward.

Of course, this is to my knowledge the first indictment under section 793(e) for publishing information to the public. That in itself is important because section 793(e) is one of the sections in the Espionage Act that does not purport to punish publishing (unlike, say, section 794, the classic espionage section.) So the DOJ has crossed a big line there. In their landmark law review article on the Espionage Act, Edgar and Schmidt make a credible case from the legislative history and other sections of the Act that section 793(e) was never intended to reach ordinary news reporting. Which probably explains DOJ's efforts to insist that Assange is no journalist. It also means that to suggest that the Assange indictment spells doomsday for all who report the news may be counter-productive going forward.

(Continued on page 7)

(Continued from page 6)

James Goodale: The Justice Department for over 50 years has aimed to prosecute journalists for the receipt of classified information leaked to them by government sources. The first such attempt was the convening of a grand jury in 1971 to indict Neil Sheehan for conspiring with sources concerning the leak to him of the Pentagon Papers. The Justice Department at that time also sought, it is believed, to indict the New York Times for publication of the Pentagon Papers. The focus of the Justice Department since that time has been on prosecution of sources – that is, leakers rather than leakees (Sheehan). It is believed the Justice Department is salivating to prosecute leakees for conspiring with leakers in order to plug leaks in the government.

For example, in 2013 it named James Rosen, Fox News reporter, as a co-conspirator in a leak case involving a government employee named Kim who had leaked to him. The government's long-term objective is to create an Official Secrets Act and therefore be able to prosecute leakers, leakees and publishers. A successful prosecution of Assange will achieve that goal and the Justice Department will then be in a position to prosecute mainstream media. By the way, the government abandoned its prosecution of Sheehan and The New York Times in 1971.

The focus of the Justice Department since the Pentagon Papers has been on prosecution of sources – leakers rather than leakees. It is believed the Justice Department is salivating to prosecute leakees for conspiring with leakers in order to plug leaks in the government.

Gabe Rottman: We don't know what's in the minds of prosecutors, but it seems unlikely the Assange superseding indictment is part of any conscious "plan" to target the press with the Espionage Act for publishing government secrets.

Rather, it's probably part of the crackdown on national security leaks that Attorney General Jeff Sessions announced in August 2017. The Washington Post recently reported that the decision to bring charges against Assange flowed from a request in 2017 by Attorney General Sessions to the U.S. Attorney's Office in the Eastern District of Virginia to take another look at the case. So, while Assange may not be the harbinger of a new chapter in American history where members of the news media are routinely prosecuted as spies for national security reporting, at the very least it raises many of the same concerns that arise in the aggressive use of the Espionage Act against journalists' sources.

That said, if the government were to start deploying the legal theories in the Assange superseding indictment more broadly, what one might see are cases where the government prosecutes the acts of soliciting, receiving or publishing classified information but then says the defendant is "no journalist" based on unethical or shady conduct that isn't legally material under the Espionage Act. That's what the Justice Department has done here in arguing, in part, that the publication of the names of human informants makes Assange "no journalist" and WikiLeaks more like an "intelligence agency."

(Continued on page 8)

(Continued from page 7)

Lynn Oberlander: At the risk of being a Pollyanna, I tend to think that the prosecution of Assange is a one-off, and that traditional American media and journalists do not have to worry that this is the start of an era of prosecutions. I don't think that the institutional media – The New York Times, The Washington Post, NBC, etc. – will be targeted on the same grounds as Assange has been, and if they are, will win. They have too much power and public respect. But I do think there is a significant risk that more outlier and independent media may be prosecuted by a Department of Justice operating in a baldly political way. Those outlets will be chilled in their reporting and their work with confidential sources, as we may already be seeing in the way that the government seems to have prosecuted multiple whistleblowers who leaked or allegedly leaked materials to the Intercept. So far – and fortunately – the government has not prosecuted any of that site's journalists or contributors, but it does at least appear to be a concerted attempt to punish sources who reach out to that organization.

It is also important to keep in mind that Assange is not an American citizen, a distinction clearly made by the indictment. In general, the First Amendment's protection for journalists is limited to US citizens or residents or those working for the American media. A foreign journalist working for a foreign publication cannot necessarily rely upon the First Amendment to protect against an Espionage Act prosecution. While there are reasons of international comity that would argue against prosecuting a Der Speigel reporter, for example, to the extent that Assange is a foreign actor who may or may not be working for a foreign state in accessing U.S. government papers, he can be clearly distinguished from most of the mainstream media.

Do journalists engage in any of the conduct Assange is accused of?

Oberlander: Of course they do. Many of the actions described in the indictment are engaged in regularly by the mainstream media. For example, the first seven paragraphs are all about how Assange and Wikileaks made public appeals that they would accept secret government documents from around the world. The indictment also discusses Assange's actions in furtherance of the conspiracy as using Jabber and taking steps to hide the identity of the confidential source (i.e. Private Manning). Investigative journalists engage in these types of activities all the time.

Many of the actions described in the indictment are engaged in regularly by the mainstream media.

But there are actions alleged in both the first and the superceding indictments that I would hope other journalists do not engage in. For example, the indictment alleges that Assange had tried to aid Manning in hacking the government's systems. That is activity that we have long cautioned journalists would be over the line. And it doesn't matter whether Assange was successful or not. (The indictment made clear that he wasn't.)

There are also actions alleged in the superceding indictment that I hope no self-respecting journalist or media organization would ever engage in. For example, the indictment alleges that

(Continued on page 9)

(Continued from page 8)

after Manning was arrested, Assange threatened to release the unredacted data set – documents that included the names of sources and others who would be in harm's way. Specifically, the paragraph 33 of the superceding indictment alleges: "When asked how these insurance files could be used to prevent "prior restraint and other legal threats," ASSANGE responded that WikiLeaks routinely "distributed encrypted backups of material we have yet to release. And that means all we have to do is release the password to that material and it's instantly available. Now of course,we don't like to do that, because there is various harm minimization procedures to go through." But, ASSANGE continued, the insurance file is a "precaution to make sure that sort of material [the data in WikiLeaks's possession]is not going to disappear from history, regardless of the sort of threats to this organization."

Whether or not a media entity effectively redacts or limits the release of information that might harm individuals, I cannot imagine working for an organization that would threaten to do so as a bargaining technique. And any journalist or organization that would make such a threat would have a difficult time convincing a prosecutor or a jury that the public interest protected their actions.

Rottman: Yes. Not only do journalists engage in the conduct Assange is accused of generally – soliciting leaks, receiving leaked information and publishing that information – they engage in the specific conduct that forms the underlying bad act, as a legal matter, for several of the Espionage Act charges.

Not only do journalists engage in the conduct Assange is accused of, they engage in the specific conduct that forms the underlying bad act, as a legal matter, for several of the Espionage Act charges.

Most notably, counts 15 through 17 of the Assange superseding indictment, which charge Assange with three violations of § 793(e) of the Espionage Act, are based solely on the act of publishing classified information online. They do not rest on a hacking allegation, as did the initial indictment. And, unlike the other Espionage Act charges, they don't even turn on Assange encouraging Manning to leak classified information or with Assange receiving or possessing that information, which, while still deserving of First Amendment protection, are usually done with more finesse by experienced investigative reporters with access to expert legal counsel.

The Justice Department does mention the publication of the names of human informants and assets in the charging language for those three counts, and most national security and investigative reporters will redact or withhold information that could put people in physical danger. Again, however, outing informants isn't material to the Espionage Act analysis. Section 793(e) of the Espionage Act punishes the transmission, receipt or communication of national defense information, a legal term of art the definition of which turns on the potential harm to U.S. interests broadly.

(Continued on page 10)

(Continued from page 9)

Say what you will about Mr. Assange's conduct in 2010 (or since), what all investigative journalists do, with some regularity, is publish government secrets online and occasionally they will publish classified documents. When it comes to counts 15 through 17 of the superseding indictment, that is precisely what the government is attempting to criminalize. This is the first case in American history where a grand jury has returned an indictment on a "pure publication" theory.

Buckley: Of course they do.

Goodale: All of the conduct of which Assange is accused is engaged in by journalists. Journalists use drop boxes to protect anonymity and urge their sources to leak to them. Journalists do not urge their sources to break passwords and in this instance the charges against Assange are unique. Assange, however, denies he tried to assist Manning in breaking a password.

Will the prosecution of Assange chill the relationships between reporters and confidential sources?

Buckley: Because the DOJ has not been shy about prosecuting sources in the past regardless of the identity of the publisher of the information, you can make the case that the risks to sources have not been increased by the Assange indictment.

Goodale: If Assange is prosecuted, journalists should be extremely cautious about establishing relationships with confidential sources that have access to classified information. The reason is that journalists could be prosecuted under The Espionage Act.

Oberlander: It may. But in truth, communication between many reporters and government confidential sources has already been chilled. It has become increasingly apparent that the government has gotten much better at tracking the leaks of documents than they were in 2013, when Edward Snowden copied a large set of documents, and the government was unable to ascertain precisely what he had accessed. Various recent indictments of whistleblowers have revealed an array of new techniques through which the government is able to determine who has viewed and download or copy confidential files. And although we have not seen a reporter reveal a confidential source under court compulsion in quite a while, I think we all know that the law will not ultimately protect the identity of confidential sources who leak national security information. If anything, the prosecution and subsequent 35-year sentence of Chelsea Manning likely chilled potential sources even more than the prosecution of Assange.

The prosecution and subsequent 35-year sentence of Chelsea Manning likely chilled potential sources even more than the prosecution of Assange.

Rottman: Probably. As noted above, rather than being the tip-of-the-spear in advance of a full assault on the press itself, the Assange indictment is likely a "shot across the bow" as part of

(Continued on page 11)

(Continued from page 10)

the crackdown on national security leaks started under Attorney General Sessions. Leak prosecutions have typically focused on sources, not entities receiving or publishing classified information, but the Assange indictment certainly signals to sources that the government is willing to be unusually aggressive in attempts to punish the disclosure of national defense information to the public as if it were traditional espionage. In that sense, it's of a piece with the government's position in the Reality Winner and Terry Albury cases, in which prosecutors sought and received punishments usually reserved for actual spies (Winner, at six years, was the longest sentence to date and Albury's five-years the second longest).

Does the prosecution undermine the protections afforded journalists under *Bartnicki*?

Goodale: *Bartnicki* only protects the passive receipt of information. The indictment of Assange goes to great lengths to accuse Assange of actively pursuing leaks. This activity is not protected by *Bartnicki* but is not prohibited by *Bartnicki* either. In other words, *Bartnicki* is not the last word on this subject. Active newsgathering – as distinguished from passive newsgathering – should be protected under the First Amendment even though *Bartnicki* does not give journalists explicit protection.

Bartnicki only protects the passive receipt of information. The indictment of Assange goes to great lengths to accuse Assange of actively pursuing leaks.

Oberlander: We all know that *Bartnicki* doesn't protect those journalists who are directly involved in obtaining illegally obtained information. The indictments describe Assange as a direct conspirator and as an aider-and-abettor of Manning's enormous leak of secret material. If proven, Assange's actions would not be protected under *Bartnicki*. The indictment alleges that Assange was closely linked to Manning's leak of the information, that he was involved almost every step of the way, and that he provided significant advice as to how to go about it. This is a far cry from the over-the-transom approach discussed in *Bartnicki*. While I am troubled by the way the indictment encroaches on the type of back-and-forth discussions that often take place between sources and journalists, I think Assange's conversations go beyond what was envisioned by the *Bartnicki* Court in any event.

Rottman: If Assange were convicted under the three "pure publication" counts noted above, that could certainly be read, and then used by future prosecutors, to limit the protections under *Bartnicki*. In *Bartnicki* and subsequent cases, the courts have suggested strongly that, absent any illegal conduct by the entity publishing the material, the First Amendment will bar punishment for the act of publication. Before *Bartnicki*, that precise question was unsettled, though the Pentagon Papers case confirmed that the government can't block publication.

But, none of the *Bartnicki* line of cases specifically involve classified information or the Espionage Act and the Assange trial would present a case of first impression.

(Continued on page 12)

(Continued from page 11)

A successful conviction of Assange under the "pure publication" counts of the indictment, upheld on appeal, could answer the open questions in the Pentagon Papers case and US v. *Morison,* 844 F.2d 1057 (4th Cir. 1988) (first successful prosecution of a government leaker under the Espionage Act), through an express holding that *Bartnicki*'s protections for "pure publication" do not apply to the Espionage Act. Were that worst-case scenario the outcome, "in the area of foreign and military affairs, the press could safely report only what the government chooses to reveal." Brief of the Washington Post et al., *Amici Curiae*, in Support of Reversal at 34, United States v. Morison, 844 F.2d 1057 (4th Cir. 1988).

Additionally, successful convictions under the other counts – all of which rely in part on allegations that Assange encouraged Manning to leak and unlawfully received classified information, in addition to publication – could also threaten *Bartnicki* protections by clarifying when solicitation and receipt would implicate a journalist in an underlying crime.

Right now, the *Bartnicki* line of cases suggest that, for instance, coordination with a source to arrange the receipt of information, even when the reporter knows the source acquired the information unlawfully, would be constitutionally protected.

A successful conviction of Assange under the non "pure publication" counts could result in a holding that the First Amendment does not protect the solicitation and receipt of classified information by journalists.

Buckley: I think not. *Bartnicki* was a great victory for the press but it was, as both the majority opinion and the concurring opinion make clear, a limited one. It also had nothing to do with the Espionage Act, national security or classified information. Unfortunately, but understandably, our courts, including the Supreme Court, have been extraordinarily deferential to the government when serious national security interests are raised.

The Act is one of the most sweeping, ambiguous and badly written criminal statutes on our books. Prosecutorial discretion is pretty much the only thing that has stood between the Act and journalists for more than a century.

Should there be a public interest defense to publishing classified information, or is prosecutorial discretion sufficient?

Buckley: The Espionage Act does not forbid the publication of all classified information; it addresses information relating to the national defense. A public interest defense to an Espionage Act prosecution would be better than nothing, but I would consider that a band-aid. The Act is one of the most sweeping, ambiguous and badly written criminal statutes on our books. A complete overhaul is needed. Prosecutorial discretion is pretty much the only thing that has stood between the Act and journalists for more than a century. I well appreciate that that is a more frightening thought today than it has been in most of the last 102 years.

(Continued on page 13)

(Continued from page 12)

Oberlander: I think that there should be some sort of public interest defense. But I think that it would have to be somewhat narrowly crafted: I don't think it will be effective to argue that there was a public interest in the massive document leaks that we've seen in the last 10 years. For particular documents or sets of documents, if there is a substantial public interest in revealing the information, there should be a defense from prosecution under the Espionage Act for both the whistleblower and the media.

Goodale: There is a First Amendment defense to publishing classified information which in effect is a public interest offense. The indictment, of course, does not refer to the First Amendment. That is the duty of the lawyers for Assange. In my view the First Amendment should be a total defense available to Assange although in the Eastern District of the Fourth Circuit there is no guarantee that District will adopt such a defense because of its opinion in Rosen (the AIPAC case). The trial of Assange, if any, is slated for the Fourth Circuit.

Rottman: The only real solution to the First Amendment concerns with the Espionage Act is tackling the massive and universally acknowledged problem of overclassification. Because there's an incentive to classify information that is both newsworthy and only embarrassing or, worse, revelatory of government misconduct, there is a strong public interest in that information becoming known to the electorate. The more trust the public has that material is being properly classified, the less whistleblowers and other sources will leak, and the less prosecutors will see the need to make an example of leakers through the aggressive application of the Espionage Act. It also has the added benefit of making classified information easier to control.

The only real solution to the First Amendment concerns with the Espionage Act is tackling the massive and universally acknowledged problem of overclassification.

Regardless, there absolutely should be a public interest defense. But even that may not be enough because the defense would balance the potential national security harm with the public interest in disclosure. Courts will often defer to government claims of national security harm.

The best checks against abuse of the Espionage Act would be a public interest defense coupled with both a clear intent standard that requires proof that the defendant subjectively intended to harm U.S. national security and a requirement that the government prove at least a strong likelihood of national security harm from disclosure. That would serve to insulate journalists and bona fide whistleblowers from exposure. It would also permit prosecutions in the most extreme cases, even those involving the press, such as a reporter conspiring with a U.S. government source at the direction of a hostile foreign power to leak and disseminate legitimate government secrets like "the sailing dates of transports or the number and location of troops." *Near v. Minnesota*, 283 U.S. 697 (1931).

(Continued on page 14)

(Continued from page 13)

Politically, most Congress-watchers believe that it would be safer to have those protections recognized by the courts as already part of the law, rather than through opening up the Espionage Act legislatively. Support for Espionage Act reform has typically been muted, and there has been strong bipartisan support for various proposals that would make the Espionage Act worse.

If Wikileaks published information that put people's lives in danger, shouldn't Assange be held accountable?

Oberlander: There are many, many types of investigative reports that may ultimately end up causing individuals harm or putting them at risk of harm, and in general that should not be the test for liability for the media. But Assange may have been reckless in how he treated secret information which did contain the names of various informants and agents, and for that recklessness he may lose some legal protection. For any public interest defense to be accepted, the whistleblower and/or the journalist who publishes the information will have to show that they acted responsibly.

Assange may have been reckless in how he treated secret information which contained the names of various informants and agents, and for that recklessness he may lose some legal protection.

Rottman: None of this is to minimize or dismiss the potential harm to human life posed by naming confidential informants, and most reporters and news outlets will not do so. As noted above, several outlets published some of the same war logs and diplomatic cables that WikiLeaks released but redacted the names of individuals who could face retaliation for cooperating with the U.S. government. That said, even in this case, there is an argument for why *the law* should err on the side of promoting transparency by insulating the publication of informants' names from Espionage Act liability.

There has always been a recognition that governmental interests, hopefully illegitimate, but sometimes legitimate, will be harmed through the exercise of editorial discretion by an independent press that publishes government secrets. In this case, the government had to take tangible and significant steps to help sources get out of harm's way and to review the material for potential harm to national security. The government's damage reports can be read in this Buzzfeed story.

The press will publish newsworthy information in the public interest that could harm U.S. national interests, including stories like torture post-9/11 that directly harmed U.S. diplomatic alliances, or the report on the "SWIFT" financial monitoring system, which, by some accounts, was particularly effective in tracking terrorist financing. With respect to torture, in a bit of irony, one of the State Department cables published by WikiLeaks disclosed that in 2006 senior U.S. officials met in Kuwait to strategize on how to stem the massive influx of foreign fighters to Iraq. They believed that "the single most important motivating factor" behind recruitment was revelations of torture by the United States.

(Continued on page 15)

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Indeed, one could envision extreme cases where the public interest in a story is so acute that it would be incumbent upon a conscientious investigative reporter to identify informants or assets, which would require the government to take steps to protect their safety as happened here. For instance, law enforcement, intelligence agencies and the military illegally used informants against political dissidents during the civil rights and Vietnam War eras. That's an indisputably important story and the identity of those informants may be significantly newsworthy, if, for instance, an organization's leadership had been compromised.

The point isn't to defend Assange's actions as an ethical matter. As a legal matter, however, the First Amendment has to preclude criminal liability for exercises of editorial discretion, even, and perhaps especially, when journalists get it wrong. If there's something more, like subjective intent to harm bona fide national security interests, or active direction by a foreign adversary, that's a different story. But the legal theory in the Assange case is based exclusively on the solicitation, receipt and publication of classified information. Those acts can't be subject to Espionage Act prosecution.

The point isn't to defend Assange's actions as an ethical matter. As a legal matter, however, the First Amendment has to preclude criminal liability for exercises of editorial discretion.

Finally, there is a federal law, the Intelligence Identities Protection Act, now at 50 U.S.C. § 3121, that expressly criminalizes the publication of the identity of a "covert agent," which includes a non-U.S. citizen "whose past or present intelligence relationship to the United States is classified information and who is a present or former agent of, *or a present or former informant or source of operational assistance to*, an intelligence agency." *See* 50 U.S.C. § 3126(4) (emphasis added).

Assange is not charged under that provision.

Goodale: The government always asserts publication of classified information endangers people's lives. I know of no case where the government has ever proved this assertion. It will have to prove this assertion to win its case against Assange and it will be difficult, if not impossible, to do so. One of the problems the government will have is that the leaks took place 10 years ago. And if those who were "put in danger" at that time are still with us, it makes the claim of endangerment harder to believe. The government, of course, will have to meet a First Amendment standard to prove endangerment. This standard should include some element of imminence.

Buckley: If Assange is proven to have violated a criminal statute that is constitutional as applied to him, of course he should.

If there is a U.S. trial and appeal in the Assange case, what will be the result?

(Continued on page 16)

(Continued from page 15)

Rottman: *If* that happens, which is a big if, it is hard to see how the courts avoid answering some of these awesome and unsettled First Amendment questions. Ironically, an Assange win might be the least dramatic result because a court could find ways to dismiss the charges on narrow, fact-specific grounds that do not confirm what press advocates fear is the expansive scope of the Espionage Act, or could, as in the AIPAC case, impose proof requirements on prosecutors that prompt them to drop the case.

An Assange loss, particularly on those three "pure publication" charges, would be a threat to press freedoms as it could involve a holding, express or logically implied, that *Bartnicki* doesn't apply to the Espionage Act. The court could try to limit a holding to the facts of the case, but the charges are structured to turn on those three journalistic activities – asking for a leak, receiving the leaked information and disclosing the leaked information through publication online. So, there would be some negative effect on the relevant precedents like *Bartnicki* regardless of what the court does. As noted, if the court were to clearly find that *Bartnicki* does not apply to the Espionage Act, the effect could be severe.

This all depends on whether extradition is successful, which it may not be. And the legal hurdles to extradition also raise a hidden press freedom issue that's worth noting. Espionage is what is known as an absolute or pure "political offense" and there is a *reciprocal* bar in the U.S./U.K. extradition agreement on extradition based on political or politically-motivated offenses. The basic idea is that governments agree they have no duty to extradite individuals who have committed an offense purely against the state, which does not involve a common crime. So, spying, sedition and treason are all often non-extraditable as political offenses.

Buckley: My guess is that this will never proceed to trial in the U.S. given the U.K. extradition standards. If I'm wrong, I think it more likely than not that Assange would be convicted, at least on some of the counts, and that such a conviction would withstand appeals.

Goodale: I am dubious Assange will win although he should.

Oberlander: If the evidence shows that Assange was with Manning every step of the way in the copying and delivery of the cables, then Assange will be found guilty, and his conviction will be affirmed on appeal. If the evidence does not go so far – if it is determined that the entreaties to get classified government information were made to a broad group, and that Assange did not direct Manning's actions, then he should be acquitted, either at trial or on appeal.

Supreme Court Holds Public Access Channel Operator Not a State Actor

Decision Gives Comfort to Online Platforms

By Jeff Hermes

In June, the U.S. Supreme Court released its opinion in Manhattan Community Access Corp. v. Halleck, No. 17-1702 (June 17, 2019) ("*MCAC v. Halleck*"). The case involved a First Amendment claim brought by a pair of filmmakers whose access to a New York City public access channel was suspended. This raised the question of whether the private nonprofit corporation operating the public access channel was a state actor. The case was closely watched less for its potential impact on public access channels than for any suggestions the Court might make about holding other privately-operated platforms for speech – especially social media networks – liable for censorship decisions.

The Court split 5-4 along partisan lines. In an opinion by Justice Kavanaugh, the Court ruled that the private non-profit was not a state actor, because it was not exercising powers "traditionally exclusively reserved to the State." The dissenting opinion (by Justice Sotomayor) argued that the State of New York created a constitutional public forum when it required cable operators receiving a franchise in the state to set aside channels for public access subject to neutral standards, and that the nonprofit managing the channels inherited the First Amendment obligations of the State. Both the majority and the dissent made clear, however, that the mere decision by a private company to open a forum for speech to the public does subject the operator to First Amendment requirements of viewpoint or content neutrality.

The case was closely watched less for its potential impact on public access channels than for any suggestions the Court might make about holding other privately-operated platforms for speech – especially social media networks – liable for censorship decisions.

Background

Under federal law, 47 U.S.C. § 531(b), state and local governments have the authority to require cable operators within their jurisdictions to set aside channels for public access. New York State exercised that authority in its regulations governing the grant of cable franchises, stipulating that franchisees must reserve channels for public access and that the public use of such channels must be free of charge and offered on a first-come, first-serve basis. On that basis, Time Warner set aside channels on its cable system in Manhattan; New York City, under authority delegated by the state, selected the petitioner, private nonprofit Manhattan Community Access Corp. (d/b/a Manhattan Neighborhood Network, or "MNN"), to operate the public access channels.

(Continued on page 18)

(Continued from page 17)

Respondents DeeDee Halleck and Jesus Papoleto Melendez believed that MNN had been neglecting East Harlem, and submitted a film to MNN about those allegations. MNN ran the film, but after a subsequent dispute with the respondents banned them from MNN services and facilities. Halleck and Melendez, alongside others, sued MNN in the Southern District of New York alleging that MNN had violated their First Amendment rights.

The district court dismissed the First Amendment claim, holding that MNN was not a state actor. The Second Circuit reversed, however, stating:

> [W]here, as here, federal law authorizes setting aside channels for public access to be "the electronic marketplace of ideas," state regulation requires cable operators to provide at least one public access channel, a municipal contract requires a cable operator to provide four such channels, and a municipal official has designated a private corporation to run those channels, those channels are public forums.
>
> Because facilities or locations deemed to be public forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations. ... [W]hether the First Amendment applies to the [private] individuals who have taken the challenged actions in a public forum depends on whether they have a sufficient connection to governmental authority to be deemed state actors. That connection is established in this case by the fact that the Manhattan Borough President designated MNN to run the public access channels.

The Court ruled that the private non-profit was not a state actor, because it was not exercising powers "traditionally exclusively reserved to the State."

Halleck v. Manhattan Community Access Corp., 882 F.3d 300, 306-07 (2nd Cir. 2018). The Supreme Court granted MNN's petition for a writ of certiorari to consider its status as a state actor.

Majority Opinion

Reversing the Second Circuit's ruling, Justice Kavanaugh wrote on behalf of the Court that the proper starting point for a state action inquiry is whether, as the Court held in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the private entity "exercises powers traditionally exclusively reserved to the state." *MCAC v. Halleck*, slip op. at 6 (internal quotation marks omitted). Stating that in this case the "relevant function ... is operation of public access channels on a cable system," Kavanaugh noted that many different types of

(Continued on page 19)

(Continued from page 18)

organizations, both public and private, had operated public access channels in the past. *Id.* at 7-8. Thus, the operation of such channels was not a "traditional, exclusive public function." *Id.* at 8.

The Court also rejected the argument that broadening the "relevant function" to the "operation of a public forum for speech" would salvage the respondents' claims against MNN, for much the same reason – namely, that both public and private entities have traditionally provided forums to members of the public for speech. *Id.* at 8-9. Justice Kavanaugh relied specifically on the Court's decision in *Hudgens v. NLRB*, 424 U.S. 507 (1976), in which the Court held that a shopping center owner was not a state actor bound by the public forum doctrine, and could "exercise editorial discretion over the speech and speakers in the forum." *Id.* at 9.

Essentially, the Court indicated that there are public fora and then there are *constitutional* public fora, and the two should not be confused. The Court specifically dropped a footnote to question the validity of dicta in Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788 (1985), suggesting that constitutional public fora could include "private property dedicated to public use." *Id.* at 10 n.3. The Court pointed out that *Cornelius* itself involved publicly owned property and stated that the phrase was "imprecise and overbroad," echoing criticism by Justice Thomas in Denver Area Educ. Telecommc'ns Consortium, Inc. v. FCC, 518 U.S. 727, 827-28 (1996) (opinion of Thomas, J., concurring in part and dissenting in part). *Id.*

Essentially, the Court indicated that there are public fora and then there are constitutional public fora, and the two should not be confused.

The Court held that the fact that MNN was operating the public access channels as the designate of New York City did not change the analysis, because "the fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor—unless the private entity is performing a traditional, exclusive public function." *Id.* at 11. Moreover, while the Court acknowledged that the New York regulatory scheme imposed on public access channels required "MNN to operate almost like a common carrier," similar regulation was not sufficient in *Jackson* to render a provider of electrical service granted a partial monopoly a state actor. *Id.* at 12, citing *Jackson*, 419 U.S. at 350, 358.

Finally, the Court rejected an argument that the channels at issue should be considered the property of New York City, and only managed by MNN on the City's behalf. Examining the franchise agreements, the Court found that nothing in the franchise agreements at issue "suggests that the City possesses any property interest in Time Warner's cable system, or in the public access channels on that system." *Id.* at 14-15. Nor did the fact that Time Warner was

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allowed to use public rights-of-way to lay cable make MNN a state actor. *Id.* at 15. However, the Court stated that a different result might be reached where a local government operated public access channels itself or took "appropriate steps to obtain a property interest in the public access channels." *Id.*

Dissenting Opinion

Justice Sotomayor's dissenting opinion on behalf of the liberal wing accused the majority of "tell[ing] a very reasonable story about a case that is not before us." Dissenting Opinion of Sotomayor, J., *MCAC v. Halleck*, slip op. at 1 ("Dissent"). She wrote that the case in fact concerned "an organization appointed by the government to administer a constitutional public forum ... not, as the Court suggests, ... a private property owner that simply opened up its property to others." *Id.*

The determinative factor for the dissenting justices was that the whole idea of creating public access channels originated with the state, and that the state secured the necessary rights on Time Warner's cable network to allow that to occur. A state-created public forum would be subject to the First Amendment; thus, reasoned the dissent, MNN accepted the obligation to abide by First Amendment standards when it accepted New York City's designation that it operate the channels. *Id.* at 4.

Justice Sotomayor's dissenting opinion on behalf of the liberal wing accused the majority of "tell[ing] a very reasonable story about a case that is not before us."

Justice Sotomayor acknowledged for the sake of argument that the majority was correct in finding that *Cornelius*'s concept of a public forum in "private property dedicated to public use" was either in error or required some showing of a government property interest in the private property at issue. *Id.* at 6. Nevertheless, she found that the State's requirement that the City obtain public access channels from Time Warner was akin to obtaining a property easement across Time Warner's network. *Id.* at 6-7. Such a right of access, like a more traditional easement, provided for exclusive use and could not be taken away without a contract negotiation. *Id.* at 8.

The dissent argued that this easement-like interest, combined with the requirement that the channels be open to the public on a "first-come, first-serve, nondiscriminatory basis," created a constitutional public forum. *Id.* at 12-13. Interestingly, the dissenters noted that they might have reached a different result had the regulatory regime allowed a designated operator to pick and choose content at its discretion. *Id.* at 12 n.9. But under the circumstances, when MNN accepted the job to manage the constitutional public forum created by the government, it accepted the constitutional responsibilities and limitations. *Id.* at 13.

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The fact that the public access channels originated with the state, said the dissent, made the most relevant precedent not *Jackson*'s "traditional, exclusive public function" analysis but the discussion of the delegation of government responsibility in West v. Atkins, 487 U.S. 42 (1988). *Id.* at 17. *West* involved a private doctor contracted to provide care to state prisoners; as with the services provided by MNN, noted the dissent, the services provided by the doctor were not traditionally reserved to the state, but the doctor was nevertheless held to be a state actor because he undertook the obligation to provide care to inmates that the state voluntarily incurred by opening the prison. *Id.* Similarly, the dissent argued that MNN became a state actor as a result of its own choices.

Implications for Social Media

The heart of the Court's opinion in this case is the following passage from the majority opinion:

> In short, merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.
>
> If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum. Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether.

It may be, however, that the Court was signaling its anticipation of a potential First Amendment challenge to future legislation seeking to control online moderation practices.

MCAC v. Halleck at 10. For those watching the case for its potential impact on social media platforms, it is hard to imagine a clearer statement that privately operated websites are not subject to First Amendment limitations on their moderation decisions.

Nor is there any purchase to be found in the dissent for plaintiffs who seek to bring First Amendment claims against online platforms for allegedly suppressing their speech. In her introduction, Justice Sotomayor acknowledges that the majority's logic is persuasive as applied to "a private property owner that simply opened up its property to others," Dissent at 1. She specifically distinguishes MNN from "a private entity that simply ventured into the marketplace," *id.* at 16, stating that "the difference is between providing a service of one's own accord and being asked by the government to administer a constitutional responsibility...on the government's behalf," *id.* at 18. Thus, she says, "the majority need not fear that 'all private property owners and private lessees who open their property for speech could be subject to First

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Amendment constraints.' ... Those kinds of entities are not the government's agents[.]" *Id.* at 18 n.13.

All in all, this is a strong opinion for digital platforms seeking to fend off lawsuits over moderation decisions. There is, however, one more item in the opinion worthy of consideration.

In a footnote, the Court identified but did not discuss the separate question of the extent to which the First Amendment rights of private operators themselves would prohibit the government from passing laws or regulations requiring platforms to carry particular speech. *MCAC v. Halleck*, slip op. at 10 n.2. This is a key question given the current bipartisan drumbeat for government regulation of platform moderation decisions. The issue has sometimes been phrased as a battle of competing paradigms drawn from two prior Supreme Court decisions, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980): Are online platforms like the newspaper in *Tornillo*, which the Court held was protected by the First Amendment against being compelled to carry third-party content, or like the shopping center in *PruneYard*, which the Court held could be required to host third-party speech under California law?

The Court's footnote in *Halleck* mentions neither of these cases; instead, it drops a "cf." cite to *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), in which the Court held that the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 requiring cable operators to provide channels for local television stations were subject to intermediate scrutiny. Of course, *Turner* is more directly on point with respect to *Halleck* (a case that also deals with cable systems), but it is interesting to consider the case as an alternative to the *Tornillo*/*PruneYard* dichotomy.

But it is also somewhat curious that the footnote exists at all. It suggests there is an open question as to how the First Amendment applies to compelled carriage laws, despite the fact that *Halleck* did not involve any sort of challenge to New York's regulatory scheme and there is no particular reason to believe that the Court is looking to reconsider *Turner*. It may be, however, that the Court was signaling its anticipation of a potential First Amendment challenge to future legislation seeking to control online moderation practices. Given that the Court was fully aware of the subtext of the decision involving digital platforms (with the Internet Association and other similar entities filling amicus briefs, and extensive press commentary on the potential implications of the case), this is at least plausible.

Jeff Hermes is a Deputy Director of MLRC.

New York Right of Privacy/Publicity Legislation Dead for 2019

By Ben Sheffner

A sweeping bill that would have re-written New York's venerable right of privacy/publicity statute, N.Y. Civil Rights Law §§50 & 51, failed to achieve passage in the final hours of the 2019 state legislative session, cheering the broad coalition of entertainment companies, news organizations, and First Amendment advocates that had opposed this legislation.

Neither Assembly Bill A.5605 nor its Senate companion, S.5959, were even brought to the floor of their respective chambers for up-or-down votes, despite heavy lobbying by representatives for actors and professional athletes, who have long advocated broadening New York right of publicity law.

Background

New York enacted its right of privacy statute in 1903, in response to a decision by the state's highest court the previous year holding that a woman named Abigail Roberson had no viable cause of action under state common law against a flour company that had used a photograph of her on posters advertising its goods, all without her permission. *Roberson v. Rochester Folding Box Co*., 171 N.Y. 538 (1902). Widespread outrage at this result led to rapid legislative action, and the passage of a statute that permitted individuals to sue for unconsented uses of one's "name, portrait, picture or voice …f or advertising purposes or for the purposes of trade." N.Y. Civ. Rights Law § 51.

A sweeping bill that would have re-written New York's venerable right of privacy/publicity statute failed to achieve passage in the final hours of the 2019 state legislative session, cheering the broad coalition of entertainment companies, news organizations, and First Amendment advocates that had opposed it.

For over a century, New York's privacy law – despite the nomenclature, it is practically identical what most other states term the "right of publicity" – has largely served its purpose of barring true commercial – i.e., advertising or merchandising – uses of one's name, image, or likeness. And the courts have, by and large, interpreted the statute ***not*** to cover uses in expressive works that receive full First Amendment protection. *See*, *e.g.*, *University of Notre Dame Du Lac v. Twentieth Century Fox Film Corp.*, 22 A.D.2d 452, 457 (1st Dep't), *aff'd on opinion of App. Div.*, 15 N.Y.2d 940 (1965) (dismissing Section 51 and unfair competition claims against the novel and movie *John Goldfarb, Please Come Home*); *Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publishing*, 94 N.Y.2d 436, 441 (2000) (privacy statute does "not apply to reports of newsworthy events or matters of public interest"); *but see Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 127 (1967)

(Continued on page 24)

(Continued from page 23)

(cause of action under §51 may lie for a depiction of an individual in an expressive work where "the presentation is infected with material and substantial falsification"); *Porco v. Lifetime Entm't Servs.*, LLC, 147 A.D.3d 1253 (N.Y. App. Div. 2017) (convicted murderer stated claim for violation of §51 based on allegedly fictionalized elements of television movie about his case). Notably, New York's privacy statute covers only living individuals; heirs cannot maintain a cause of action for uses of a deceased person's image, even in advertisements. *See Smith v. Long Island Jewish-Hillside Med. Ctr.*, 118 A.D.2d 553, 554 (1986).

The 2019 Legislation

The 2019 legislation, backed primarily by SAG-AFTRA, the union that represents 160,000 actors and other performers, would have radically re-written and expanded Sections 50/51. The bill would have transformed the traditional "right of privacy," as well as introducing novel rights not previously recognized in New York law. The bill had three major provisions:

Right of Privacy/Publicity. The bill would have retained the existing "right of privacy," which applies only to living individuals. This right was re-characterized as addressing the "the mental, emotional, or reputational injuries" sustained by a plaintiff whose "persona" was used without permission "for advertising purposes or purposes of trade without written consent." However, **the** bill would have layered on top of the "right of privacy" a new "right of publicity," defined as "an independent property right, derived from and independent of the right of privacy, which protects the unauthorized use of a living or deceased individual's name, portrait or picture, voice, or signature for advertising purposes or purposes of trade without written consent and the pecuniary loss sustained." This new "right of publicity" would exist for the individual's life, and, for those domiciled in New York when they die, and subject to a registration requirement, for forty years after his or her death.

The bill would have layered on top of the "right of privacy" a new "right of publicity," defined as "an independent property right."

Significantly, the bill included an "expressive works exemption," similar to those enacted in recent decades in other states, that would have explicitly excluded from the ambit of the right of privacy and publicity a variety of works that receive full First Amendment protection, including "news, public affairs or sports broadcast[s]," "a play, book, magazine, newspaper, musical composition, visual work, work of art, audiovisual work, radio or television program if it is fictional or nonfictional entertainment, or a dramatic, literary or musical work," "a work of political, public interest or newsworthy value including a comment, criticism, parody, satire or a transformative creation of a work of authorship," and advertisements and promotions for any such works.

(Continued on page 25)

(Continued from page 24)

Digital Replicas. The bill would have established a novel right to control uses of "digital replicas" representing professional actors, musical performers, and athletes. SAG-AFTRA and others have expressed concern that producers may soon be able to create computer-generated digital replicas or "avatars" of actors who could "act" in movies or television programs without the actor's consent (or payment to him or her), threatening the ability of that performer to earn a living. And so they sought legislation that would head off such practices before they became widespread.

While the MPAA and others have acknowledged the legitimacy of SAG-AFTRA's interests in this area, the broad wording of this provision, and its application to deceased performers – for whom the employment-based justification for protection against use of digital replicas does not apply – led to concern that it could impinge on their ability to make biopics, docudramas, and similar works about actors, musicians, and athletes. Broadcasters also expressed alarm that the digital replica provisions would effectively establish a new form of sound recording performance royalty not recognized in copyright law, though last-minute amendments appeared to have assuaged such concerns.

Deepfakes. Lastly, the bill contained a provision providing a cause of action for the unconsented use of an individual's image in "deepfake" videos – essentially, pornographic videos where the face of an individual is digitally inserted into the video so that it (falsely) appears that she (it's almost always "she") is engaged in a pornographic performance. The faces of many prominent actresses have been used in such videos, and SAG-AFTRA has made enacting legislation targeting it a priority in both New York and California. While the New York bill's deepfakes provision did include exceptions for "a work of political or newsworthy value, or similar work … or for purposes of commentary or criticism," First Amendment advocates have expressed concern about the broad wording and the lack of an explicit exemption for parody and satire.

A large coalition, many of whom do not see eye-to-eye on other issues, including copyright, came together and voice strong opposition to the bill.

Legislative Action

With the support of the state AFL-CIO in a legislature where Democrats now enjoy overwhelming majorities in both chambers, SAG-AFTRA appeared poised to achieve its long-held objective of enacting significant amendments to Secs. 50 and 51. In the final days of the legislative session, the bill won virtually unanimous approval in four separate Assembly committees, and favorable votes in both chambers seemed inevitable. However, a large coalition consisting of motion picture and television producers, broadcasters, videogame publishers, news organizations, First Amendment and Civil Liberties advocates, major internet companies, and law professors – many of whom do not see eye-to-eye on other issues,

(Continued on page 26)

(Continued from page 25)

including copyright – came together and voiced strong opposition to the bill, both through traditional lobbying and by running advertisements on the popular *Empire Report* web site, which is widely read in Albany political circles. Faced with such broad opposition, legislative leaders in both the Assembly and the Senate declined to bring the bill to the floor for a vote on final passage before the session ended in the early-morning hours of June 21.

While the defeat of A.5605/S.5959 was a significant victory for defenders of the First Amendment in New York, the fight is likely not over. Legislative leaders, when they agreed not to move this bill, requested MPAA and its allies to negotiate with SAG-AFTRA in an attempt to reach consensus on language acceptable to both sides, which could be incorporated into a new bill that would be introduced in 2020. Such discussions will likely address many of the provisions in the 2019 bill. And SAG-AFTRA is expected to continue to press for new and expanded right of publicity and related legislation in other states as well.

Ben Sheffner is Senior Vice President & Association General Counsel, Copyright & Legal Affairs, at the Motion Picture Association of America, Inc.

Colorado Adopts Anti-Slapp Statute

New Law Based on California's Protective Statute

By Steven D. Zansberg

On July 1, 2019, Colorado became the thirtieth state (including the District of Columbia) to have an anti-SLAPP statute. On June 3, 2019, House Bill 19-1324 was signed into law by Colorado's Governor Jared Polis. The bill, modeled after (copied almost verbatim from) California's anti-SLAPP statute, was spurred by a recent highly-publicized SLAPP case that actually ended quite well for the SLAPPed defendant.

SLAPP Case That Prompted the Act

In 2016, Pete Kolbenschlag, an environmental activist on the Western Slope of Colorado, posted a reader comment on a newspaper's website in which he accused a Texas-based oil company, SG Interests, of having been "fined" by the U.S. government for rigging bids on BLM oil leases. In fact, in 2013 SG Interests had agreed to pay the U.S. government a half a million dollars to settle an anti-trust case and a related *qui tam* action, but it had not admitted any wrongdoing. Notably, years before Kolbenschlag posted his reader comment, some sixteen other publications, including *The National Law Review*, *The Aspen Daily News*, and the *Crested Butte News*, had all published that SG Interests had paid fines. Nevertheless, SG Interests sued only Kolbenschlag for defamation based on his reader comment three years later.

(Continued on page 28)

Environmental activist Peter Kolbenschlag, front center, was the defendant in the SLAPP case that prompted the Act. Image courtesy of Peter Kolbenschlag

(Continued from page 27)

Kolbenschlag filed a motion to dismiss and attached numerous pleadings from the DOJ's anti-trust action to establish the substantial truth of his reader comment. The district court judge refused to take judicial notice of those federal court pleadings, and instead converted the motion to one for summary judgment, ultimately granting it. *See SG Interests I Ltd. v. Kolbenschlag*, No. 2017-cv-30026, 46 Media L. Rptr. 1941 (Colo. Dist. Ct. June 20, 2108). But, because the case was not dismissed under Rule 12(b) – which, under existing Colorado law, would have entitled Kolbenschlag to his attorneys' fees – he did not have a statutory *right* to recover those fees. (Subsequently, after SG Interests appealed the grant of summary judgment, the district court judge awarded Kolbenschlag his fees upon finding that SG Interests' lawsuit was both groundless *and* vexatious.) As a professional community organizer and activist, Kolbenschlag succeeded in generating a significant amount of press attention for his protracted and successful legal battle with the oil company. Kolbenschlag's case became "Exhibit A" for why Colorado needs an anti-SLAPP statute.

Colorado's Legislature Responds

Towards the end of the 2018-2019 legislative term (with exactly one month remaining), three Democratic legislators (Sen. Mike Foote (D. Boulder), Rep. Lisa Cutter (D. Littleton), and Rep. Shannon Bird (D. Westminster)) introduced HB 19-1324. The bill tracks, almost verbatim, California's Anti-SLAPP Act: it provides for a "special motion to dismiss" in cases where the defendant is sued on account of any "act in furtherance of a person's right of petition or free speech," including "any written or oral statement or writing made in . . . a public forum in connection with an issue of public interest."

Steve Zansberg and Peter Kolbenschlag testifying before the Colorado House Image courtesy Jeff Roberts, CFOIC

Upon the filing of such a "special motion to dismiss," if the court finds that the defendant demonstrated the first prong under the statute, the claims must be dismissed "unless the court determines that the plaintiff has established that there is a reasonable likelihood that the plaintiff will prevail on the claim." Just as in California, the court may determine the motion based upon supporting and opposing affidavits filed in connection with the motion. And, if the motion is granted, the defendant is entitled to an award of his or her attorneys' fees. Like the California statute, the filing of such a motion stays all discovery and a denial of such a special motion is subject to an interlocutory appeal, as of right.

(Continued on page 29)

(Continued from page 28)

The Process

In contrast to the detailed recitation of the strategy and tactics employed by our colleagues in Tennessee, (*see* article on page 8 of last month's *Media Law Letter*), the blow-by-blow narrative of how Colorado's anti-SLAPP bill became law is far less involved (or interesting). Shortly after the bill was introduced in Colorado's House of Representatives, a hearing was set before the House Judiciary Committee.

Both Pete Kolbenschlag and his attorney testified in support of the bill. (*see* photo inset) Kolbenschlag recounted the personal toll he had endured over the past two years as a defendant in SG Interests' SLAPP suit. Two other environmental activists testified about their experience having filed an action under Colorado's Open Records and Open Meetings Laws, only to be countersued for more than $100 million by a different oil and gas company who intervened in that lawsuit.

A representative of the ACLU also testified in support of the bill. The bill was voted out of committee on a 10-1 vote, and, with no opposition from the Colorado Trial Lawyers Association or anyone else, the bill was passed by the House of Representatives on a 60-2 vote. Following a hearing before the Senate Judiciary Committee, before whom I was the only witness, the bill was passed unanimously by the Senate on the last day of the legislative session, May 3, 2019.

The bill tracks, almost verbatim, California's Anti-SLAPP Act

Forty Years in the Making & The Road Ahead

Although the anti-SLAPP bill moved swiftly, with literally *no opposition*, through both houses of the Colorado legislature and on to the Governor's desk, others have noted that, to some extent, Colorado's new law was 40 years in the making. The reason for that observation is that the term "SLAPP" – Strategic Lawsuit Against Public Participation – was actually coined by a law professor at the University of Denver Sturm College of Law, George "Rock" Pring.

Concerned by a growing number of lawsuits filed against activists who challenged real estate development in the late 1970s, Rock Pring joined forces with a sociologist, Penelope Canan, and launched the Political Litigation Project at Denver University in 1984. They conducted the first nationwide study on SLAPPs, examining more than one hundred cases. *See* Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Enviro. L. Rev. 1 (1989). In 1996, Pring and Canan co-authored their seminal book, *SLAPPs: Getting Sued for Speaking Out*, which included a model anti-SLAPP statute as an appendix.

Thus, Colorado can legitimately claim to be "the birthplace" of a national movement to fight SLAPPs that, as of July 1 (with the addition of Tennessee and Colorado), includes 29 states and

(Continued on page 30)

(Continued from page 29)

the District of Columbia. That leaves 21 more states and, of course, the federal government, to go. Onward!

Addendum:

On June 27, 2019, Colorado's Court of Appeals affirmed the Delta County District Court's order granting summary judgment to Pete Kolbenschlag, and ordered SG Interests and its counsel jointly to pay Kolbenschlag's attorneys fees incurred in defending a frivolous appeal.

Steven Zansberg is a senior counsel in the Denver office of Ballard Spahr, LLP. In addition to defending Pete Kolbenschlag in the SG Interests litigation, he co-chairs the MLRC's State Legislative Developments Committee and is President of the Colorado Freedom of Information Coalition.

MLRC London Conference September 15-17, 2019

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Inheritance Feud Leads to Troubling Ruling on Defamatory Meaning

Accusing Law Professor of Unintentional Falsehood Is Defamatory Per Se

By Steven Mandell

A statement made about a law professor in the midst of a heated inheritance dispute was defamatory per se and could not be innocently construed. Black v. Wrigley et al., Case No. 17-cv-101 (N.D. Ill.). The defense argued that in this context it is not uncommon for lawyers to be accused by their adversaries of making unintentional false statements to a court. The court held, however, that the statement caused prejudice to the professor's professional reputation and was actionable.

Family Feud Over Inheritance

Bernard and Katherine Black are married law professors at Northwestern University's Pritzker School of Law. Shortly before her death, Bernard's mother disinherited Bernard, Katherine and their two children in favor of Bernard's younger sister, Joanne, who suffered from a mental illness. A probate court in Denver, Colorado where Joanne lived appointed Bernard conservator of her estate. Later Joanne's guardian *ad litem* obtained information that Bernard had diverted a significant amount of Joanne's inheritance to himself and his family. The guardian *ad litem* hired a forensic accountant, Pamela Kerr, to investigate Bernard's actions and prepare an expert report tracing the funds. Based, in part, on Kerr's report, the Denver probate court concluded that Bernard had acted deceptively and in bad faith, ordered him to reimburse Joanne $1.5 million, and imposed treble damages under Colorado's civil theft statute.

Meanwhile, Bernard commenced a second suit in New York State court in which he sought to be appointed guardian of Joanne's property and collaterally attack the Denver probate court's ruling. Bernard's cousin Cherie Wrigley cross-petitioned to be appointed Joanne's guardian with the support of her brother, Anthony Dain.

On January 7, 2016, Katherine submitted a twenty-page letter to the New York court. Among numerous other allegations, Katherine stated that Wrigley and Dain had concealed the fact that a person Wrigley had hired to look after Joanne's affairs, Esaun Pinto, was a convicted felon and had engaged in "illegal coercive tactics to prevent the Black family members" from testifying. Katherine also wrote that the Denver probate court had found Pinto's conduct sufficiently concerning to appoint a forensic accountant to investigate him. Katherine wrote the letter on letterhead bearing the name and logo of the Northwestern University School of Law.

In response, Kerr sent an e-mail to Wrigley to which she attached a letter drafted on her (Kerr's) professional letterhead and addressed to the dean of the Northwestern University law

(Continued on page 32)

(Continued from page 31)

school. The letter expressed shock that Katherine had written the letter on university letterhead. It also quoted a passage from Katherine's letter to the New York judge in which Katherine stated that the judge in the Colorado case had authorized Kerr to investigate the conduct of Esaun Pinto. Kerr wrote in her letter to the dean that this claim was "100% false" and "completely false" and further stated that, "in fact, the Colorado Court authorized me to conduct an investigation into the actions of her husband . . . [Bernard]." Wrigley submitted Kerr's letter to Northwestern through a portal designed to receive ethics complaints.

Katherine sued Kerr and Wrigley for, among other things, defamation *per se*, claiming that Kerr's letter amounted to a statement that Katherine lied to the New York judge which, according to Katherine, is a statement that prejudices Katherine in her profession. Kerr moved for summary judgement under Illinois' innocent construction rule. She argued that Kerr's statement could be given a reasonable non-*per se* defamatory construction because the statement did not accuse Katherine of lying *i.e.*, making an intentionally false statement.

She noted that in the context of a heated debate or argument, it is not uncommon for lawyers to be accused by their adversaries of making false statements to a court. She further argued that under the Illinois innocent construction rule, when faced with a statement that is susceptible to both a *per se* and non-*per se* construction, a court must adopt the non-*per se* construction and dismiss the case absent a showing of special damages.

A jury could reasonably find that an allegation that a law professor made false statements to a court – whether those statements were intentional or merely reckless or negligent – caused prejudice to the professor's reputation.

The court rejected Kerr's argument, denying her motion for summary judgment. The court found that a jury could reasonably find that an allegation that a law professor made false statements to a court – whether those statements were intentional or merely reckless or negligent – caused prejudice to the professor's reputation. The court further found that a jury could conclude that Kerr and Wrigley's primary purpose in submitting the ethics complaint was to prejudice Katherine in the eyes of her employer. The case is set for trial in July.

Steven P. Mandell, Steven L. Baron and Natalie A. Harris of Mandell Menkes LLC in Chicago represent Pamela Kerr. Donald L. Homyk represents Katherine Black.

Website Accessibility: Legal Requirements and Best Practices for Ensuring Compliance

By Christine N. Walz

Increased litigation against website operators under the Americans with Disabilities Act (ADA) highlights the on-going need for media entities with an Internet presence to consider whether their websites are accessible to persons with disabilities, especially those with visual and hearing impairments.

The ADA and, in many cases, similar state laws prohibit discrimination on the basis of disability by places of public accommodation. For most of the ADA's history, lawsuits alleging violations of the ADA focused on "brick and mortar" locations given that both the ADA and its implementing regulations plainly establish governing legal requirements in these locations. But today, ADA lawsuits concerning websites are starting to outnumber those concerning physical locations.

In general, these lawsuits allege that the websites at issue are inaccessible to individuals with disabilities, and therefore, deny those individuals "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."

Generally applicable ADA accessibility requirements have generally not been viewed as an impermissible burden on First Amendment rights.

What does it mean for a website to be accessible? An accessible website is one that allows people with disabilities to independently acquire the same information, engage in the same interactions, and enjoy the same services within the same timeframe as individuals without disabilities, with substantially equivalent ease of use. As a practical matter, this primarily concerns how websites can be used by individuals that have vision or hearing impairments and in particular how the websites interact with the screen readers and other assistive technologies used by those individuals.

News content itself is not a "public accomodation" subject to the ADA requirements. *See Treanor v. Washington Post Co.*, 826 F. Supp. 568, 569 (D.D.C. 1993)(dismissing complaint that alleged that newspaper's refusal to review book by author with disability violated the ADA).

However, generally applicable ADA accessibility requirements have generally not been viewed as an impermissible burden on First Amendment rights. *See, e.g. Rendon v. Valleycrest Prods.,*

(Continued on page 34)

(Continued from page 33)

Ltd., 294 F.3d 1279, 1285 (11th Cir. 2002) (contestant hotline, which was an automated fast finger telephone selection process for a television quiz show, was a place of "public accommodation" within meaning of ADA); *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015) (digital library's website and mobile applications were places of public accommodation under Title III of the ADA); *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 434 (9th Cir. 2014) (considering, but not deciding, whether the California Disabled Persons Act applied to online news site).

For a variety of reasons, there is not a clearly established statutory or regulatory standard addressing website accessibility. However, recent court decisions have rejected defenses based on the absence of legislative or administrative activity on this issue. *See, e.g., Robles v. Yum! Brands, Inc.* (C.D. Cal., Jan. 24, 2018) 2018 WL 566781, at *5 ("The lack of specific guidelines from the DOJ does not excuse Pizza Hut from complying with the ADA's general mandates."); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 403 (E.D.N.Y. 2017) ("The plaintiff has made a prima facie case that Blick is violating his rights under the ADA. The court will not delay in adjudicating his claim on the off-chance the DOJ promptly issues regulations it has contemplated issuing for seven years but has yet to make significant progress on.").

Therefore, to determine accessibility, courts have primarily looked to the voluntary Web Content Accessibility Guidelines established by the international website standards organization the World Wide Web Consortium (W3C).

To determine what is accessible, courts have primarily looked to the voluntary Web Content Accessibility Guidelines established by the international website standards organization the World Wide Web Consortium.

These guidelines recommend the following (non-exclusive) accessibility features:

- adding invisible alternative text to graphics
- ensuring that all functions can be performed using a keyboard and not just a mouse
- ensuring that image maps are accessible
- adding headings so that visually-impaired people can easily navigate the site.

Most of these changes are made in the back-end coding of websites and generally do not change how a website appears.

Given the on-going trends in website accessibility litigation, all companies with an online presence should adopt some or all of the following practices to ensure that their websites are

(Continued on page 35)

(Continued from page 34)

accessible to individuals with disabilities, to comply with the legal requirements and to avoid litigation:

- Evaluate websites and mobile applications based on Web Content Accessibility Guidelines;
- Adopt an accessibility policy and post an accessibility statement on websites;
- Train key personnel in accessibility requirements;
- Require website developers and vendors to comply with Web Content Accessibility Guidelines;
- Prioritize accessibility during any website accessibility redesigns.
- Routinely re-evaluate or test website to ensure on-going compliance.
- If you receive a legal complaint or letter regarding compliance, discuss with in-house counsel and outside counsel to develop strategy for responding.

Christine N. Walz is a partner in Holland & Knight's New York office. This article summarizes a recent presentation on this topic organized by the Advertising and Commercial Speech Committee, Employment Committee, and Litigation Committee.

Los Angeles Times Wins Access to USC Abuse Settlement Docs

By Karl Olson

The *Los Angeles Times*, which won a Pulitzer Prize this year for its reporting on a sexual abuse scandal at the University of Southern California, won an important court victory May 21 when a federal judge unsealed key documents revealing what USC officials knew about the practices of a former school gynecologist and when they knew it. Chi v. University of Southern California, No. 2:18-cv-04258 (C.D. Cal. May 21, 2019).

The ruling by U.S. District Judge Stephen V. Wilson granting the *Times*' motion to unseal was noteworthy because it delved into what standard applies to sealing decisions related to class action settlements, and because it rejected USC's argument that documents exchanged during a mediation could be hidden from the public. The decision ended with a strong endorsement of access in general, particularly in the #MeToo context.

Judge Wilson held, in a 16-page single-spaced ruling, that documents related to class action fairness proceedings could only be sealed for "compelling reasons," and then found that USC's arguments based upon the mediation privilege lacked merit. The Court held that "factual documents produced during informal discovery relied upon during the mediation session" are "inherently not protected from public disclosure," because, "While the parties' communications *about* those documents may be traditionally kept secret, the *documents themselves* are not."

The decision ended with a strong endorsement of access in general, particularly in the #MeToo context.

Times Breaks Story About Gynecologist's Practices

Judge Wilson's ruling came in a class action lawsuit which arose out of Pulitzer Prize-winning revelations by the Times about Dr. George Tyndall, who was the gynecologist at USC's student health center for decades before taking a secret deal which allowed him to leave his post with a substantial financial payout. Through old-fashioned shoe-leather reporting and interviews with Dr. Tyndall's patients, Times reporters Harriet Ryan and Matt Hamilton uncovered evidence of shocking practices by Dr. Tyndall.

After decades of complaints about Dr. Tyndall, documents unsealed as a result of Judge Wilson's order later revealed, USC administrators hired a team of medical experts to evaluate him. The experts came back with a disturbing report saying there was evidence that Dr. Tyndall was preying on vulnerable Asian students and had signs of "psychopathy."

Judge Wilson himself commented at a court hearing this year that if the allegations against Dr. Tyndall were true, his practices were the acts of a "monster."

(Continued on page 37)

(Continued from page 36)

Litigation and $215 Million Settlement

After the *Times*' reporting of Dr. Tyndall's practices broke, dozens of lawsuits against USC were filed. The lead lawsuit landed in Judge Wilson's Central District of California courtroom in downtown Los Angeles (the court is now located near the *Times*' old building).

The case settled fairly quickly (without depositions) for $215 million. The plaintiffs' lawyers filed a motion for preliminary approval of the settlement, and lodged under seal documents they'd been given by USC, under a protective order, about the internal USC report.

The *Times* then moved to intervene and unseal the material the plaintiffs' lawyers had given the court in support of their preliminary approval motion. USC vigorously opposed the Times' motion. Judge Wilson granted it.

In the Ninth Circuit, courts apply a "compelling reasons" standard to decisions about sealing "dispositive motions" such as summary judgment motions. *Kamakana* v. *City and County of Honolulu*, 447 F.3d 1172, 1178-79. But courts apply a relaxed "good cause" standard to a "sealed discovery document attached to a non-dispositive motion." *Phillips ex rel. Estates of Byrd* v. *General Motors Corp.*, 307 F.3d 1202, 1213 (9th Cir. 2002). So the initial battle on the Times' unsealing motion was about which standard applied.

After the Times' reporting of Dr. Tyndall's practices broke, dozens of lawsuits against USC were filed.

Judge Wilson initially remarked that "the determination of whether a motion is dispositive is not always clear." He concluded that even though the sealed documents were filed in connection with objectors' motions to intervene to oppose the settlement, they were "filed in reference to a substantive motion for preliminary approval of a class action settlement," and therefore qualified as a "dispositive motion under applicable precedent rather than a 'tangential' motion unrelated to the resolution of the underlying causes of action." Accordingly, the court applied the "compelling reasons" standard.

That wasn't the end of the story. USC argued that the Court's and public's only concern with a class action settlement should be whether it was the product of arm's length negotiations and whether counsel had adequate information at hand while negotiation the settlement. Not so, the court ruled.

> "[T]he Court must allow class members to voice their concerns about the substantive fairness of any settlement reached via objections at the final settlement approval stage. To allow the parties to reach a 'fair' settlement agreement based on known facts pertaining to the merits of the underlying

(Continued on page 38)

(Continued from page 37)

> causes of action, without providing class members with those facts, would upend the purpose of Rule 23's requirement of court approval and class involvement in the settlement process....Simply put, the Court, and the public, maintains a substantial interest in accessing the information under seal to ensure that class members are afforded the information and relief they deserve."

Ringing Endorsement of Access, Especially in "#Me-Too" Cases

The Court's decision contains a ringing endorsement of access in general and access to records of sexual harassment and abuse in particular. Judge Wilson quoted an earlier Central District case which explained, "The presumption of access exists because the citizens are entitled to observe, monitor, understand and critique their courts – even in the most mundane of cases that excite no media interest – because what transpires within our courtrooms belongs to our citizens in a fundamental way."

Judge Wilson then applied those first principles to the disturbing facts of the case:

> "[T]he Court notes the extensive media coverage surrounding this case and similar class-wide allegations of sexual harassment or abuse against persons of authority across the country. Providing the public with all available, non-privileged information furthers the public narrative about inappropriate sexual behavior and ensures for longer-lasting changes beyond the case at hand. The public's legitimate interest in the sealed documents therefore outweighs any potential interest USC has asserted in maintaining confidentiality of discovery documents exchanged during mediation pursuant to a private agreement between the parties."

The *Times* ended up getting more than it originally requested in its unsealing motion. After the *Times*' motion to unseal, the parties gave the court additional material for *in camera* review in connection with the settlement approval motion. The Court's order said it intended to unseal that material too, and gave the parties seven days to object to disclosure. Seeing the writing on the wall, USC released that material too at the same time the other documents were unsealed. The *Times* promptly reported on the disturbing revelations of Dr. Tyndall's practices and how USC "did not fire Tyndall or notify the state medical board." And it achieved an important access victory along the way – to go with its earlier Pulitzer Prize for investigative reporting.

Karl Olson is a partner at Cannata, O'Toole, Fickes & Olson LLP in San Francisco. He, Zachary Colbeth and Aaron Field, and Jeff Glasser of LA Times Communications LLC , represented the Los Angeles Times in its unsealing motion.

How Many Public Facts Does It Take to Create A Privacy Interest?

Massachusetts SJC Grapples with Privacy Interests in Public Data Compilations

By Jonathan M. Albano

The Boston Globe, like many press organizations, often uses birth and marriage records for news reporting purposes, including identifying trends, ensuring that the state is properly performing its data collection efforts, and confirming the identity of persons named in articles (there are, after all, more than 500 registered voters in Massachusetts named John Sullivan). Believing that it would help ensure accurate news reporting, the Globe made a public records request for the state's electronic birth and marriage records database and, when the request was denied, brought an action under the Massachusetts Public Records Law (G.L. c. 66, §§ 10 and 10A).

A Massachusetts Superior Court granted summary judgment in favor of the agency, holding that the disclosure of compilations of millions of birth and marriage would constitute an unwarranted invasion of personal privacy. In a decision issued on June 17, 2019, the Massachusetts Supreme Judicial Court reversed the trial court and remanded the case for evidentiary findings on a number of issues, including whether comparing successive years of compilations of birthdate and marriage records would reveal information protected by Massachusetts confidentiality statutes, and whether any privacy interests in the compilations are outweighed by the public interest in the information. Boston Globe Media Partners, LLC v. Department of Public Health, 2019 WL 2495460 (Mass. 2019).

The Globe made a public records request for the state's electronic birth and marriage records database and, when the request was denied, brought an action under the Massachusetts Public Records Law.

On the latter point, the Supreme Judicial Court departed from federal precedent by holding that the relevant public interest to be weighed in the privacy balance need not relate to the functioning of government. *Id.* at *13-15. *Compare United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (the purpose of FOIA "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct").

Birthdate and Marriage Records in Massachusetts

In Massachusetts, your birthdate is a matter of public record. Anyone can obtain a copy of anyone else's birth certificate (and marriage certificate) from the Registry of Vital Statistics or

(Continued on page 40)

(Continued from page 39)

from the city in which the person was born (or was married). The same person could obtain paper copies of the birth and marriage certificates of as many other people as they could name before the offices closed. Or they could find the same information on a database made available on read-only public computers in the office of the Registry of Vital Records and Statistics.

After using the Registry's public computers to research birthdate, marriage and other demographic issues, a Globe reporter made a public records request for a copy of the electronic database he had accessed through the computers. The Registry conceded that individual birthdate and marriage information was public, but contended that disclosure of the database would violate certain Massachusetts confidentiality statutes or constitute an unwarranted invasion of personal privacy. The Supreme Judicial Court addressed both issues, and decided that further fact-finding was needed to determine whether the database is a public record under Massachusetts law.

The "Statutory Exemption"

The "statutory exemption" to the Massachusetts Public Records Law excludes from the definition of a "public record" information "specifically or by necessary implication exempted from disclosure by statute." G.L. c. 4, § 7, cl. 26(a). Although birth records generally are public, certain vital records are confidential by statute, including records of children born out of wedlock, records of medical intervention for sex reassignment, adoption, and withdrawals or acknowledgements of paternity. G.L. c. 46, § 2A; G.L. c. 46, § 13. Because the Registry excluded from its public facing database any birth records that fell within those categories, the Globe's request did not, standing alone, implicate the confidentiality statutes.

In Massachusetts, your birthdate is a matter of public record. Anyone can obtain a copy of anyone else's birth certificate (and marriage certificate) from the Registry of Vital Statistics.

That did not end the inquiry, however. The state's database is regularly updated to include authorized changes to birth records, such as occurs when a child is adopted, paternity is acknowledged or withdrawn, or gender reassignment occurs. Accordingly, the Court reasoned, "protected information could be gleaned through comparison if the Globe or another requester were to obtain in the future an updated version of the same indices requested here." *Globe*, 2019 WL 2495460 at *6. "A side-by-side comparison of the same person's data at different points in time might reveal, for example, the biological parents' names of an individual who has since been adopted, the name of a putative father whose nonpaternity has since been established, and the previous name and sex of an individual who has since completed sex reassignment surgery." *Id.*

(Continued on page 41)

(Continued from page 40)

The Superior Court had in essence dodged this issue by holding that, because the Globe had asked for only the extant version of the database, no side-by-side comparisons would be possible, leaving consideration of the statutory exemption for another day when and if a request was made for an updated version of the database. The Supreme Judicial Court found that solution unsatisfactory, and remanded the case for additional factual findings about the extent to which the indices requested by the Globe could be compared to later-requested indices to reveal information protected from public disclosure by statute, and whether the risk of revealing such information triggered the statutory exemption.

The Privacy Exemption

The Massachusetts statute exempts from mandatory disclosure "medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." G.L. c. 4, § 7, cl. 26(c). As with its analysis of the statutory exemption, the Court instructed the trial court to consider on remand whether the database requested by the Globe could be compared to later-requested indices to reveal medical information if future records showed that an individual had undergone medical treatment for the purpose of a sex reassignment. *Globe*, 2019 WL 2495460 at *7.

The balance of the Court's decision was devoted to analysis of the privacy exemption. The governing legal standard requires a court to first determine whether there is a privacy interest in the requested records. If there is not, then the requested material is not exempt. If there is a privacy interest, the court is required to employ a balancing test to assess whether the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy. *Id.* at 8.

The Court identified three non-exclusive factors relevant to determining the threshold question of whether there is a privacy interest in the requested records: "(1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal nature; and (3) whether the same information is available from other sources." *Id.* (citing *People for the Ethical Treatment of Animals, Inc. v. Department of Agric. Resources*, 477 Mass. 280, 292, 76 N.E.3d 227 (2017). In this case, the Court identified a case-specific factor as the "aggregate nature of the requested indices, which combine discrete information about millions of individuals." *Globe*, 2019 WL 2495460 at *8. Observing that it had not previously been called upon to address whether there is a greater privacy interest in a compilation of personal information than in the discrete information that a compilation summarizes, the Court held that "in certain circumstances, there is." *Id.* (citing *Reporters Comm.*, 489 U.S. at 764).

(Continued on page 42)

(Continued from page 41)

The Court agreed that a "minimal amount of nonintrusive data does not become private merely because it relates to millions of people." *Globe*, 2019 WL 2495460 at *9. "But where requested records include a fair amount of personal information, it matters how many individuals the records implicate: the more people affected by disclosure, the greater the privacy concerns." *Id.* In this case, the Court noted, the marriage index entries would likely include name, date of marriage, spouse, place where the license was filed, and certificate number. Some of the birth index entries would likely include name, date of birth, place of birth, gender, and parents' names. *Id.* These factors, the Court ruled, "suggest" there is a privacy interest in the requested indices, requiring a remand for additional findings on the following four issues: (1) the extent to which multiple indices could be compared to reveal private information, (2) the availability from other sources of the information in the requested indices, (3) the risk from disclosure of identity theft or fraud, and (4) the extent to which disclosure could result in unwanted intrusions (such as enabling people to target the elderly). *Id.* at 10, 13.

Assuming that there is a privacy interest in the requested records, the trial court must then weigh the privacy interest in nondisclosure against any public interest in disclosure. *Id.* at 13. On this issue, the Court rejected the trial court's conclusion that the relevant public interest is limited to knowing whether public servants are carrying out their duties in a law-abiding manner. The Court recognized that, in applying an analogous balancing test under the federal Freedom of Information Act, the Supreme Court ruled that the only relevant public interest is the extent to which the disclosure of the information would shed light on an agency's performance of its statutory duties or "otherwise let citizens know what their government is up to." *Id.* at 14 (quoting *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (quotations, alterations, and emphasis omitted). The Court nevertheless held that Massachusetts law contained no such limitation and instead serves an "important purpose in addition to shining sunlight on government operations." *Globe*, 2019 WL 2495460 at *15.

The Court rejected the trial court's conclusion that the relevant public interest is limited to knowing whether public servants are carrying out their duties in a law-abiding manner.

"Information," the Court stated, "is the bread and butter of democracy, and the government is in a unique position to collect and aggregate information from which the public may benefit. As the request in this case demonstrates, reporters, scholars and others seek to use this information to learn and teach." *Id.* Accordingly, in order to "ensure that the public-private balancing test reflects the various uses to which government information may be put," Massachusetts courts may properly consider a public interest unrelated to government operations when determining whether the disclosure of information constitutes an unwarranted invasion of personal privacy. *Id.*

(Continued on page 43)

(Continued from page 42)

As is obvious, just as the Supreme Judicial Court did not finally resolve the issue of whether the disclosure of compilations of public birth and marriage data is an unwarranted invasion of privacy, the tension between the value of data journalism and judicial apprehension about disseminating "big data" in the Internet age remains an ongoing challenge for public access advocates.

Boston Globe Media Partners, LLC was represented by Jonathan M. Albano of Morgan, Lewis & Bockius LLP, Boston, Massachusetts. The defendant Department of Public Health was represented by Massachusetts Assistant Attorney General William W. Porter, Boston, Massachusetts. Andrew F. Sellars and Julissa Milligan, of the BU/MIT Technology & Cyberlaw Clinic in Boston, and Bruce D. Brown, Katie Townsend, and Caitlin Vogus, of the Reporters Committee for Freedom of the Press in the District of Columbia, submitted a brief amici curiae.

This Side of the Pond: UK Media Law Developments

Serious Harm Requirement; Interpreting Social Media Posts; Public Interest and More

By David Hooper

More sharp-eyed observers will recollect that this column is normally captioned "The Other Side of the Pond." However, having this weekend attended the inaugural MLB fixture of the Red Sox v. The Yankees, I feel the column perhaps needs to be renamed "This Side of the Pond." The games were sold out but ultimately disappointing for the Red Sox who had perhaps unwisely designated it a home fixture. We do not forget Tea Parties that easily!

The audience was overwhelmingly Americans who had combined it with a vacation, but rules were helpfully set out for us Brits and there was less of an avalanche of statistics that seemed to beset one at US baseball grounds. More importantly from a personal point of view, I did not receive a foul hit in the face as has had happened to me in DC.

Serious Harm Means Serious Harm

Lachaux -v- Independent Print (2019) UKSC 27

The Supreme Court has recently ruled on how the requirement of serious harm in Section 1 Defamation Act 2013 is to be interpreted. Essentially the Supreme Court has upheld the ruling of the trial judge Mr Justice Warby and has overruled the approach of the Court of Appeal and restored the law to what we thought it was.

Section 1 Defamation Act 2013 requires that the claimant show that the publication of the defamatory words has caused him or her serious harm or is likely to cause serious harm. In the case of a claimant company under Section 1 (2) there is not serious harm unless it has caused or is likely to cause the body that trades for profit serious financial loss.

The question was to what extent had the threshold for bringing libel actions in England been raised? Did evidence of serious loss have to be proved by the claimant or was it sufficient for the court simply to draw an inference from the words which had been published? Mr Justice Warby held that all but the most serious cases such as allegations of serious criminal conduct or

(Continued on page 45)

(Continued from page 44)

paedophilia, evidence of serious harm did have to be adduced. The Court of Appeal said that it was essentially a matter of inference from the words. It seems that the Court of Appeal were anxious to avoid preliminary hearings where evidence of serious harm had to be adduced, adding to the expense of libel actions. The Supreme Court overruled the approach of the Court of Appeal which in the view of Lord Sumption gave little effect to the language of Section 1 Defamation Act 2013, an Act stated to have the intention of amending the law of libel.

Lachaux was a French National working in the UAE and sued The Independent and Evening Standard which reported claims made by his former wife in a bitter matrimonial dispute of kidnapping the child of the marriage and domestic abuse. As it happened, the judge concluded after hearing evidence that these allegations *did* meet the threshold of serious harm.

The Supreme Court was in no doubt that the approach of the Court of Appeal that serious harm could be deduced as a matter of inference from the seriousness of the defamatory meaning was wrong. Serious harm was a factual matter, the Supreme Court held, to be established by reference to the impact of the statement about which the claimant complains. They ruled that the Defamation Act had unquestionably amended the common law, whereas the Court of Appeal approach appeared to be that Section 1 was really just incorporating the test of a threshold of seriousness set out in cases such as *Jameel* and *Thornton*.

The old common law rule that there was an irrebuttable presumption of damage to reputation which did not need to be independently proved no longer survives.

The Supreme Court considered that the common law threshold of seriousness had been raised and that there had been a significant amendment introduced by Section 1. The requirement in Section 1 that the statement should have caused serious harm was to the consequence of publication and not to the publication of itself. It was a proposition of fact which could only be established by reference to the impact the statement was shown to have had. The words "*has caused*" necessarily call for an examination of the impact of the statement. The old common law rule that there was an irrebuttable presumption of damage to reputation which did not need to be independently proved no longer survives. The court will now in assessing serious harm look at a combination of the inherent tendency of the words to cause serious harm and the actual impact on those to whom they are communicated. In the case of companies, financial loss is the measure of harm and it must exceed the threshold of seriousness.

Recent statistics have shown that there has been an increase in defamation claims albeit on a very small base. The 2018 judicial statistics showed that 265 defamation claims were issued in London in 2018 as opposed to 156 in 2017 and 112 in 2016. This may have been due in part to the increase in the number of social media libel cases, but in all probability the ruling in Lachaux may henceforward discourage the bringing of many libel claims. This was a ruling which will certainly assist media defendants. It should, however, be pointed out that in assessing the likelihood of serious harm being established, defendants cannot take into account

(Continued on page 46)

(Continued from page 45)

the fact that similar allegations to the like effect have been published elsewhere. This is the rule in *Dingle -v- Associated Newspapers* which was upheld by the Supreme Court.

Serious harm has to be evaluated in the light of the publication that is sued and that publications cannot simply point to the fact that other publications have made very similar allegations. The fact that the allegations have wide currency may make it more difficult for the claimant to prove that the publication has caused serious harm but media defendants will need to apply the tests set out by the Supreme Court to evaluate whether a claimant has a prospect of establishing that their publication has caused the claimant serious harm.

Context and the Casual Meaning

Stocker v Stocker 2019 UK SC17

The Supreme Court issued an important ruling on meaning in libel cases involving publication in social media. As often happens in English libel law, the facts were bizarre and the earlier judicial decisions were eccentric. The claimant former husband had been awarded £5,000 damages against his former wife who, as one does, had confided on Facebook to her former husband's new partner and her Facebook friends that he "*had tried to strangle me.*" This revelation was visible to the relatively small number of the new partner's friends on Facebook and to the former wife's Facebook friends. The former wife certainly had a point that connubial bliss had been in short supply in the Stocker marriage. He had breached a non-molestation order and it was established that there was an occasion where he had put his hands around her neck to silence her – in the sense of getting her to shut up rather than more sinister Don Corleone sense - leaving red marks on her neck which were visible to the police when they attended the premises two hours later.

The Supreme Court issued an important ruling on meaning in libel cases involving publication in social media. As often happens in English libel law, the facts were bizarre and the earlier judicial decisions were eccentric.

The approach of the trial judge appeared to come from the world of academia and left one with the impression that his familiarity of the world of social media was perhaps a little less than one might have hoped for. His starting point was that Ms Stocker was not dead and had survived the incident. The judge consulted the Oxford English Dictionary and noted that strangling essentially had two meanings. The first was killing by the extreme compression of the throat. That mercifully had not happened. The second was of grasping by the throat and applying force to her neck. Since Ms Stocker had accused her former husband of *trying* to strangle her and since he *had* actually grasped her by the throat and applied force to her neck, for her to be able to justify her allegation she had to prove that he had *tried* to kill her by choking her to death.

The fact that he had grasped her by the throat and applied force to her neck meant that it could not be said that he was *trying* to do what in fact he had in fact done. In other words, and utterly bizarrely, the upshot of the judge's approach was that if Ms Stocker had told her Facebook

(Continued on page 47)

(Continued from page 46)

friends that Mr Stocker had strangled her she would probably have won the case on the second lesser meaning as she could show that he had grasped her by the neck although of course he had not killed her. This intellectual analysis may well have been appropriate for a work of scholarship but it did seem singularly inappropriate to an unloading of grievances on social media or to put it bluntly bonkers.

Again, the approach of the Court of Appeal left something to be desired. The court considered that the judge had appropriately analysed the rival contentions and were reluctant to disturb his analysis and to substitute their own view. It would not have been right in the Court of Appeal's opinion for the judge to determine the matter on the basis of a dictionary definition. That however was merely a part of the judge's thought process and analysis and the Court of Appeal upheld his ruling.

The Supreme Court applied a greater degree of common sense in their ruling. Readers of Facebook do not subject what they read to such close analysis. Meaning in a social media situation must be determined contextually. The court needs in determining meaning to put itself in the position of the reasonable social media user. It was a casual medium in the nature of conversation rather than carefully chosen expressions. Essentially the Supreme Court adopted the approach of Mr Justice Warby in the case of Monroe v Hopkins (2017) EWHC 433 in relation to defamatory Tweets and the world of Twibels. There the judge pointed out that tweeting was a conversational medium and that an impressionistic approach was much more fitting in determining meaning and that it was wrong to engage in over-elaborate analysis of a 140-character tweet.

Provided that the threshold of serious harm can be met claims can certainly be brought for libel published in social media. What *Stocker* establishes is that in determining meaning the court will avoid over-elaborate analysis and will seek to determine meaning from the impression that the words would have conveyed to the ordinary social media user. The case calls to mind the approach of Mr Justice Eady at the outset of social media cases when he noted that a number of comments that appeared in what were them termed chatrooms were analogous to casual remarks made in a public house and should not spawn libel actions and did not have the degree of seriousness which they might have had in printed media.

Honest Opinion Defence Upheld

Dr Salman Butt v Secretary of State for the Home Department (2019) EWCA 937

The Court of Appeal recently upheld a ruling of Mr Justice Nicol that statements in a Home Office press release amounted to an expression of honest opinion with the basis of that opinion having been set out in general terms. Dr Butt was described in a Home Office press release as an extremist hate speaker who legitimised terrorism and from whose pernicious and poisonous influences students should be protected. This was a press release to accompany the publication of a survey by the government's Extremist Task force entitled "Tackling extremism in universities and colleges." It was based on an evaluation by the Extremist Analysis Unit.

(Continued on page 48)

(Continued from page 47)

The ruling of the Court of Appeal gives teeth to the defence of honest opinion. In the past such statements would be likely to have been held to be statements of fact which would have to be justified – a process which could be costly and lengthy and possibly uncertain in outcome given the difficulty of proving such matters particularly if it was necessary to rely on covert surveillance or nervous witnesses. Governments have views and opinions which can be protected by the defence of honest opinion. The advantage of the width given to the defence of honest opinion is that there will be a defence if the opinion is one that an honest person could hold based on facts existing at the time. It is not necessary to prove that the opinion expressed was objectively correct in fact.

Guidance on Public Interest Defence - Section 4 Defamation Act 2013

Serafin v Malkiwicz (2019) EWCA 852

The facts of this case were a little unusual. The claimant was a Polish builder who ran a food business and did work for a Polish cultural association and a Polish care home. He was severely criticised in a Polish language magazine, Nowy Czas. He was a litigant in person and he had the misfortune to have his case heard by Mr Justice Jay who had become well known before his judicial appointment for his forensic dissection of the misdoings of certain sections of the media when he was standing counsel to the enquiry into the activities of the media conducted by the Court of Appeal judge Sir Brian Leveson.

There was a 7-day trial in which the claimant complained of wide-ranging character assassination in the article. That however cut no ice with Mr Justice Jay who found that what was written was true, an expression of honest opinion, that it was a matter of public interest that the claimant was cheating these organisations and that his conduct was brazenly unethical and for good measure, the judge concluded that even if he had been entitled to damages, they would have been negligible given that his reputation had been shot to pieces in the case.

The ruling of the Court of Appeal gives teeth to the defence of honest opinion. In the past such statements would be likely to have been held to be statements of fact.

The Court of Appeal appears to have taken the view that the judge's handling of the case was disastrous. The judge manifestly transgressed the principle that the judge should remain neutral, they said. He had acted in a manner that was manifestly unfair and hostile to the claimant. The nature and tenor and frequency of the judge's interventions rendered the trial unfair. For good measure, the report attaches a schedule of the judge's interventions and it will be interesting to see if he is assigned further media cases.

However, the real interest of the case was in the analysis of the public interest defence under Section 4 Defamation Act 2013. The Court of Appeal felt that the case did *not* raise a matter of public interest and was not, for example about how the charities were run, but it was aimed at the claimant personally and did not contribute to any debate of public interest. These were essentially matters involving a private individual and a private dispute.

(Continued on page 49)

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Section 4 required a two-stage test. Was the subject matter a matter of public interest, and secondly, were the steps taken to gather and publish the information responsible and fair? The defendants failed first test. They also, on the Court of Appeal analysis, failed the second test. The approach to the second test would depend on the subject matter, the context, the tenor, the tone and the seriousness of the issues. In this case, the claimant's conduct related to his private capacity. The court must look at all the circumstances of the case and they are likely to apply most of the factors laid out in the Reynolds defence in reaching their conclusion whether the issue of public.

The Court of Appeal did not feel that the responsible and fair test had been met. The judge had failed to counterbalance the claimant's right to reputation under Article 8 of the European Convention of Human Rights against the defendants' freedom of expression rights under Article 10. The defendants had not undertaken reasonable enquiries and checks to evaluate the facts and to consider the other side of the coin in the form of what the claimant's response to the criticisms were. In the view of the Court of Appeal, the standards of journalism in this case left much to be desired when it came to applying the Reynolds' factors.

This has been an important case in setting out the steps that will be required of a media defendant to establish a public interest defence under Section 4**.** The key point is that a defendant must show that their investigation of the story was carried out in a responsible and fair manner. They should put the allegations to the complainant and should give balance to his or her responses and they should evaluate carefully the reliability and the source of the allegations against the complainant. The approach is not very different from the Reynolds case but it is probably that much more flexible. Defendants are prudent to keep a careful note of the steps they have taken to investigate the matter and to get both sides of the story. However, if the defence is established the claim will be defeated without the burden of having to prove that the underlying allegations are true.

The key point is that a defendant must show that their investigation of the story was carried out in a responsible and fair manner.

Publishing Details of Criminal Investigation can be a breach of privacy

ZXC v Bloomberg LP (2019) EWHC 970

The Chief Executive of an international company which was being investigated in regard to allegations of fraud, bribery and corruption brought an action for damages for misuse of personal information when he was named in an article published by Bloomberg using details from a confidential Letter of Request which was stated to be a highly confidential state to state law enforcement document where Mutual Legal Assistance was sought by one country from another in accordance with the United Nations Convention against corruption. It was a confidential law enforcement document which seemingly had been passed without appropriate authority to Bloomberg.

(Continued on page 50)

(Continued from page 49)

Originally, the Complainant had sought an injunction to prevent publication by Bloomberg but this had failed before Mr Justice Garnham (2017) EWHC 328. I wrote about that decision making the point that it appeared to be an exemplary way of dealing with and publishing confidential information of public interest. See Across the Pond: Bloomberg Prevents Businessman's Attempt to Obtain Injunction, MediaLawLetter April 2017.

Normally, when applications for injunctions in relation to confidential information fail no further steps are taken, as the whole aim of such proceedings is to stop the offending publication seeing the light of day rather than recovering damages. However, ZXC pursued Bloomberg for damages for misuse of private information and when the matter was heard before Mr Justice Nicklin, he was awarded £25,000 in damages. Bloomberg had however been granted permission to appeal to the Court of Appeal so this saga, is by no means complete.

However, as things stand, Bloomberg's initial success before Mr Justice Garnham was by dint of the conduct of their external UK lawyers turned into defeat. Mr Justice Nicklin considered that the evidence submitted by their UK lawyers fell short of the standards required by the Court. He considered the evidence was misleading by omission in that it had not been made clear to the Court that the Journalist had in fact received and retained a copy of the confidential Letter of Request whereas the evidence stated simply that he had been shown it. This, the Judge felt, deprived ZXC of the opportunity of showing the potential harm of such a confidential document being disclosed as opposed to the Journalist simply having become aware of the investigation through his normal journalistic endeavours.

Mr Justice Garnham had concluded that initially there had been no adverse reaction from the UK Law Enforcement Department dealing with the matter to the fact that Bloomberg was aware of the investigation and proposed to publish and article about it. Mr Justice Nicklin criticised the UK lawyers for not making available the correspondence from the Agency which asserted that publication would in fact damage the investigation and the Judge considered that if this had been disclosed, an injunction might well not have been granted. If a judge feels that all the material facts had not been placed before the court, he is likely to find against the offending party and punish them in terms of costs orders.

Whether these criticisms of the external Lawyers will survive the trip to the Court of Appeal remains to be seen. It is in any event a salutary reminder to English legal practitioners that in interlocutory proceedings it is imperative to disclose all evidence including material which may be adverse to your case, even if the disclosure might on analysis turn out not to be determinative of the case.

The real importance of the case is the willingness of the Court to give privacy protection to those who are the subject of Police investigations prior to their being charged. There have been a number of cases where the media have been tipped off about police raids - normally by police officers seeking to supplement their salary - in the course of investigations or where people have been arrested for the purpose of being questioned at a police station at a preliminary stage

(Continued on page 51)

(Continued from page 50)

of the investigation where there has been a great deal of publicity but where ultimately no criminal charges have ensued and/or it has been clearly established that the person investigated was innocent. This culminated in the Cliff Richard case where a Police raid on his home was leaked in advance to the BBC and the Police and the BBC ended by paying substantial damages to Cliff Richard for misuse of private information.

Lady Justice Sharp has observed that there is a growing recognition that as a matter of public policy the identity of those arrested or suspected of crime should not be released to the public save in exceptional and clearly defined circumstances. Indeed, the Police Guidance on Media Relations indicate that the Police will not name those arrested or suspected of crime save in exceptional circumstances where there is a legitimate police purpose to do so. In the ZXC case no charges have been brought against him. The Court overall felt that there was no pressing need for the contents of the Letter of Request in so far as it related to the ZXC to be published and there was no public interest justification for publishing it.

The ruling of the Court of Appeal will be awaited with great interest by the legal profession in the United Kingdom. While journalists will instinctively feel that it is a matter of great public interest that serious allegations relating to senior individuals at international companies are matters of great public interest – and this feeling would no doubt be reinforced when they have chapter and verse of who the individuals and company were – the mood in the United Kingdom is towards protecting the privacy of those simply being investigated for misconduct. As things stand at present, there are perils in terms of privacy claims in jumping the gun of the individual being charged and naming those who are simply being investigated before being charged or in naming those who are arrested when the Police do not release their name. Media Defendants are likely to be in a stronger position when they refer simply to the company being investigated, where a privacy claim would be difficult to bring. In such circumstances, however media Defendants will need to be mindful of the possibility of a claim for breach of confidence if confidential documents have come into their possession in breach of an obligation of confidence.

While journalists will instinctively feel that it is a matter of great public interest that serious allegations relating to senior individuals at international companies are matters of great public interest, the mood in the United Kingdom is towards protecting the privacy of those simply being investigated for misconduct.

Defendant's liability to pay conditional fee agreement success fees have been abolished in privacy and defamation cases.

The fiesta enjoyed by Claimant lawyers in conditional fee cases where in return for undertaking the cost of the litigation lawyers could claim their fees plus an uplift of up to 100%, that is to say resulting in double is over in respect of conditional fee agreements entered into after 5 April 2019. There can still be conditional fee agreements, but they are a matter as between the Claimant and their lawyers where the Claimant may have to pay his lawyers a success fee of up to 25% of the damages but that is not a charge upon the Defendant.

(Continued on page 52)

(Continued from page 51)

As damages are considerably less in the UK than in the USA, the new regime is considerably less remunerative for Claimant lawyers. The CFA fees had resulted in enormous fees being claimed by Claimant lawyers as in effect they had no paying client and stood to benefit provided that they were successful and had a solvent Defendant from whom they could recover their fees. It was not unusual therefore to find some Claimant lawyers charging £1,000 an hour or more and why write an 8-paragraph letter when you could write an 8-page letter and get the media defendant to cough up the costs of the confection?

It was a regime which the European Court of Human Rights had criticised in the MGN case relating to the model Naomi Campbell against the UK in 2011 where it considered that recovery of a 100% success fee infringed the Defendant's article 10 rights. The recoverability of CFA success fees was introduced by Section 58 Courts and Legal Services Act 1990. It was recognised that this regime was too favourable to Claimant lawyers and was pushing up the cost of litigation and on occasion compelling settlement of unmeritorious claims on the grounds of cost alone.

Section 44 Legal Aid Sentencing & Punishment of Offenders Act 2012 put an end to the recoverability of CFA success fees from Defendants with effect from April 2013 but it did not apply to publication and privacy proceedings. This was due in considerable measure to the criticisms that were made of the press in the Leveson Inquiry and the decision to exclude privacy and defamation claims from the abolition of this CFA regime was essentially a political matter. Privacy and defamation claims have now been brought in line with other civil litigation but After The Event (ATE) premiums are still recoverable from Defendants. An ATE policy will give an unsuccessful Claimant a fixed amount of protection against an order against him or her for costs if their claim is unsuccessful. The premium given that defamation and privacy claims can be distinctly uncertain in outcome are very substantial.

That CFA success fees can no longer be recovered from Defendants is good news for the media.

Accordingly, the potential liability on Defendants to pay the ATE premium can be a significant extra expense in privacy and defamation claims. The justification for allowing ATE fees to be recoverable is a political judgment that where there is no publicly funded legal aid available the existence of ATE insurance does give Claimants access to justice in cases where the Insurers are satisfied on legal advice that the Claimant on the face of it has a meritorious claim. However, that CFA success fees can no longer be recovered from Defendants is good news for the media.

David Hooper is a Consultant at Howard Kennedy in London.

Viral Like Me

By Lance Koonce

I had heard this story before: the one where someone's tweet goes viral and is rapidly embedded in media stories around the globe. In fact, it's a story that had been at the center of a court case I'd been handling for the past few years.

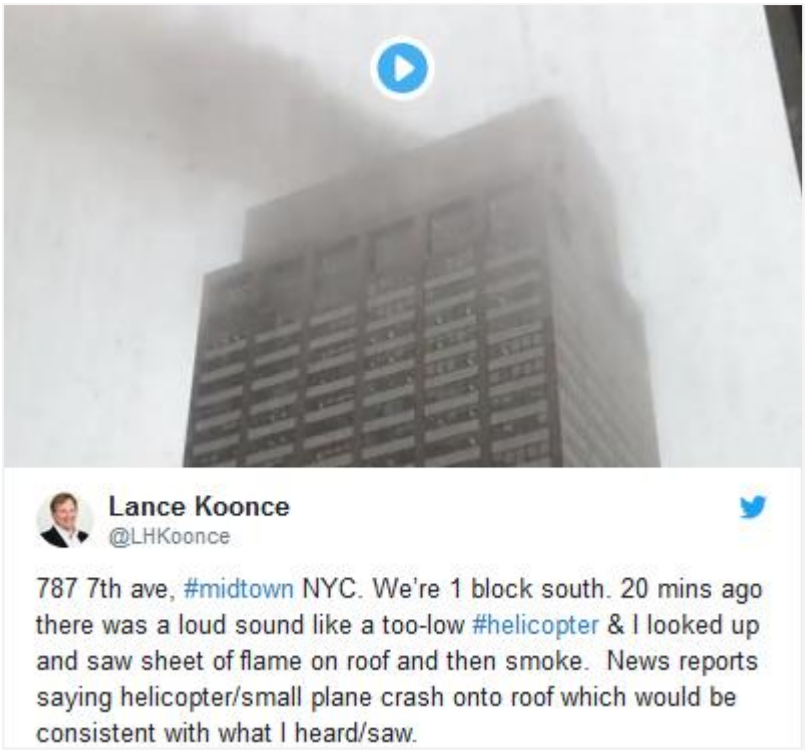
But this time, it was my tweet, and my video. And the view from the other side, as it turns out, was pretty disorienting.

On Monday afternoon, at around 1:40 p.m., I was sitting at my desk when I heard the sound of a helicopter flying very low. Soon, it practically sounded like it was landing right outside my office window, on the 21st floor of a midtown Manhattan high-rise.

The noise ended as quickly as it had begun. I stood up and went to the window—conditioned to do so, as are many of us who lived through September 2001—and looked up. At the top of a building a block north, I saw a flash of fire and a plume of smoke.

I'm really not certain why I took out my phone and started filming. Partly, you think, *someone might need to see this at some point*. But also, there's a feeling of helplessness seeing something occurring in the distance, and you just want to *do* something. I recorded for a little more than a minute, describing what I had heard and seen earlier. Then I stopped filming and called 911, annoyed with myself that I had not done that first.

Then I sat back down and did what most of us now do when we get word of an incident—I began Googling. Not finding much, I decided to post my video (see right).



What I had witnessed was the crash of a helicopter flown by Tim McCormack, an experienced pilot, longtime firefighter, and the sole victim of the accident. By all initial indications, McCormack prevented what could easily have been an even more tragic event by setting his helicopter down hard on the roof of 767 Seventh Ave. If so, McCormack is a hero, and his last act was one of selflessness.

(Continued from page 53)

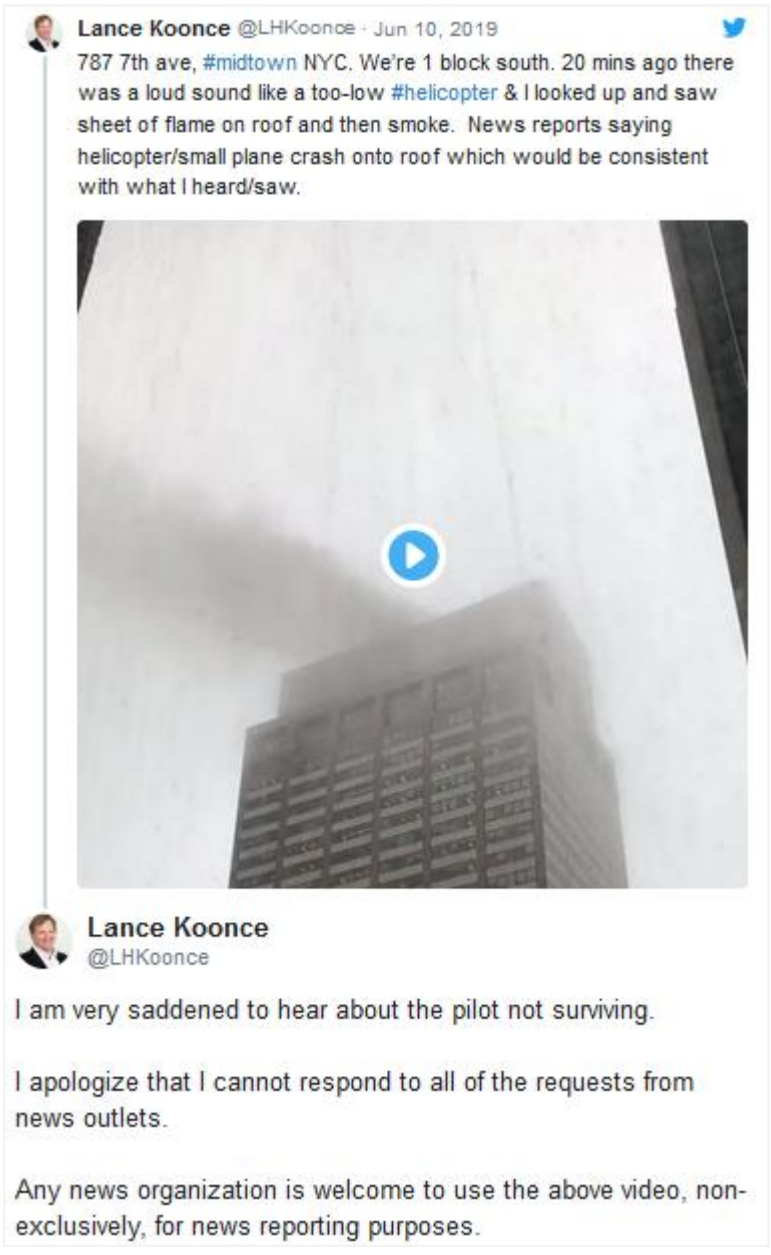
My own place in this story is far less significant—deciding to make that Twitter post hardly constituted an act of bravery. Nonetheless, the consequence of that decision highlights how, as bystanders with powerful recording and broadcasting machines that fit in the palms of our hands, our rights, responsibilities, and expectations have changed. For a lawyer whose main area of practice has been at the intersection of technology and media—in that uncomfortable, often legally gray zone where innovation collides with tradition—it was especially illuminating.

The news business has been occupying that gray zone for a long time, a place where the rules, both legal and market-based, shift constantly. One of the issues for news organizations like Slate—and, frankly, all media companies—is when and how to use online content created by third parties.

Over the years I've seen the power of viral media. I've represented individuals whose creative content was turned into memes and became so widespread that they were co-opted by advertisers. I've represented authors whose entire works were uploaded onto sites where they could be read for free. But I've also defended media companies that used newsworthy content created by others against claims of copyright infringement. And, yes, I've represented technology companies that enable all of this, whose platforms make the exponential virality of content possible.

This time, it was my content in the middle of it all. Within minutes of posting the video, my phone started buzzing with Twitter notifications. Nine minutes later, I received my first inquiry from a news organization, asking for permission to use the video. Then came the interview requests.

Those requests—many, if not most, from clients—came in so rapidly that I had to stop responding. So I posted a new message (see right).



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By day's end, the video had 1 million views on Twitter. I had been contacted by dozens of reporters, and because I freely gave usage permission, it had appeared on most major U.S. news sites and some abroad. I only did a handful of interviews, because at a certain point the attention began to feel ghoulish.

In the meantime, something else had emerged on my Twitter feed: a discussion about my rights as a creator. Soon after I uploaded the video, someone posted a warning that I should not give permission to news organizations to use it, because they would make money from it and not me. This sparked quite a debate.

One of the most radical shifts in media over the past 20 years is the rise of user-generated content. We as humans have been creating content since we first began painting pictographs on cave walls. But when a single smartphone video can receive more views than a carefully crafted advertising campaign, perhaps the rules of the game around content publication must change. But how? The questions are important—and difficult. Who gets to control the use of my content, especially if I publish it openly on social media? What if it relates to a newsworthy event? Who, if anyone, gets paid for its use, and under what circumstances? Can I put the content genie back in the bottle once I've released it to the world?

These are questions that news organization and content companies now grapple with every day, questions I'm increasingly grappling with as a lawyer. But these are questions that individuals are being forced to confront every day as well, and that is something profoundly new.

In any event, it's one thing to see the impact of viral dissemination happening to others. It's another thing entirely to be swept up in it yourself and to see how quickly something you've created can be blown about the world like a feather in a hurricane.

It's one thing to see the impact of viral dissemination happening to others. It's another thing entirely to be swept up in it yourself and to see how quickly something you've created can be blown about the world like a feather in a hurricane.

In fact, over the past two years I've been involved in a dispute that deals with the very issue debated in my Twitter feed: the use of an individual's tweet, with a photo, that was subsequently embedded in multiple news stories.

In that case, Justin Goldman took a photo of Patriots quarterback Tom Brady on a sidewalk in East Hampton, apparently attempting to help recruit Kevin Durant to the Celtics. Goldman posted the photo to Snapchat, and then others tweeted it out. A number of sports news outlets, including a few I represented, published articles about Brady and embedded the tweet in their articles. Goldman sued some of them for copyright infringement. We argued there was sufficient legal authority indicating news organizations could embed third-party content without incurring liability. However, the judge ruled against us, allowing Goldman to bring an infringement claim.

(Continued on page 56)

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It won't be the last case in which these issues play out. But the upshot was that many media companies had to change their practices, trying the best they could to determine who owns social media content. Hence, all the requests I received. In my case, the answer was easy: I shot the video, so I owned it and could give permission for use. If I had posted someone else's video, on the other hand, it might not have been so easy to find the owners and clear content for use, especially against a ticking news clock.

What about my choice to freely license my video? For me, it was also pretty simple. I firmly believe that it's important for the press to be able to report on newsworthy content—though it was gratifying, and appropriate, that in most instances I was credited when my video was used. Still, I only gave permission for news reporting purposes so that in theory I could retain some control over future uses.

In a fast-moving, fluid situation, that was the best I could do. But I'm a lawyer with two decades of experience in such matters. The nuances of such rule setting are going to be very different for different people with different content in different circumstances.

The bottom line is that the use of content created by others needs to be fair, in the circumstances. If a news organization reports on a breaking story, "fair" likely means using whatever portion of the content is needed to tell the story, crediting the owner. If the use is for some commercial purpose that doesn't directly serve an important societal interest, "fair" may mean payment. This is why the "fair use" concept in copyright law, which incorporates First Amendment concerns, is so important, messy as it often is in its application.

We all also need better clarity around how and where content is used, and by whom, as well as clearer data on who created it. We need to better equip our courts and governments to address technological transitions more rapidly so that individuals and companies have guardrails in place to help them make decisions. Revamping our institutions takes significant political and social will, and it won't be easy. But if we don't do so, the pace of change is going to leave them behind. Part of the solution will be technologies that can help us better manage the fairness in all this. There are solutions under development—some using blockchain and artificial intelligence—that may allow us to better know the provenance of content and follow it throughout its life cycle. If we can do that, then perhaps we can credit people properly and pay people effectively, depending on the use. And reduce some of the disorientation.

Now that would be a media ecosystem worth striving for.

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Of Criminal Courts, Gas Station Law, and Pig Slop: A Senior Media Lawyer's Advice to a Newbie

By James Stewart

When Jake Wunsch of MLRC asked me to write this piece, my first reaction was: "What could be better? Write about yourself and give people advice whether they have asked for it or not!"

James Stewart

It's funny where life takes you. After four years at West Point and a four-year Army commitment (one year of which was spent in Vietnam – long before it was a tourist destination), I was thinking that I had better decide what my next career was going to be. So I found myself at the University of Michigan Law School as a 26 year old 1L.

Defamation got a fairly cursory overview toward the end of our torts course when we were all pretty exhausted and confused. No one thought it would be on the exam, so we treated it as a torts footnote. I distinctly recall thinking to myself: "This *New York Times* thing is a lot more interesting than that clock falling on Mrs. Palsgraf, but it'll never have much effect on my life." Really. So how did I get here all these years later and what can I tell you to ease your journey?

I've been at this long enough that when I started – and for some time thereafter – faxes were a big new thing. There were no car phones (much less cell phones); the internet, social media, and emails had not yet been imagined; and a 24-hour news cycle would have been unimaginable. How, you might ask, could we have conducted a sophisticated media practice under those circumstances? The answer is simple. We actually talked to each other – and very frequently in person!

Not a bad practice to keep in mind today as you are rushing to reply to the latest email. So much change and yet, as I look back I recall the line from the song "As Time Goes By" from Casablanca (note to millennials: – it's a classic 1942 movie that all the old gaffers love): "the fundamental things apply, as time goes by." They do. Well, what are those fundamentals as I see them?

Build a Foundation

If you thought that you knew a lot about the practice of law coming out of a fancy law school, you have probably already realized that you were wrong. It's going to be your career and, like

(Continued on page 58)

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building anything, it has to have a solid foundation. I hear and sympathize with the problem that it is increasingly hard to have new (and sometimes not-so-new) lawyers get on-their-feet experience like taking depositions, arguing motions, and standing up in court and making intelligent noises. You have to be a little creative on this one.

When I was in my first year of practice, I got firm approval to accept appointments in the Detroit Criminal Court. It was a great and eye-opening experience. Years later, when I found myself back in the Detroit Criminal Court defending against a prosecutor or defense lawyer subpoena to one of our reporters, I didn't have to learn the (very) unique aspects of practice in that building. I had been there! Some local prosecutors' offices have programs for law firm newbies to work part time and the right pro bono cases will offer you the same opportunity.

Also in my early days, the firm represented one of the major oil companies that franchised gas stations in the City of Detroit. Of course, the stations were required to indemnify our client, but most had no insurance and little money. So I became the firm's lead expert at dog bite, shooting, stabbing, and beating-up at gas-stations. Again, years later when I found myself arguing motions or trying cases in the state circuit courts for our media clients, I had been there before and so had a good understanding of what would work and what wouldn't. I also learned to deal with other lawyers, court clerks, and judges and to make decisions that I would have to live with.

I sympathize with the problem that it is increasingly hard to have new lawyers get on-their-feet experience like taking depositions, arguing motions, and standing up in court and making intelligent noises. You have to be a little creative on this one.

Another firm client in those early years was a prominent brewery. The brewery had always given the spent brewers grain to farmers for pig slop – all they had to do was show up and get it. Then someone decided they were missing a revenue opportunity and they decided to sell it to the farmers instead – an unpopular move with the farmers, as you might imagine. This decision coincided with a farm crisis in Michigan in those years and non-payments from the farmers skyrocketed. I was dispatched to run a collection practice around the state against the farmers, including suing them in their home rural courts. Talk about a fool's errand! But I learned a lot about dealing with hostile judges and forging ahead when all seemed lost (as it often was). I wish I had kept count of how many times opposing counsel (or the judge for that matter) sneeringly referred to "that 'Detroit' feed company."

Finally, the firm had a good-sized practice in defending Workers Compensation claims in the administrative tribunal fondly known then as simply "the Bureau." There were several things you had to understand going in – it was an "in-crowd's in-crowd" and plaintiffs always won. As a young lawyer, what could be better? You did party and expert depositions, scheduled

(Continued on page 59)

(Continued from page 58)

plaintiffs for medical evaluation, presented evidence and cross examined (basically as you would at a trial) – all with absolutely no one expecting you to win. It's changed now, but back then it was the Wild West. I had a ball.

My favorite was a doctor, Bureau regular. He took the stand in a case and somehow forgot that in this particular matter he was supposed to be testifying for the plaintiff. After he gave very pro-defense testimony, the claimant's lawyer sheepishly reminded him why he was there. Without batting an eye, the doctor completely recanted his prior testimony and reversed field – and no one was the least bothered by it. You don't learn about stuff like that – and deciding on the fly what to do about it – by writing briefs or drafting interrogatories.

You may wonder why I am taking you on this trip down Memory Lane. I fully realize that opportunities like these are very tough for a new lawyer to find in today's world. But you'll never know if they exist if you don't look for them. And such experiences can really help you in any defense work – media or otherwise.

A media practice at a law firm is at heart a litigation practice – defending lawsuits, pursuing access litigation, and responding to subpoenas, just for example. It's hard to properly advise a client what might happen if litigation results if you've never been there.

A formal continuing legal education program is also essential to building a foundation. It did not exist for me. I learned by observing what others did (sometimes not well) without fully understanding in some cases why it was done that way. It's probably why the education and mentoring of young lawyers has been and remains one of my passions. A media practice at a law firm is at heart a litigation practice – defending lawsuits, pursuing access litigation, and responding to subpoenas, just for example. It's hard to properly advise a client what might happen if litigation results if you've never been there. You must have a strong foundation in litigation mechanics in your state system and in the federal courts in your jurisdiction. Experience is not the only building block. Continuing education and solid mentoring play a crucial role.

At Honigman, we provide formal litigation associate training program through both in-house programs and various vendors like NITA. Yes, I know that such activities take away from billable time etc. Don't fall into that trap. If your firm offers it, embrace it. If your firm does not offer it, suggest it and get in on the ground floor in designing the program.

Get Involved

This starts when building your foundation but continues throughout your career. Get out there! Of course, the MLRC and the Forum provide excellent opportunities and you should be as active in those as possible. Note: I said *be active*, which means doing more than just going to the programs and listening. But there is even more you should be doing. Certainly, bar

(Continued on page 60)

(Continued from page 59)

associations differ widely across the country, but if there is a local or county bar association then join it. Join the local Federal Bar Association chapter as well. Then, after you have done this, it's simple – do something! Start by going to the meetings. It can be tough at first and you may feel awkward and as if everyone in the room knows everyone but you. Stick your hand out and say hello – you'll soon be part of the crowd. Volunteer for committees or projects. If there are social events or bench bar conferences, go. This is how you get to know the judges and the lawyers who will be with you as you progress in your career. Yes, it takes away from billable time but, as Hyman Roth observed to Michael Corleone in Godfather II, "this is the business we've chosen."

Have a Mentor and be a Mentor

When I went to my first firm, I had no plans to be a media lawyer. The firm represented one of the major newspapers in Detroit along with some radio and TV clients. There were two senior partners controlling the work. I did some media projects for each. They liked me and my work and I liked and respected them. The rest was history for me. They began involving me in work for those media clients, I loved the work and working with them. As they proceeded to retirement in one case and further management responsibilities in the other, I began assuming more and more responsibility until … here I am. It simply will not work to your benefit to be recognized as nothing more than a great work receptacle who has no particular friends in higher places.

Yes, bar activities takes away from billable time but, as Hyman Roth observed to Michael Corleone in Godfather II, "this is the business we've chosen."

It's also important to be a good mentor to those below you. I don't necessarily mean the official "mentor" programs that most firms have. I mean start to see the younger lawyers who you would like to work with and help them progress. I'm probably getting ahead of myself, but it's the start of how you build a team that you enjoy working with.

When You Get a Media Project, Jump All Over It

This is another way of saying: "Look, if doing media work is important to you, then act like it is!" Here's an example. A few years ago my colleague Len Niehoff and I were contacted by a client at about 4 p.m. on a beautiful Friday afternoon in late May with a spectacular weekend forecast. It turned out that some judge in a court about 100 miles away had entered an order barring our client from publishing the contents of a document that its reporter had obtained from the county clerk during the course of a very high profile criminal case against a former MSU athlete. As we all know, this is called a prior restraint and is presumptively unconstitutional.

(Continued on page 61)

(Continued from page 60)

Our clients were most upset and rightly so. We had to learn what this situation was all about, draft pleadings, and be in court Monday morning. We needed an associate. We called our associate Andy Pauwels, who we had heard good things about although we had not worked with him. We laid out the hand we'd been dealt and then said to him: "We've got some serious weekend time in our future, Andy. Can you help us?" I have no idea what Andy and his wife had planned for the weekend, but his answer without missing a beat was "Sure, what do we need to do?" This led to increased opportunities for Andy and he's now a key part of our media defense team with regular client contact. Get it?

Keep Your Perspective / Don't Take Yourself Too Seriously

This covers a fairly wide area. A few thoughts:

First, although it may be tempting in many circumstances, viewing and treating opposing counsel as if they are the devil incarnate is generally not necessary or productive. You can do your job quite well without it. Also, it can drive some lawyers nuts when you don't jump in the gutter with them. Most judges don't like it either. Don't respond to snarky nastygrams or pleadings with equal and opposite snarkiness. Avoid this. Always take the high road, no matter how tough it can be with some attorneys.

All of us basically spend the vast majority of our time with professionals and well-educated people. At the risk of generalization, we all kind of think alike and most of us are not going to be a majority of a jury. Get to know people from all walks of life.

Responding to retraction demands provides an example of what I mean. The lawyer who sent it may be the addressee, but is definitely not my audience. I always consider what our response will look like blown up or on the monitor screens in front of a juror. (Hint: You'll go a long way if you avoid sarcasm, snarkiness, threats, and preachy First Amendment lectures. Such missives are counterproductive. It is crucially important to be the high road traveler to the jury). The same thing goes for pleadings – avoid the ad hominem stuff and stay on the high road.

I have observed that a number of lawyers at big firms express disdain for the state court system. This seems rather elitist to me. I suppose a number of you are rolling your eyes, and I know that state courts can vary widely and wildly. But it has been my experience that some of the best trial judges I encountered were state court judges and some of the hardest working juries were state court juries. If you've taken the time to get out of the office and learn through experience in the state court system, you are less likely to be so dismissive – or at least you will be so on a more informed basis.

Broaden your relationships. All of us basically spend the vast majority of our time with professionals and well-educated people. At the risk of generalization, we all kind of think alike

(Continued on page 62)

(Continued from page 61)

and most of us are not going to be a majority of a jury. Get to know people from all walks of life. Unfortunately, in our society it is not all that easy, but it'll be good for you on many levels – and especially when the day comes that you are speaking to a jury.

Get away for more than a few days when you can. I had a friend who used to say: "If I die, they'll have to get along without me for a long time, so they can practice while I'm on vacation for a week." I know that it's not so easy in the world we find ourselves in today, but a day or so here and there is not getting away and is not recharging your batteries.

Try volunteering. Don't do it as a way to add something to your compensation review or to look good to the firm or to find business. That is a terrible idea. Instead, find something you have a passion for and jump in. If you do it for those reasons, you'll have a great time, meet new people and see life from a different vantage. In my volunteering, I regularly find that whatever business problems are tormenting me suddenly seem way less all absorbing. You will, too.

Finally, make friends, be a friend, and treat everyone the same no matter what their station in life. Your life will be richer for it. Some of my best friends are those I have met through MLRC and the Forum. Yes, those friendships have been good for business, but the shared experiences and laughs are of even greater value to me.

Good luck.

James Stewart is Senior Counsel at Honigman LLP in Ann Arbor, MI.

10 Questions to a Media Lawyer
Gillian Phillips

Gillian Phillips is Director of Editorial Legal Services at Guardian News & Media, London.

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

By default. I went up to Cambridge on a minor history scholarship, but during my second year I started worrying about what I would do with a history degree, so late in the day I switched subjects and did a law degree over two years. This gave me an extra year at Cambridge back in the days when the state paid for your fees. It also allowed me to continue to row for my college and play lacrosse for the university. I then bumbled off to do my articles in a city law firm knowing relatively little about the different branches of law in the UK – solicitors and barristers – or what area I wanted to practice in. I soon realised I didn't like the city very much and wasn't interested in their mainstay of banking and commerce. I used to read the Guardian even in those days, but I had to smuggle it in as everyone else read the Times and the FT. I looked around for new jobs and hey

(continued on page 64)

Phillips (at bow) rowing in a coxed four at Cambridge

In Rio de Janeiro on a trip to speak to David Miranda, Glenn Greenwald's partner, after he had been detained in August 2013 by UK authorities using schedule 7 of the Terrorism Act 2000

(Continued from page 63)

presto one day a job for a civil litigation lawyer at the BBC popped up. I was able to escape and the rest, as they say, is history.

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

I love it that every day is completely unpredictable, will involve a whole array of different subject matters and throws up a new challenge. As an in-houser, my primary concern is getting that day's copy out – to whatever level of risk editors want to take. So you can be reading about tax evasion or blood diamonds or politicians with Russian "links" or some musician you've never heard of who has had a fracas somewhere. Endlessly entertaining. I hate the way the burden of proof in the UK in libel makes it so hard to publish some stories you know to be true.

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

The case that still sent shudders down my spine was the decision to fight a particular libel case while I was at the (London) Times. It was a fair comment case where a football opinion writer had expressed some pretty strong views about a UK football club owner. He sued, the case was heard by a jury and the jury awarded him £250,000 general damages – an enormous sum in those days. I swear my heart stopped when the jury gave their decision. Times editor Robert Thomson said the award was a "disproportionate amount for the use of one mild adjective in a single piece of commentary in the sports pages … The case sets an unwelcome precedent for all columnists, who are supposed to have strong views on their chosen subjects," he said.

(Continued on page 65)

(Continued from page 64)

The football owner was represented by Mishcon de Reya, who said in typically combative style "The decision of the jury … will send a loud and clear message to all newspapers that they cannot hide behind the cloak of fair comment whilst being cavalier with the facts." In the end, we were able to settle the case on appeal for a much lower award, but I learnt a hard lesson that juries did didn't really understand fair comment.

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

I've been very fortunate to have been at the Guardian while they were doing some great investigations. If we are talking court cases, then I guess it would be the recent litigation over the Paradise Papers brought by Appleby against the Guardian and the BBC. If we are talking more generally, then there was the Trafigura super injunction case, and the time the police wanted to use the Official Secrets Act against a Guardian journalist.

And then of course there's been a lot of stuff where court cases didn't directly result but were threatened – Wikileaks, Snowden and the NSA leaks to name but two. On the back of Snowden, I got to do a bit of travelling and saw some parts of the world I wouldn't otherwise have got to (see pictures). Having your editor asked by MPs if he loved his country was quite an extraordinary moment.

What's a surprising object in your office?

I have an owl which I was given by a family friend when I qualified as a solicitor. Unfortunately, they didn't know that I wasn't a barrister, but I'm still very fond of her.

Favorite sources for news – legal or otherwise?

I'm a bit of a media law junkie, so I'm subscribed to far too many sites and can be up half the night reading everything and trying to stay up to speed. Obviously, I am in and out of theguardian.com all the time, but I also use the BBC a lot. For legal stuff where would I be without the MLRC MediaLaw Daily bulletin? I also subscribe to Inforrm blog and get RPC's fortnightly email digest for media lawyers, take ten.

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

Don't get me started on this. Short answer is, it depends what your aim is. Lawyers can serve a useful societal purpose … there are always going to be a lot of wrongs in the world to be righted and weak to be protected but ….

(Continued on page 66)

(Continued from page 65)

Favorite fictional lawyer?

Afraid I'm pretty unambitious here. I like nothing more than to read or watch fiction based around smart heroic downtrodden female lawyers, (especially lesbian ones - although too often they have a tendency to get distracted by a pretty face) fighting the good fight. I loved Glenn Close as Patty Hewes in Damages and I also devoured Suits and the Good Wife / Fight. In the late 1970s, there was a great publishing imprint called The Women's Press which did some excellent crime fiction, and that set me on my way. Having said that, there's not an awful lot of fictional lesbian lawyers around (as opposed to private detectives, police officers and amateur sleuths of all shapes and sizes).

What keeps Phillips up at a night? Very occasionally too much to drink; and sometimes, her cats.

What issue keeps you up at night?

Very occasionally too much to drink. And sometimes my cats (see picture). Otherwise not a lot. I'm a pretty good sleeper. I cycle in and out of work most days, which takes me a good 50 minutes each way and provides me with plenty of head space for sorting through difficult issues.

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

I hate to think. In my childhood I played a lot of playground football and a couple of my schoolmates went on to play women's football for a local club. Unfortunately, I don't think I would ever have made the grade, but watching the women's World Cup at the moment does make me think what a great thing sport is if you have what it takes. Or maybe I could have written a great series based around a fictional lesbian lawyer.