For exclusive use of MLRC members and other parties specifically authorized by MLRC. © 2013 Media Law Resource Center, Inc.

520 Eighth Avenue, North Tower, 20th Floor, New York, New York 10018 (212) 337-0200



Reporting Developments Through May 25, 2013

### MLRC

	Sixth Annual Legal Frontiers in Digital Media Conference Managing a Data Breach, Privacy Class Actions, IP and Business Issues, Perspectives from Venture Capitalists	04	
LIBEL & F	PRIVACY		
3d Cir.	<b>Court Reinstates Right of Publicity Suit Over NCAA Football Video Game</b> Use Was Not Transformative to Defeat Claim Hart v. Electronic Arts	07	
Wash.	<b>Court Reinstates Libel Damage Award Over Communism Allegation</b> Statement Not Opinion or Protected Political Speech Duc Tan vs. Le	09	
N.D. III.	Bomb Bystander's False Light Fizzles		
S.D.N.Y.	<b>Court Grants Summary Judgment in Libel Case Arising Out of Michael Lewis's The Big Short13</b> <i>Opinion, Substantial Truth, Lack of Defamatory Meaning Defeat Claim</i> Chau v. Lewis		
N.Y. Sup.	Court Dismisses Libel and Related Claims Against Vanity Fair		
Ill. Cir.	Summary Judgment for Chicago Tribune in Mistaken Identity Defamation Case		
Tex. App.	<b>Texas Newspaper and Source Win Anti-SLAPP Motion on Appeal19</b> <i>Plaintiffs Failed to Show Prima Facie Case</i> Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.		
Tex.	<b>Not Defamatory Per Se to Question Doctor's Truthfulness</b>		
III. Cir.	Illinois Circuit Court Grants Summary Judgment in "Wrong Picture" Defamation Fair Report Privilege Applied Buchanan v. ChicagoLand Television News	21	

Page 2	May 2013	MLRC MediaLawLetter
Wash.	<b>State Enacts Uniform Correction and Clarification Law</b> <i>Law Expressly Applies to Electronic Publications</i> ESB 5236	
REPORTE	RS PRIVILEGE	
Hawaii	Shield Law Set to Lapse on June 30th Under Sunset Provision Legislature Fails to Agree on Renewal	
ACCESS		
U.S.	Supreme Court Upholds Virginia's Citizen-Requester Only FOIA Provision Not Even Nate Silver Could Have Predicted This McBurney v. Young	
Va.	Virginia Supreme Court Set to Interpret Cameras-In-Courtroom Law Media Seek Broad "Good Cause" Standard Virginia Broadcasting Corp. v. Commonwealth of Virginia	
D.C. Cir.	Affirms Bin Laden Death Photos Exempt From FOIA Disclosure Properly Withheld to Prevent Violence Against America Judicial Watch v. Department of Defense	
INTELLE	CTUAL PROPERTY	
	<b>Copyright, Fair Use &amp; Orphan Works</b> Legal Conundrums in the Use and Misappropriation of Photographs and Visual Ima	
9th Cir.	<b>Court Affirms that Righthaven Lacks Standing to Pursue Copyright Claims</b> Declines to Rule on Fair Use Defense Righthaven LLC v. Hoehn	
S.D.N.Y.	YouTube Wins Summary Judgment Again in Battle with Viacom Video Sharing Platform Protected by DMCA Safe Harbor Provision Viacom Int'l Inc. v. YouTube, Inc.	
INTERNA	TIONAL	
England	<b>The New Defamation Act 2013</b> What Difference Will It Really Make?	41
ETHICS		
	<b>Ethics Corner Special: The Legal Ethics of Social Networking</b>	51

May 2013

# MLRC Institute to Launch Video Contest Call for Partners

The MLRC Institute, the 501(c)(3) sister organization of MLRC, will launch a First Amendment Video Contest this summer that invites high school students to submit short videos discussing the First Amendment and cyberbullying --

- Is cyberbullying the type of speech that should be protected by the First Amendment?
- What are their thoughts or experiences with cyberbullying?
- How has their school or state dealt with the problem?

The Institute is in the process of developing prizes and determining ways to promote the contest. We are looking for organizations to partner with us or to underwrite the Contest.

If any member organization is interested, or to learn more, please contact Dorianne Van Dyke at dvandyke@medialaw.org.

# **UPCOMING EVENTS 2013-14**

MLRC LONDON CONFERENCE September 23-24, 2013 | London, England

# MLRC ANNUAL FORUM

November 13, 2013 | New York, NY

## MLRC ANNUAL DINNER November 13, 2013 | New York, NY

LEGAL ISSUES CONCERNING HISPANIC AND LATIN AMERICA MEDIA May 10, 2014 | Miami, FL

MLRC/NAA/NAB MEDIA LAW CONFERENCE

Setpember 17-19, 2014 | Reston, VA

# www.medialaw.org

**RETURN TO TABLE OF CONTENTS** 

May 2013

# MLRC MediaLawLetter

# Sixth Annual Legal Frontiers in Digital Media Conference

On May 16 & 17, 2013, MLRC, in conjunction with Stanford Law School's Center for Internet & Society, held its sixth annual conference focusing on the legal issues surrounding digital publishing. This year's conference, which was co-chaired by **Tim Alger**, Perkins Coie and **Mark Kahn**, Evernote, was held at a beautiful new facility at Stanford Law School: Paul Brest Hall. The sessions included panels on managing a data breach, privacy class actions, online speech and the search for truth, copyright, IP and business issues in content aggregation, and perspectives from venture capitalists.

The conference was supported by AXIS PRO, Bingham McCutchen LLP, CNA, Covington & Burling LLP, Davis Wright Tremaine LLP, Dentons US LLP, Dow Lohnes PLLC, Jackson Walker L.L.P., Kelley Drye & Warren, Lathrop & Gage LLP, Microsoft Corp., Munger Tolles & Olson LLP, Perkins Coie LLP, Sheppard Mullin Richter & Hampton LLP, Sidley Austin LLP, WilmerHale; with special thanks to Google Inc., the sponsor of Thursday's reception.

The Conference kicked off on Thursday afternoon with "Into the Breach: Managing Data Security Incidents." Winston Krone, Kivu Consulting, gave a presentation titled "The Anatomy of a Breach," which identified the major causes of data breaches and addressed ways to respond to such an incident once it has occurred. A follow-up discussion was led by Matthew Fischer, Sedgwick LLP, and included a panel of additional data breach experts: Jonathan Avila, Wal-Mart Stores, Inc., Bo Holland, AllClear ID and Joanne McNabb, California Attorney General's office, who discussed how companies might prepare in advance to manage a breach and then various options to be taken in response to a hypothetical data breach.

(Continued on page 5)



From left to right, Rosemarie Ring, Munger, Tolles & Olson, Michael Rhodes, Cooley LLP and Blake Lawit, LinkedIn.



From left to right, Tim Alger, Perkins Coie, Kashmir Hill, Forbes, Steve Buttry, Digital First Media, Regina Thomas, AOL Inc. and Mark Little, Storyful.

### **RETURN TO TABLE OF CONTENTS**

May 2013

Page 5

### (Continued from page 4)

Among the points made by the panel was that companies should disclose data breaches whenever there is the potential for harm to customers, and not withhold disclosure based upon whether it is legally required by one state statute but not another. As Mr. Avila stated: the "greatest risk is reputational, not legal ... [and] the reputational harm will be far greater than any fine that will be imposed."

Next up, **Rosemarie Ring**, Munger, Tolles & Olson, moderated a discussion dubbed: "What's Your Exposure? Understanding Key Issues in Privacy Class Actions," which took a look at privacy class action suits from three different perspectives: plaintiff's counsel (**Scott Kamber**, KamberLaw, LLC), defense counsel (**Michael Rhodes**, Cooley LLP) and in-house counsel (**Blake Lawit**, LinkedIn). Rhodes commented on why many of these cases do not survive the pleadings stage: positing that since many of the free services that have been sued for privacy violations are designed for the very purpose of sharing user information, "what's the harm?" Mr. Kamber responded: "Do you [internet companies] really want to be telling your consumers that their data has no value?" According to Kamber, the standard that should apply to these cases is whether something happens to consumer data that is inconsistent with the expectations of the consumer.

The next panel was an exploration of journalism in the age of social media entitled: "Getting it Right: What Obligations Do New Media Have in the Search for Truth?" which was moderated by **Tim Alger**, and included a panel of experts in new media journalism: **Steve Buttry**, Digital First Media, **Kashmir Hill**, Forbes, **Mark Little**, Storyful, and **Regina Thomas**, AOL Inc. Mr. Alger kicked off the session quoting a recent speech by CBS's Scott Pelley: "In a world where everyone is a publisher, no one is an editor." Mr. Little characterized the changes in media over the past ten years as a "revolutionary shift in power in media" where journalists are managers of an overabundance of information, but – in light of universal access to social media – not in control of either the means of production or distribution of news. While news organizations have often been criticized in recent years for being too quick to jump on *(Continued on page 6)* 



From left to right, Jeremy Feigelson, Debevoise & Plimpton LLP, Darin Bassin, CBS Interactive, Benjamin Glatstein, Microsoft and David Kramer, Wilson Sonsini Goodrich & Rosati.



From left to right, Tobin Dommer, Sheppard Mullin, David Blumberg, Blumberg Capital, Andrea Zurek, XG Ventures and David Hornik, August Capital.

May 2013

# MLRC MediaLawLetter

### (Continued from page 5)

stories before a proper vetting has occurred, according to Ms. Hill, the shift in the nature of news reporting has changed such that "news organizations no longer get to say what's a story anymore."

Friday morning's sessions began with the "Digital Copyright Mashup" – a panel covering a wide array of hot copyright issues: the major litigations involving Aereo and Dish "Hopper" services; developments in the DMCA, including *Viacom v. YouTube*; copyright trolls; the first-sale doctrine, the resale of digital music and the *ReDigi* case; and what's next after the failure of SOPA and PIPA to gain traction in Congress. This discussion was moderated by **Jeremy Feigelson**, Debevoise & Plimpton LLP, and included **Darin Bassin**, CBS Interactive, **Benjamin Glatstein**, Microsoft, **David Kramer**, Wilson Sonsini Goodrich & Rosati, and **Laurence Pulgram**, Fenwick & West LLP. An overall theme of the session (and the conference in general) was the challenge of applying pre-digital statutes to the digital world. This is particularly true in the case of the *Aereo* and *Dish Network* litigations, both involving new technologies that stretch existing copyright law as applied to broadcasters, and a subject of much debate among the panelists. According to Mr. Pulgram, however, the ultimate outcome of these cases will come down to whether the courts perceive these new technologies as creating a "loophole or a natural progression" in the law.

The first Friday panel was followed by another session focusing on copyright, which continued on the theme of the tension between innovators and rights holders. This session, "Balancing Innovation and Intellectual Property Protection in New Forms of News Distribution," was led by **Tim Jucovy**, Washington Post. To begin this session, **Harlan Yu**, Robinson + Yu, presented a tutorial on how news aggregator sites work and how content originators can manage their websites in order to either accept or decline

crawling by aggregators. This was followed by a panel discussion which included: **Anthony Falzone**, Pinterest, **Geoff Griffith**, Google, **Stuart Karle**, Reuters, and **David Vigilante**, CNN. In this panel, an interesting discussion arose regarding where the line should be drawn as to what and how much content can be taken from the source material by third-party distribution platforms. While Mr. Vigilante posited that "usurpation" of a content creator's business model is where aggregators cross the line, Mr. Falzone suggested that drawing the line at "substitution" of the originator's business model strikes the better balance between innovators and content creators.



From left to right: Geoff Griffith, Google and David Vigilante, CNN.

The conference wrapped up with a final panel that

has become something of a tradition at the Legal Frontiers conference – a discussion with members of venture capital firms. This year's panel featured **David Blumberg**, Blumberg Capital, **David Hornik**, August Capital and **Andrea Zurek**, XG Ventures. The discussion was moderated by **Tobin Dommer**, Sheppard Mullin. Each first described their firm's investment niche. Ms. Zurek said her money was in mobile; that the smartphone is the direction, especially internationally. Mr. Blumberg also made special note that mobile, especially in developing countries, was a disruptive trend. Mr. Blumberg identified a number of disruptive trends, including not only mobile, but social media, cloud computing, big data, and algorithmic optimization tools and analytics; and each of the panelists described a number of companies they have recently invested in that are taking advantage of these new technologies. Hornik noted that his company has a problem with some media distribution platforms as investment opportunities, which may acquire a lot of attention, and influence the way people consume data, but don't and aren't likely to make money, and "at the end of the day, aren't businesses."

In the wake of rumors that were already circulating on Friday, May 17, Hornik colorfully cited an example of the type of company he was referring to: Tumblr. "If it is acquired for a billion dollars my brain will explode yet again!" (the following Monday, it was reported that Yahoo! had agreed to purchase Tumblr for \$1.1 billion).

### We gratefully acknowledge our conference sponsors:

AXIS PRO; Bingham McCutchen LLP; CNA; Covington & Burling LLP; Davis Wright Tremaine LLP; Dentons US LLP; Dow Lohnes PLLC; Google Inc.(Reception Sponsor); Jackson Walker LLP; Kelley Drye & Warren; Lathrop & Gage LLP; Microsoft Corp.; Munger Tolles & Olson LLP; Perkins Coie LLP; Sheppard Mullin Richter & Hampton LLP; Sidley Austin LLP; WilmerHale

# Third Circuit Reinstates Right of Publicity Suit Over NCAA Football Video Game

### By Nathan Siegel

In a closely-watched case, the Third Circuit adopted the "transformative use" test to balance the competing interests of the right of publicity and the First Amendment. <u>Hart v.</u> <u>Electronic Arts, Inc</u>., 2013 WL 2161317 (3d Cir., May 21, 2013). Applying that test, a divided panel held that Electronic Arts' ("EA") NCAA Football video games were insufficiently transformative to withstand the claims of a class of former college football players whose images and biographical information were the basis for the games' digital avatars.

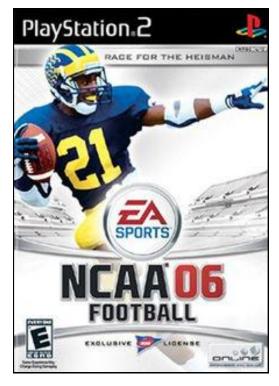
The Court thus reversed the decision below, which applying the same test had granted summary judgment to EA. *Hart* is the first decision to expressly adopt the "transformative use" test outside the state of California, and the Court appeared to signal that the test applies broadly to any form of expressive speech alleged to violate the right of publicity.

### What Test Applies?

Much of the Court's analysis addressed which of several competing tests most appropriately balance First Amendment interests and the right of publicity. The Court first rejected the test employed by the Missouri Supreme Court in *Doe v. TCI* 

*Cablevision*, 110 S.W.3d 363 (Mo. 2003), which asks whether a commercial or expressive use of the plaintiff's identity is more "predominant." The panel found that test to be "subjective at best, arbitrary at worst" – though ironically the dissent would subsequently voice similar criticism of the majority's application of the transformative use test here.

The Court then extensively addressed the "*Rogers* test", which was first articulated by the Second Circuit in *Rogers v*. *Grimaldi*, 875 F.2d 994 (2d Cir. 1989). That test asks



whether the defendant's use of the plaintiff's identity was "wholly unrelated to the [expressive work] or was simply a disguised commercial advertisement for the sale of goods or services." *Id.* at 1004. The panel found the *Rogers* test to be insufficiently protective of publicity rights, suggesting that the defendant will always win as long as a use of a celebrity's identity has some connection to the reason the celebrity became prominent in the first place. This, in the Court's view, would "turn the right of publicity on its head" by essentially immunizing those aspects of a plaintiff's identity that have

the greatest value. 2013 WL 2161317 at \*17.

The Court concluded that Rogers should be confined to trademark cases, and expressly held that the scope of the right of publicity is more expansive than trademark rights. EA and its amici had argued that any balancing test should be more protective of speech in the publicity context than it is in trademark law, because the personal, proprietary interests protected by the right of publicity are less socially important than the consumer protection concerns that support trademark restrictions. The Third Circuit reached the opposite conclusion, and its analysis is notably sympathetic to the interests protected by publicity rights. For example, it explicitly rejected the views of some other courts, such as the Tenth Circuit

in *Cardtoons, L.C. v. MLBPA*, 95 F.3d 959 (10th Cir. 1996), which questioned whether publicity rights meaningfully contribute to celebrity fame and achievement.

Having disposed of the alternatives, the panel then concluded that the "transformative use" test first adopted by the California Supreme Court in <u>Comedy III Productions, Inc.</u> <u>v. Gary Saderup, Inc., 25 Cal. 4th 387 (2001)</u>, borrowed from the fair use doctrine in copyright law, best balances the (Continued on page 8)

May 2013

## MLRC MediaLawLetter

### (Continued from page 7)

competing interests. The panel then parted company, however, both with respect to the definition of the test and its application to these video games.

### Applying the Transformative Use Test

The majority held that the test focuses solely on how a plaintiff's specific identity appears in the work, i.e. whether it is actually altered or otherwise transformed. Other aspects of a work, including even other "highly creative elements [present] in great abundance," the majority deemed irrelevant to the inquiry. *See* 2013 WL 2161317 at \*24. The Court further rejected the relevance of the interactive elements of these video games, which permit players to alter the default settings of any avatar. The Court expressed the concern that any video game could become transformative simply by introducing some interactivity as a cover for exploiting celebrity likenesses. Having eliminated the relevance of anything other than the default settings of the avatars themselves, the Court then concluded that the games did not meaningfully transform the players' identities.

At the same time, in a part of the opinion that is sure to be scrutinized in future cases, the majority maintained that its construction of the transformative test "effectively restricts the right of publicity claims to a very narrow universe of expressive works." It further acknowledged that <u>Brown v.</u> <u>Entertainment Merchants Association, 131 S. Ct. 2729 (2010)</u> requires that video games be treated the same as other forms of speech for First Amendment purposes. Nonetheless, the majority maintained that its construction of the test protects video games to the same extent as biographies, documentaries, and other works that realistically portray individuals.

### **Dissenting Opinion**

By contrast, Judge Thomas Ambro argued in dissent that the majority misconstrued the relevant California precedent, which he read to require that all aspects of a creative work be considered in determining whether its use of the plaintiff's identity is transformative, not simply that identity in isolation. Judge Ambro found the majority's construction of the test difficult to square with providing First Amendment protection for works such as biographies, and suggested that the panel was effectively fashioning a "medium-specific metric that provides less protection to video games than other expressive works," in contravention of *Brown*. 2013 WL 2161317 at \*27. Once all creative aspects of EA's games are taken into account, including their interactive features, the dissent found the games to be "imaginative transformations of the games played by real players," analogous to movies and books. *Id*. at 28.

### Analysis

*Hart* starkly illustrates how a test initially developed by a single state Supreme Court to address the production of T-shirts displaying celebrity images has been seemingly "transformed" into an all-purpose First Amendment test for any media subjected to a right of publicity claim. Indeed, a casual lawyer reading *Hart* might well lose sight of the fact that the case was before the Third Circuit, and assume it was before a California Court of Appeals panel trying to make sense of binding, but idiosyncratic state court precedent. And far from bringing any clarity to this already confusing area of the law, the fact that the four judges in this case (including the district court) have all purported to apply the transformative use test, but split 2-2 on its result here, illustrates how the test can be just as "subjective at best, arbitrary at worst" as other tests the panel eschewed.

Indeed, the transformative use test is sufficiently malleable such that its application often seems to amount to little more than a means of engaging in ad hoc balancing of a court's view of the equities of each case -- which may well be the point. It is unlikely, however, that the panel's decision in *Hart* will be the last word on this important issue. EA is expected to seek re-hearing *en banc*, and essentially the same case, brought by another class of former college athletes challenging the same games, has been argued twice and has been awaiting a decision from the Ninth Circuit for more than two years. *See Keller v. Electronic Arts, Inc.*, No. 10-15387 (9<sup>th</sup> Cir.) Interestingly, Judge Wallace Tashima of the Ninth Circuit sat by designation and cast the deciding vote in *Hart*, but is not on the panel that heard *Keller*. Stay tuned.

Nathan Siegel is a partner at Levine Sullivan Koch & Schulz LLP in Washington, D.C. and represented a media amicus coalition in support of EA. Plaintiff was represented by Michael Rubin, Altshuler, Berzon, Nussbaum & Rubin, San Francisco, CA. EA was represented by Elizabeth McNamara, Davis Wright Tremine, LLP, NY. A full list of amici and counsel is available in the linked opinion. May 2013

# Washington Supreme Court Reinstates Libel Damage Award Over Communism Allegation

Statement Held Not Opinion or Protected Political Speech

### By Judith Endejan

The long tail of the Vietnam War produced an interesting decision from the Washington Supreme Court that reinstated a jury verdict for plaintiffs accused of being undercover Viet Cong agents. On May 9, 2013, the Washington Supreme Court issued <u>Duc Tan vs. Le</u>, 300 P.3d 356, which held that defendants' statements accusing the plaintiffs of communist/ Viet Cong connections were not protected opinion, and that clear cogent and convincing evidence supported a jury's finding of actual malice justifying an award of \$310,000.

### Background

All the parties in the case are part of a Vietnamese community that settled in the Olympia, Washington area after

the Vietnam War. The plaintiffs were Duc Tan and the Vietnamese Community of Thurston County (VCTC). Tan was a teacher in Vietnam drafted into the South Vietnamese Army during the Vietnam War. He was captured by the Vietnamese Communist Army and spent six months in a "Communist Re-education Camp". Tan and his family fled, and ultimately settled near Olympia in 1979. The VCTC was

started in the 1970's and became a non-profit corporation in 1997 to provide cultural support for Vietnamese communities in Thurston County (which contains Olympia).

All of the defendants were born in Vietnam and had experienced significant hardship after Saigon fell to Communist rule in 1975, including substantial imprisonment.

These defendants were members of the Committee Against the Viet Cong Flag formed to seek removal of that flag from the South Puget Sound Community College. The Communist Flag elicits painful emotions throughout the Vietnamese community. In 2003, the defendants disseminated two public notices by email and on the internet that accused Tan and members of the VCTC of multiple activities on behalf of "evil communists." Defendant Le wrote three additional newsletter articles that accused Tan and VCTC of assisting the Viet Cong and serving as undercover agents for the Viet Cong.

In 2004, the plaintiffs sued for defamation. The trial court ruled that Tan and the VCTC were public figures, which was not challenged on appeal. After an eleven-day trial, the jury found by special verdict that each of the defendants had defamed Tan and the VCTC, awarding Tan \$225,000.00 and VCTC \$85,000.00. The Court of Appeals reversed finding that defendants' statements, such as calling someone a communist, are protected by the First Amendment.

**Supreme Court Decision** 

The Washington Supreme Court disagreed. It found that the Defendants' statements were not protected opinion because the opinion that Tan and the VCTC supported the Viet Cong government was based on false and defamatory facts. The court said that the

defendants made a series of false statements to support their assertion that plaintiffs supported communism and the Viet Cong government.

These were not statements of opinion, the court found, even though an accusation of being a communist is imprecise or loose language. The court said it is "quite another case to accuse someone of being an agent of the Viet Cong communist government." The court concluded "there is no First Amendment of protection for the type of false, damaging statements uttered here. Indeed, the purpose of the law of defamation is to punish such statements."

(Continued on page 10)

These were not statements of opinion, the court found, even though an accusation of being a communist is imprecise or loose language.

May 2013

## MLRC MediaLawLetter

### (Continued from page 9)

The court rejected arguments that because defendants' true factual statements created the "sting" of the damaging publication that the additional false statements did not cause any separate additional harm. The court rejected this, stating that the case did not involve a mixture of true and false statements because the defendants produced no true statements establishing that Tan and VCTC are communists or communist sympathizers. Thus the "sting" analysis does not apply.

The court then reinstated the jury verdict, finding actual malice after giving substantial deference to the jury's determinations of credibility. This determination plus "an independent review of the record" led the court to conclude there was clear and convincing evidence to support inference of actual malice.

This evidence included, among other things, the fact that no attempts were made to contact Tan before publishing the defamatory statements, that the defendants had to have been aware of the true facts they used to make their accusations because they have been present at the events that gave rise to the accusations; that the defendants have a history of acrimony with Tan and that the defendants failed to investigate any of the facts before publication. Chief Justice Madsen wrote

the opinion and was joined by five other Justices.

### **Dissenting Opinion**

Justice Johnson wrote a stinging dissent, emphasizing that the majority failed to take into account the defendants' experiences with communism that had to impact the actual malice analysis. Justice Johnson noted that the defamatory statements that describe certain events was "colored by their cultural and political experience." Justice Johnson said it was improper for the court – and culturally insensitive – to disregard a speaker's history and experiences in the actual malice analysis. Justice Johnson thought that the defendants' allegations that Tan and the VCTC are communists or

Justice Johnson wrote a stinging dissent, emphasizing that the majority failed to take into account the defendants' experiences with communism that had to impact the actual malice analysis.

communist sympathizers are non-actionable statements of conjecture or opinion, that the Vietnamese community could weigh within the context of a political debate.

The majority rejected Justice Johnson's approach because "as an Appellate Court, we must apply the proper, legal standards of review and not decide issues based on the personal experiences and histories of the parties, except as legally relevant to the issues before us."

This case was clearly highly charged. The majority seemed offended by defendants' trumped up charges such as those claiming that Duc Tan and his "gang" "worshipped the communists," "poison our children's minds," have "continuously and systematically betrayed the Vietnamese community by working on behalf of the Viet Cong government."

> Justice Johnson, on the other hand, found that those statements, placed in a context of the defendants' background demonstrated precisely why they should be protected by the First Amendment. He said, "The majority's holding is a miscarriage of justice for Mr. Le and all those who have risked everything to enjoy the protections of the United States Constitution, its First Amendment and Article 1, Section 5 of the Washington State Constitution."

This decision is remarkable because it

comes from a state that has no punitive damages, a strong anti -SLAPP statute and a recent favorable retraction statute that would suggest that plaintiffs' defamation verdicts in Washington are as common as the purple unicorn.

Judith Endejan is a partner at Graham & Dunn LLP in Seattle, WA. Plaintiff was represented by Gregory M Rhodes, Younglove & Coker, PLLC, Olympia, WA; and Kenneth Masters and Shelby R. Frost, Masters Law Group PLLC, Bainbridge Island, WA. Defendants were represented by Michael Barr King, Carney Badley Spellman PS, Seattle, WA; Nigel Stephen Malden, Nigel Malden Law, Tacoma, WA; Rebecca Marie Larson, Davies Pearson PC, Tacoma, WA; and Howard Mark Goodfriend, Smith Goodfriend PS, Seattle, WA.

# **Bomb Bystander's False Light Fizzles** *TV Reenactment Was Accurate and Not Defamatory*

### By Steve Mandell, Steve Baron, and Natalie Harris

Discovery Communications, LLC's Investigation Discovery Network ("Discovery") broadcasts the "Wicked Attraction" docudrama series featuring the true stories of seemingly ordinary people who, as a result of some *wicked attraction*, join together to commit heinous crimes. The "Lust for Life" episode recounts the wicked attraction between Lisa Toney, the estranged wife

of Chicago janitor Marcus Toney, and her con artist lover, Sienky Lallemand.

### Background

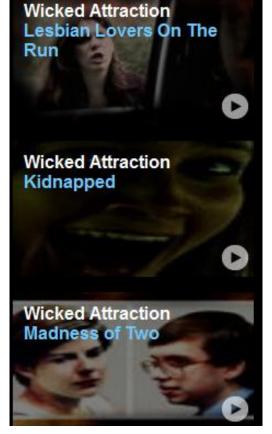
Their story involves sex, blackmail, greed, fraud, and murder. Before meeting Lisa Toney, Lallemand served time in federal prison for blackmail after luring another man into a sexual tryst, secretly videotaping the encounter, and attempting to extort money from the man in exchange for keeping the tape a secret.

He continued his scheming with Lisa Toney. Using his good looks and charm, he lured Lisa Toney into disclosing her husband's personal information which Lallemand used to steal Marcus Toney's identity and make over \$200,000 in fraudulent purchases including expensive trinkets, hotel stays and a luxury car.

Shortly after Marcus Toney

discovered that someone had stolen his identity, he received a suspicious Valentine's Day package. In the days that followed, he received numerous taunting voicemails from the undisclosed sender, Sienky Lallemand, urging him to open the package.

Distraught over the credit fraud and threatening messages, Marcus Toney reached out to his friend Alphonso Butler.



The men were talking at Toney's home after an evening out when Butler asked Toney about the unopened package on the cocktail table in the living room. Toney speculated that the package probably contained a VCR with a sex tape sent by his wife and her new lover. The "Lust for Life" portrayal of the seconds that followed formed the basis of Butler's lawsuit against Discovery.

> As the reenactment scene unfolds, the actor portraying Alphonso Butler says to Marcus Toney, "[1]et's open it, I'm going to open it," referring to the mysterious package. Then, the actor portraying Toney rushes in front of Butler, and opens the package himself, triggering the explosion of a hidden pipe bomb. Butler staggers out of the burning home, but his friend Marcus Toney is dead.

> The "Lust for Life" episode aired in the summer of 2012. Shortly thereafter, Alphonso Butler filed suit against Discovery in the United States District Court for the Northern District of Illinois claiming violation of the Illinois Right Of Publicity Act (IRPA), defamation, reckless and negligent infliction of emotional distress. Specifically, Butler claimed he never gave permission to use his identity in connection with the episode and that the reenacted scene "portrayed [Butler] as having encouraged Mr. Toney to open

the package . . . [which] placed [Butler] in the light of having been the direct impetus behind his best friend's death."

Discovery moved to dismiss Butler's complaint arguing, among other things, that the reenactment scene did not use Butler's identity for a commercial purpose and was not defamatory as a matter of law. In lieu of responding to the *(Continued on page 12)* 

May 2013

# MLRC MediaLawLetter

### (Continued from page 11)

motion, Butler amended his complaint, dropping the IRPA and reckless infliction of emotional distress claims and adding a claim for false light invasion of privacy. The amended complaint alleged that the reenactment placed Butler in "in the light of having been the direct impetus to his best friend's death, in that the scene depicted [Butler] as having persuaded the decedent to open the package containing the pipe bomb when [Toney] did not want to open it."

Discovery moved to dismiss Butler's amended complaint attaching both a video of the episode and a transcript of Butler's witness testimony from Lisa Toney and Sienky Lallemand's criminal trial. Discovery argued that the episode was a substantially true portrayal of events Butler recounted in his sworn testimony.

### **Motion to Dismiss Granted**

On May 9, 2013, the court granted Discovery's motion to dismiss. Butler v. Discovery Communications LLC, No. 12 cv 6719 (N.D. Ill. 2013) (Coleman, J.). The memorandum opinion held that the episode's portrayal of Butler saying to Toney "something akin to 'go ahead and open it or I will" is not substantially different from Butler's testimony that "Toney [said] to Butler 'Go ahead, tear it open,' when both Butler's testimony from the criminal trial and the reenactment scene show Butler starting to open the package and Toney stepping in to finish opening it." The court also found that the absence of any suggestion in the episode that Butler knew the package contained a bomb precludes Butler's characterization of the scene as falsely suggesting that he caused Toney's death. Finally, the court concluded that Discovery owed Butler no duty to investigate the underlying facts by contacting Butler because Discovery had no reason to doubt the accuracy of the reenactments scene.

Lisa Toney and Sienky Lallemand will live out their days in federal prison for their crimes, including their plot to murder Marcus Toney. Alphonso Butler's claims based on Discovery's portrayal of his brief brush with their deadly scheme are also doomed.

Steve Mandell, Steve Baron and Natalie Harris of Mandell Menkes LLC represented Discovery Communications, LLC. Manotti L. Jenkins of Law Offices Of Manotti L. Jenkins represented Alphonso Butler.



©2013 MEDIA LAW RESOURCE CENTER, INC. 520 Eighth Ave., North Tower, 20 Fl., New York, NY 10018

### **BOARD OF DIRECTORS**

Susan E. Weiner, Chair David S. Bralow Marc Lawrence-Apfelbaum Karole Morgan-Prager Lynn B. Oberlander Kenneth A. Richieri Mary Snapp Kurt Wimmer Robert P. Latham (DCS President)

### **STAFF**

**Executive Director** Sandra Baron Staff Attorneys Maherin Gangat David Heller Michael Norwick **Production Manager** Jacob Wunsch **MLRC Administrator** Debra Danis Seiden MLRC Fellow Lindsey Davis **MLRC Institute Fellow** Dorianne Van Dyke Interns Scott Lipschitz Yenu Wodajo

# **Court Grants Summary Judgment in Libel Case Arising Out of Michael Lewis's** *The Big Short*

### By Paul J. Safier

On March 29, 2013, Judge George B. Daniels of the Southern District of New York granted summary judgment to all defendants in the libel suit arising out of Michael Lewis's best-selling book on the origins of the 2008 financial crisis, *The Big Short: Inside The Doomsday Machine. <u>Chau v.</u> <u>Lewis</u>, 2013 WL 1296374 (S.D.N.Y. Mar. 29, 2013).* 

The plaintiff, Wing Chau, a collateral debt obligation (CDO) manager who specialized in mortgage-backed securities, and Harding Advisory LCC, Chau's assetmanagement firm, brought suit against Lewis, the book's

publisher (W.W. Norton & Co.), and Steven Eisman, a hedge-fund manager who was one of the sources for Lewis's book. Chau and Harding contended that they were defamed by a single chapter of *The Big Short* that provided critical commentary on Chau's business practices in connection with the book's sharply negative assessment of the subprime mortgage-backed securities industry and its role in facilitating the financial crisis.

In granting summary judgment, the court held that the each of the discrete portions of the book challenged by Chau and Harding was either protected opinion, substantially true, not "of and concerning" either plaintiff, or not reasonably capable of defamatory meaning. The Court's ultimate assessment was that, in light of the

widely-held view that "investments in subprime mortgage bonds, and their subsequent disastrous default, [were] significantly responsible for the greatest economic crisis since the Great Depression," it was Chau's status as "one of the largest CDO managers of sub-prime mortgage-backed securities," not anything actionable in the book, that made him a "target[] of public criticism." *Id.* at \*14. Accordingly, the Court concluded that "Chau's attempt to shift blame for the negative image now publically ascribed to that activity,

<text><image><section-header><text>

and those who engaged in it, to the author and his source in the form of a libel suit, is unsupported by law or fact." *Id.* 

### Background

The Big Short was published in 2010 and endeavors to provide a unique perspective on the 2008 financial crisis. The conceit of the book is to explore the origins and nature of the financial crisis by chronicling the experiences and thinking of some of the small handful of financial professionals who saw the crash coming and made money

> betting against – or "shorting" – the mortgage-backed financial instruments that, according to book, were substantially responsible for the crisis.

> One of the financial professionals Lewis focuses on is Eisman, a New York hedge-fund manager, who was later named a defendant in the lawsuit. Eisman is described in the book as an eccentric and outspoken critic of Wall Street conventional wisdom, someone with "a talent for offending people," who carries around "a picture of the financial world in his head that [i]s radically different from, and less flattering than, the financial world's self-portrait." The book traces the evolution of Eisman's thinking about the sub-prime mortgage market from 1991, when he first started studying that market, to the period between 2006 and 2008, when Eisman

acquired a substantial short position on sub-prime mortgage bonds (bonds made up of pools of subprime mortgage loans) and subprime mortgage CDOs (securities made up of pools of subprime mortgage bonds).

The chapter of the book at issue in the lawsuit – Chapter Six, *Spider-Man at the Venetian* – revolves in large part around a conversation that took place during the 2007 American Securitization Forum in Las Vegas between Eisman and Chau. In the book, that conversation is presented (*Continued on page 14*)

May 2013

# MLRC MediaLawLetter

#### (Continued from page 13)

as a pivotal moment in the evolution of Eisman's thinking about subprime mortgage-backed securities. Up to that point, Eisman had been concerned that those on the other side of his bet - i.e., those investing in subprime mortgage bonds and CDOs – knew something about the quality of the underlying mortgages in those securities that he did not. His conversation with Chau is presented as the event that ultimately disabused him of that notion and caused him to fully commit to his short position. Accordingly, the section of the chapter in which Chau makes an appearance moves between summarizing Eisman's recollection of their conversation and summarizing Eisman's and/or Lewis's theories about the subprime CDO market and the special importance of CDO managers like Chau in that market.

For instance, the chapter includes the following passages:

Later, whenever Eisman set out to explain to others the origins of the financial crisis, he'd start with his dinner with Wing Chau. Only now did he fully appreciate the central importance of the socalled mezzanine CDO-the CDO composed mainly of triple-B-rated subprime mortgage bonds—and its synthetic counterpart: the CDO composed entirely of credit default swaps on a triple-B-rated subprime mortgage bonds. "You have to

understand this," he'd say. "This was the engine of doom." He'd draw a picture of several towers of debt. The first tower was the original subprime loans that had been piled together. At the top of this tower was the triple-A tranche, just below it the double-A tranche, and so on down to the riskiest, triple-B tranche—the bonds Eisman had bet against. The Wall Street firms had taken these triple-B tranches—the worst of the worst—to build yet another tower of bonds: a CDO. A collateralized debt obligation. The reason they'd done this is that the rating agencies, presented with the pile of bonds

The court held that the each of the discrete portions of the book challenged by Chau and Harding was either protected opinion, substantially true, not "of and concerning" either plaintiff, or not reasonably capable of defamatory meaning.

backed by dubious loans, would pronounce 80 percent of the bonds in it triple-A. These bonds could then be sold to investors pension funds, insurance companies—which were allowed to invest only in highly rated securities. It came as news to Eisman that this ship of doom was piloted by Wing Chau and people like him.

As it happened, FrontPoint Partners had spent a lot of time digging around in those loans, and knew that the default rates were already sufficient to wipe out Wing Chau's entire portfolio. "God," Eisman said to him. "You must be having a hard time." "No," Wing Chau said. "I've sold everything out."

> The whole point of the CDO was to launder a lot of subprime mortgage market risk that the firms had been unable to place straightforwardly. The last thing you wanted was a CDO manager who asked lots of tough questions.

> But the CDO manager was also paid a fee of 0.01 percent off the top, before any of his investors saw a dime, and another, similar fee, off the bottom, as his investor received their money back. That doesn't sound like much, but,

when you're running tens of billions of dollars with little effort and no overhead, it adds up. Just a few years earlier, Wing Chau was making \$140,000 a year managing a portfolio for the New York Life Insurance Company. In one year as a CDO manager, he'd taken home \$26 million, the haul from half a dozen lifetimes of working at New York Life. ...

Between shots of sake he told Eisman that he would rather have \$50 billion in crappy

(Continued on page 15)

### May 2013

Page 15

### (Continued from page 14)

CDOs than none at all, as he was paid mostly on volume.

[T]hey watched Eisman grab Greg Lippmann, point to Wing Chau, and say, "Whatever that guy is buying, I want to short it." Lippmann took it as a joke, but Eisman was completely serious: He wanted to place a bet specifically against Wing Chau. "Greg," Eisman said, "I want to short his paper. Sight unseen." Thus far Eisman had bought only credit default swaps on subprime mortgage bonds; from now on he'd buy specifically credit default swaps on Wing Chau's CDOs.

In February 2011, a little less than a year after the book was published, Chau and Harding brought their defamation lawsuit. In the lawsuit, they challenged twenty-six distinct statements from Chapter Six of *The Big Short*. All of the defendants moved for summary judgment after the conclusion of discovery.

### **Opinion Defense**

The heart of the District Court's summary judgment ruling was its conclusion that "[m]ost of the twenty-six

statements contained in Chapter Six of The Big Short constitute non-actionable expressions of opinion." *Chau*, 2013 WL 1296374, at \*6. In reaching this conclusion, the Court noted that "[t]he New York Court of Appeals has consistently found that the New York Constitution affords greater protection for statements of opinion than its federal counterpoint." *Id.* In particular, the Court observed that New York law requires a court, in determining whether a particular statement constitutes protected opinion, to consider "the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might signal to readers of listeners that what is being read or heard is likely to be opinion, not fact." *Id.* (quoting *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292 (1986)). Toward that end, the Court noted that it "is relevant to the Court's analysis" that "Lewis's publication was a book, as opposed to a newspaper or magazine." *Id.* at \*8. That is because "[i]n a long book[,] which need not report on current factual events, an author has the freedom to develop a thesis, conduct research in support of the thesis, and publish an entirely one-sided view of people and events." *Id.* (quoting *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501, 1509 (D. Minn. 1988)). Accordingly, "[a] reader of such a book not only expects to find opinion but probably is in active search of opinion; a discussion of history without synthesis and analysis has little intellectual content." *Id.* 

With that context in mind, the Court concluded that nineteen of the twenty-six challenged statements were protected opinion. In particular, the Court held that statements such as that Chau "didn't spend a lot of time worrying about what was in the CDOs," or that he didn't

> "give a [f—] about the investors," or that "Harding was Merrill Lynch's 'go-to-buyer' of its "awesome CDO machine, notorious not only for its rate of production . . . but also for its industrial waste," would be "understood by an average reader as [nothing] more than the speaker's own personal opinions." *Id.* at \*9. Similarly, the Court held that the book's claim that the kind of CDOs managed by Chau were "engine of doom" of the financial crisis and that "this ship of doom was piloted by Wing Chau and people like him" were clearly "Eisman and Lewis's own thesis of the

origins of the financial crisis," and thus protected as opinion. *Id.* The Court further explained that statements in the book about CDO managers generally, such as that "[t]he less mentally alert the two guys, and the fewer questions they asked about the triple-B rated subprime bonds they were absorbing into their CDOs, the more likely they were to be patronized by the big Wall Street firms," were couched in language that made clear to the reader that the statements were merely "opinionated criticism." *Id.* at \*10.

### **Substantial Truth**

The Court also held that "[a]n examination of the full context of . . . The Big Short shows that many of the (Continued on page 16)

Court's summary judgment ruling was its conclusion that "[m]ost of the twenty-six statements contained in Chapter Six of The Big Short constitute nonactionable expressions of opinion."

The heart of the District

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © 2013 Media Law Resource Center, Inc.

## Page 16

May 2013

# MLRC MediaLawLetter

### (Continued from page 15)

allegedly defamatory statements about plaintiffs are completely or substantially true . . . ." Id. at \*11. In particular, the Court held that statements such as that Chau's goal "was to maximize the dollars in his care" or that he "was paid mostly on volume" were completely true. Id. In addition, the Court held that the "gist or substance" of a number of additional statements was true. Id. For instance, the Court concluded that the statement that "[Chau] controlled roughly \$15 billion, invested in nothing but CDOs backed by the triple-B tranche of a mortgage bond" was substantially true because it was undisputed that "[p]laintiffs had a substantial amount of money-billions of dollarsinvested in CDOs backed by the triple-B tranche of a mortgage bond," which made the gist of the statement true. Id. Similarly, the Court held that the statement that "almost giddily, Chau explained to Eisman that he simply passed all

the risk that the underlying home loans would default on to the big investors" was substantially true because, "whether or not Chau" actually said that, "the statement itself communicates the undisputed statement that Chau had little personal exposure to the CDOs he managed." *Id.* In all, the Court concluded that eight of the challenged statements were either completely or substantially true.

### The Group Libel Doctrine

The Court also held that a number of the challenged statements were not "of and concerning" either Chau or Harding, and thus were non-actionable on that basis. Noting that "a plaintiff cannot sustain a libel claim if the allegedly defamatory statement 'referenced plaintiff solely as a member of the group," id. at \*12 (quoting Church of Scientology Int'l v. Time Warner, Inc., 806 F. Supp. 1157, 1160 (S.D.N.Y. 1992), the Court concluded that neither plaintiff could challenge those statements that consisted simply of negative commentary about CDO managers in general. In reaching this conclusion, the Court rejected the plaintiffs' argument that, because the challenged portions of the book repeatedly shift focus between Chau and Harding (on the one hand) and observations about CDO managers in general (on the other), even those statements cast in purely general terms would be understood as referring specifically to the plaintiffs. In rejecting that position, the Court explained that "[p]laintiffs cannot . . . merely allege that every unflattering comment made about CDO managers in *The Big Short* is a personal libellous accusation concerning Chau simply because Chau is a CDO manager who appears as a central representative character in Chapter 6." *Id.* at \*12. Accordingly, the Court held that seven of the challenged statements were not "of and concerning" the plaintiffs.

### Not Defamatory

Finally, the Court held that nine of the challenged statements were not reasonably capable of defamatory meaning. For instance, the Court concluded that the statement that Chau told Eisman he "sold" his equity in his CDOs "out" was not defamatory because "businesses may have various reasons for choosing not to maintain equity in

their investors' investments." *Id.* at \*13. Similarly, the Court concluded that the statement that "Chau's goal 'was to maximize the dollars in his care" was "not reasonably susceptible to any defamatory meaning" because "[n]o reasonable reader would interpret this . . . to mean anything more than that Chau strove to make as much money for himself and his investors as possible." *Id.* at \*14. Finally, the Court concluded that the statement that, after his conversation with Chau, Eisman "wished to short Chau's investments d[id] not

defame Chau." Id.

### Conclusion

The District Court concluded that none of the statements from *The Big Short* challenged by plaintiffs was actionable, and, accordingly, granted summary judgment to all defendants.

David A. Schulz, Michael D. Sullivan, Celeste Phillips and Paul J. Safier of Levine Sullivan Koch & Schulz, LLP represented the defendant Steven Eisman. Celia Goldwag BarenHolz and Gabriel Virgil Rauterberg of Cooley Godward Kronish LLP represented defendants Michael Lewis and W.W. Norton & Company. Steven Molo and Robert Kry of Molo Lamken, LLP represented plaintiffs Wing Chau and Harding Advsiory LLC.

The Court also held that "[a]n examination of the full context of . . . The Big Short shows that many of the allegedly defamatory statements about plaintiffs are completely or substantially true . . . . "

May 2013

# New York Court Dismisses Libel and Related Claims Against *Vanity Fair*

A New York trial court held in March that the widow of famous fashion designer Oleg Cassini could not recover damages for libel and emotional distress against *Vanity Fair* over an article that profiled her husband and discussed their relationship. <u>Cassini v. Advance Publications, Inc.</u>, No. 108971/2011, 2013 WL 1774044 (N.Y.Sup. March 14, 2013).

### Background

Marianne Nestor Cassini, widow of famed fashion designed Oleg Cassini, sued *Vanity Fair* magazine over an article published in September 2010. The article focused on Oleg Cassini's colorful life and romantic relationships, including his engagement to Grace Kelly, his marriage to actress Gene Tierney, and his relationship with plaintiff. The article also revealed a bitter legal dispute over Cassini's estate between plaintiff and her step daughter Tina Cassini.

According to the article, plaintiff declined several requests from *Vanity Fair* to be interviewed for the story. However, following publication, Cassini sued to recover damages for libel and infliction of emotional distress.

Among other things, plaintiff complained about statements in the article that she "laughed" at her step daughter; that she "was a nobody" who was around to "sharpen pencils" for Oleg Cassini and his mistresses; and that she threw parties for older men "looking for action."

### **Motion to Dismiss**

The trial court granted the publisher's motion to dismiss, holding that plaintiff failed to state a claim for either libel or emotional distress.

Plaintiff claimed *Vanity Fair*'s report was "malicious and false." The court, however, ruled that plaintiff failed to plead facts showing falsity or fault. The court also rejected plaintiff's claim that *Vanity Fair* suggested she was a prostitute when it wrote that she and her sisters threw parties for wealthy, older men "looking for action." It said, in the context of the entire article, the mention did not suggest

inappropriate behavior. Moreover, statements in the article that plaintiff tolerated her husband's mistresses was not an allegation that plaintiff was unchaste.

The court also held that *Vanity Fair*'s article involved a matter of public concern because it showed "the difficulties in distributing a well known designer's estate, complicated by a little known marriage, his numerous romantic relationships, and internal conflict." Because the subject of the article detailing the Cassinis' relationship was of legitimate public concern, plaintiff was required to plead gross irresponsibility by *Vanity Fair*. Plaintiff, however, did not allege that *Vanity Fair* inaccurately reported statements attributed to Tina Cassini regarding plaintiff, or that *Vanity Fair* knew the statements were false or otherwise acted with gross irresponsibility in publishing the article. Instead, the court noted that the author sought to interview plaintiff, but she declined.

As to the claim for infliction of emotional distress, the court held that plaintiff failed to meet each of the elements necessary to establish the tort. To successfully claim infliction of emotional distress, plaintiff needed to allege that *Vanity Fair*'s conduct was "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." The magazine article, however, was not extreme and outrageous as a matter of law. Furthermore, the court held the emotional distress claims was simply a duplication of the failed libel claim.

Finally, although the court dismissed on the merits, it noted that even if plaintiff's complaint survived a motion to dismiss, her claim was untimely since her lawyer miscalculated the timeframe to serve the complaint. The plaintiff also filed a complaint in London against Vanity Fair over the same article but failed to serve it within the allotted time under UK law.

Defendants were represented by Elizabeth A. McNamara of Davis Wright Tremaine LLP in New York. Plaintiff was represented by Christopher Kelly of Reppert Kelly, LLC in New York.

May 2013

# Summary Judgment for Chicago Tribune in Mistaken Identity Defamation Case

# Lack of Evidence of Actual Malice

### By James A. Klenk and Gregory R. Naron

The Circuit Court of Cook County granted summary judgment dismissing a defamation claim against the Chicago Tribune and two of its reporters on actual malice grounds. The case, *Rivera v. Gibson, et al.*, No. 2011 L 008228 (Cir. Ct. Cook Cty.) involved a reporter's misreading of the criminal courts' electronic docket records.

The court accepted Tribune's arguments that the mistake was at most merely negligent, and under precedent such as *Time, Inc. v. Pape*, 401 U.S. 279 (1971), such error is "not enough to create a jury issue of 'malice' under *New York Times*," which creates "a constitutional zone of protection for errors of fact caused by negligence." *Id.* at 290-91.

### Background

The plaintiff in *Rivera*, Roberto Rivera, was a Cook County government official, indicted for alleged corruption in the exercise of his official duties as the director of a County jobs program. In reporting on the scandal-plagued program, defendants mistakenly stated that plaintiff had pled guilty to the charges and was serving a prison term, when in fact it was a different Roberto Rivera that had done so. When the error was called to defendants' attention by plaintiff's lawyer, the reporter discovered that there was more than one Roberto Rivera who had been indicted in Cook County, and he had looked at the wrong docket sheet. Tribune promptly corrected the report in print and online.

### **Summary Judgment Motion**

On summary judgment, defendants pointed out that neither "sloppy" journalism nor a "failure to investigate" is sufficient to prove actual malice as a matter of law. *E.g., Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); *Costello v. Capital Cities Commc'ns, Inc.*, 125 Ill. 2d 402, 421 (1988).

In particular, from the U.S. Supreme Court on down, the courts have found that a factual error borne of misreading official documents or other source material cannot constitute actual malice. *E.g., Time v. Pape*; *Wanless v. Rothballer*, 115 Ill. 2d 158, 173 (1987) (reporter's "errors of interpretation" not "indicative of a reckless disregard for the truth of her allegations").

Cook County Circuit Judge Diane J. Larsen agreed with defendants that the reporter's misinterpretation of the criminal docket was still an honest belief as to the truth of the statements reported, and "no evidence of actual malice" in the record. Judge Larsen noted that the case was "very similar" to an Ohio case cited in defendants' submissions, *Young v. The Morning Journal*, 129 Ohio App. 3d 99, 717 N.E.2d 356 (1998), in which the reporter also misread a docket sheet as referring to "the wrong James Young."

Plaintiff appealed the court's summary judgment order, but the Illinois Appellate Court recently dismissed the appeal for want of prosecution.

James A. Klenk, Natalie J. Spears, Gregory R. Naron, and Kristen C. Rodriguez, of Dentons in Chicago, represented The Chicago Tribune and its reporters. Plaintiff was represented by Armand L. Andry, Esq. and Raymond A. Figueroa, Esq., both of Chicago.

### **RETURN TO TABLE OF CONTENTS**

May 2013

# Texas Newspaper and Source Win Anti-SLAPP Motion on Appeal

The Texas Court of Appeals this month applied the Texas anti-SLAPP statute to dismiss defamation and related claims against a local newspaper and its source. <u>Newspaper</u> <u>Holdings, Inc., et al. v. Crazy Hotel Assisted Living, Ltd., et</u> <u>al.</u>, No. 01-12-00581-CV, 2013 Tex. App. Lexis 5407 (Tex. App. May 2, 2013). The court held that a series of news articles about a retirement home involved matters of public concern and plaintiffs failed to establish a prima facie case that the articles were false or defamatory. In addition, in a case of first impression, the court addressed the commercial speech exclusion in the Texas Citizens' Participation Act (TCPA), the state's anti-SLAPP statute, holding that neither the newspaper nor its source had engaged in commercial speech to fall outside the scope of the anti-SLAPP statute.

### Background

At issue in the case were a series of articles published in the *Mineral Wells Index*, a local newspaper owned by Newspaper Holdings, Inc. (NHI), about allegations of misconduct against the Crazy Water Retirement Hotel, a retirement and assisted-living center in Mineral Wells, Texas. Among other things, the articles concerned the plaintiff's efforts to stop residents from using the home health services of IntegraCare, threats to evict residents if they continued to use its services, related official investigations and other allegations of misconduct. Charlotte Patterson, IntegraCare's Chief Compliance Officer, had contacted the newspaper about the situation and served as a source for some of the information in the articles.

In 2011, the home and the president of its corporate owner sued the newspaper, the source, and her company for defamation, business disparagement, and tortious interference with contract. They alleged that the articles falsely implied they engaged in Medicaid fraud and elder abuse. The trial court denied a motion to strike the complaint under the TCPA.

### **Appellate Court Decision**

On appeal, the court first held that each of the articles involved clear matters of public concern. These included the

quality of care at assisted living facilities and the right of residents to choose their own health care providers. Next the court examined whether plaintiffs established a prima facie case for their claims.

On the defamation claims, the court found that plaintiffs failed to show that the newspaper articles were substantially false. The newspaper's use of the term "eviction notice" was a reasonable description of the plaintiffs' letter to residents. In addition, stating that the assisted living facility had a "myriad" of problems may have been immoderate, but in context was substantially true. Moreover, it was insufficient to plead that other third party allegations reported by the newspaper were false because plaintiffs provided no evidence "that the individuals to whom the newspaper reporter attributes these statements did not make them."

As to the source defendant, the court considered two quoted statements in the articles. First, that 'this case involves a number of possible areas of focus for prosecutors' including "elderly abuse"; and, second, that Integra was being excluded because it was not sending "referrals" to plaintiffs. The court concluded the first statement was made without fault and the speculation about plaintiffs' motives was not defamatory as a matter of law.

The plaintiffs business disparagement failed for these same reasons. And their tortious interference claim failed because nothing in the record suggested the newspaper or source interfered with the obligations between residents and the plaintiffs. Finally, the court rejected plaintiffs' argument that the commercial speech exception under the TCPA applied. The newspaper "was in the business of reporting community events" not the sale of goods within the meaning of the statute. To hold otherwise would "swallow the protections the statute was intended to afford." The source and her company did not engage in commercial speech, but addressed issues of public health and safety.

Bob Latham and Amanda Patrick of Jackson Walker LLP represented IntegraCare and Ms. Patterson before the trial court and on appeal. Co-counsel Jim McCown, at Nesbitt, Vassar & McCown, L.L.P., represented NHI. Plaintiffs were represented by David Harvey, Harvey & Associates, Houston.

# **Texas Supreme Court: Not Defamatory Per Se to Question Doctor's Truthfulness**

In an interesting non-media defamation case between two doctors, the Texas Supreme Court reversed a \$175,000 jury damage award, holding that statements accusing plaintiff of being a liar were not defamatory per se and plaintiff was not entitled to damages where there was no proof of actual injury to reputation. *Hancock v. Variyam*, No. 11-0772 (Tex. May 17, 2014).

At issue were statements made in a letter to hospital colleagues stating that plaintiff has a "reputation for lack of veracity" and "deals in half truths, which legally is the same as a lie." The trial court held that these statements were defamatory per se as a matter of law and the jury awarded compensatory and punitive damages. The Court of Appeal affirmed the jury damage award, noting that calling someone a liar is "so obviously hurtful to the person aggrieved that no proof of [their] injurious character is required to make [them] actionable." *See* 345 S.W .3d 157, 164.

After reviewing the complex common-law and constitutional framework for defamation per se and presumed damages, the Texas Supreme Court reversed.

"[T]he inquiry is not whether a reputation is necessary for a profession. If that were true—because all professions require reputations of some sort—all statements defaming professionals would be defamatory per se. Rather, the proper inquiry is whether a defamatory statement accuses a professional of lacking a peculiar or unique skill that is necessary for the proper conduct of the profession.

The specific trait of truthfulness is not peculiar or unique to being a physician. As the comments to the Restatement illustrate, "a charge that a physician is dishonest in his fees is actionable, although an imputation of dishonesty in other respects does not affect his character or reputation as a physician." Id. § 573 cmt. c."

The court dismissed the claim in its entirety because plaintiff failed to prove any actual injury to reputation. Plaintiff failed to show at trial that any recipient of the letter believed its statements or thought less of plaintiff. And his testimony that he "experienced some sleeplessness and other anxiety does not rise to the level of a substantial disruption in his daily routine or a high degree of mental pain and distress."

# MLRC Bulletin 2013 Issue 1 Legal Frontiers in Digital Media

Selected Issues Regarding Patent Infringement Lawsuits Brought by Non-Practicing Entities

Standing Up to Privacy Class Actions: How Clapper Fortifies the Available Defense

The Lanham Act as a Weapon Against Internet Speech

Distinctions With a Difference: Search Engines and Online News Aggregators

Fair Use and Implied License Issues in AP v. Meltwater

www.medialaw.org

May 2013

# Illinois Circuit Court Grants Summary Judgment in "Wrong Picture" Defamation Case Fair Report Privilege Applied

### By James A. Klenk and Gregory R. Naron

The Circuit Court of Cook County recently entered summary judgment dismissing a "wrong picture" defamation claim on fair report privilege grounds. *Buchanan v. ChicagoLand Television News*, No. 2012 L 1140 (Cir. Ct. Cook Cty.)

### Background

The defendant in *Buchanan*, ChicagoLand Television News ("CLTV"), reported that a Chicago Transportation Authority security guard by the name of Christopher Buchanan had been arrested and charged with aggravated criminal sexual abuse. The plaintiff, also named Christopher Buchanan, was incarcerated in an Illinois penitentiary at the time of the assault; a different Christopher Buchanan was charged with the crime.

Yet, in announcing the charges, the Cook County Sheriff's Department emailed a mug shot of plaintiff -- not the arrestee -- to the Chicago Breaking News Center. The Breaking News Center is a Tribune Company entity that aggregates the latest news stories in text, video, audio and photography from Tribune's news operations in Chicago --CLTV, WGN-TV, WGN Radio and the Chicago Tribune. CLTV used that mug shot to illustrate its newscast about the Christopher Buchanan arrest.

The day after the newscast aired, a viewer representing herself as plaintiff's mother called to complain that CLTV had displayed the picture of the wrong Christopher Buchanan, and upon investigating, CLTV learned that within 30 minutes after sending it, the Sheriff's Department discovered it had sent the Breaking News Center the wrong mug shot, and emailed the correct mug shot. However, unlike the mug shot of plaintiff -- which was sent to a group email address that included CLTV -- this email and the correct mug shot were sent <u>only</u> to an individual at the Breaking News Center, who did not forward it to anyone at CLTV, and did not work in the same facility as CLTV.

### **Illinois Fair Report Privilege**

The Illinois courts have enunciated a robust fair report privilege in defamation cases, protecting reports based on information obtained from governmental sources, as long as they are a "fair abridgment" of the governmental actions or proceedings. "[C]ourts have consistently held that news reports based on the records and utterances of police and other law enforcement officers are the types of official proceedings protected by this privilege." *Eubanks v. Northwest Herald Newsp.*, 397 Ill. App. 3d 746, 749 (2d Dist. 2010). Illinois follows the Restatement (Second) of Torts § 611 (1977) in holding that the privilege is not defeated by a showing of malice. *Solaia Tech., LLC v. Specialty Publ'g Co.*, 221 Ill.2d 558, 587 (2006).

Following *Eubanks*, *Solaia*, and other Illinois fair report authority, Cook County Circuit Court Judge Kathy Flanagan granted summary judgment for CLTV, holding "the information in the story accompanied by the mug shot was a complete and accurate report of the information emailed by the Sheriff's Department," and "the truth or falsity of the information therein is irrelevant" to the privilege's application. (Slip Op., p. 4.)

Strongly reaffirming the privilege's broad application, Judge Flanagan rejected plaintiff's arguments that the Breaking News Center, not the Sheriff's Department, was the source of the information reported, and that arrest records did not fall under the privilege because they are preliminary to judicial proceedings. "The information regarding the arrest . . . was provided to the Defendant by an official government source, the Sheriff's Department, and is, thus, within the scope of the privilege. . . . an arrest record is an official report which is covered by the fair report privilege." (*Id.*, citing *Dolatowski v. Life Printing & Publ'g Co.*, 197 Ill. App. 3d 23, 27 (1st Dist. 1990)).

James A. Klenk, Natalie J. Spears, Gregory R. Naron, and Katherine L. Staba, of Dentons in Chicago, represented CLTV. Plaintiff was represented by Alfred S. Vano and Adam J. Feuer of the Santilli Law Group, Ltd.

# Washington State Enacts Uniform Correction and Clarification Law

### By Bruce E.H. Johnson, Ambika Doran, and Sarah Duran

On May 20, 2013, Washington Governor Jay Inslee signed into law <u>ESB 5236</u>, a version of the Uniform Correction or Clarification of Defamation Act ("UCCDA"), which provides incentives to publishers and prospective libel plaintiffs to settle their disputes before litigation.

Washington previously had no retraction law, and publishers attempting to correct had to rely on a 1911 decision allowing defendants to plead and prove retractions to mitigate damages. This statutory reform will improve on these uncertain common law benefits.

Washington's legislature modeled the statute after the Uniform Law Commission's UCCDA, proposed in 1993 with support from various sections of the American Bar Association, which just one other state—North Dakota—has since adopted. (As of this writing, Laura Lee Prather is hard at work in Austin, so stand by for more news.)

The Washington law requires plaintiffs to request a correction or clarification before filing a lawsuit. If they do not, they cannot recover reputational or presumed damages at trial. The statute applies not just to defamation lawsuits, but to any claim targeted at an allegedly false statement. And perhaps most notably—unlike most state retraction laws—it expressly applies to all electronic publications. For defendants, moreover, the process is voluntary.

Under the law, a request for a correction or clarification is timely and sufficient if it is made within the statute of limitations for a defamation claim, identifies the person making the request, and specifies the allegedly false statement and why the requester believes it is defamatory or otherwise actionable. If the publisher makes a timely and sufficient correction, the plaintiff may not recover reputational or presumed damages; damages are also limited if, upon request, the plaintiff refuses to disclose evidence of the statements' falsity. The filing of a defamation lawsuit constitutes a request for correction or clarification. The Washington law requires plaintiffs to request a correction or clarification before filing a lawsuit. If they do not, they cannot recover reputational or presumed damages at trial.

A correction is timely and sufficient if made within 30 days of receipt of a request for correction or clarification or of evidence of falsity and if the correction meets certain specifications.

If a publisher misses this deadline, it may offer to settle the dispute after the filing of a lawsuit by publishing a correction and paying the prospective plaintiff's reasonable attorneys' fees incurred before publication of the correction or clarification.

The new law is untested but likely to have a significant effect on defamation actions in Washington State, and may serve as a model for other states seeking to amend their laws to accommodate electronic publications.

The statute applies to all publications on or after July 28, 2013.

Bruce Johnson, Ambika Doran, and Sarah Duran, attorneys at Davis Wright Tremaine LLP ("DWT") in Seattle, were heavily involved, together with Rowland Thompson of Allied Daily Newspapers of Washington, in proposing the new law, advocating its enactment, and drafting and vetting proposed revisions and amendments. They wish to thank DWT partner Dan Waggoner, who helped create the UCCDA as an adviser to its drafting committee, and the other media lawyers (both pro-plaintiff and pro-defense) who were also involved.

May 2013

# **MLRC State Legislative Committee Wants Your Input**

Now in its third year, the MLRC State Legislative Committee continues to keep a watchful eye on the issues affecting our media clients in the state capitals.

Representative from more than twenty-five states and the District of Columbia currently serve on our committee, and we are reaching out to others to maximize the information we can provide for the MLRC membership.

Our committee is tracking and impacting (by passing positive legislation, i.e. anti-slapp and retraction and preventing adverse legislation, i.e. anti-paparazzi and right of publicity) First Amendment, open government, public notice and other legislation affecting media organizations on the state level, including:

- Access to 911 call tapes
- Agricultural gag bills
- Anti-paparazzi
- Anti-slapp
- Arrest records, dashcam video, law enforcement records, mug shots and search warrants (access to)
- Autopsy records
- Cameras in the Courtroom
- Cyber bullying
- Date of birth legislation
- Expunction
- Libel tourism
- Open Meetings
- Prior restraints
- Privatization of governmental functions
- Public Information
- Public Notice
- Records retention policies for governmental agencies
- Reporter's Privilege
- Retraction
- Right of Publicity
- Scanner traffic legislation
- Social media

In addition, this year we will be working with the MLRC Newsgathering Committee on two projects involving expunction laws and access to publicly-funded pension programs.

Please help us by letting us know of bills that are being proposed in your jurisdiction impacting any of the areas we are tracking or let us know about other areas you think we should add to our list. Contact committee co-chairs Laura Prather at laura.prather@haynesboone.com or Elizabeth Allen at eaallen@gannett.com.

# Hawaii's Shield Law Set to Lapse on June 30th Under Sunset Provision

Legislature Fails to Agree on Renewal

### By Jeffrey Portnoy and Gerald Kato

Hawaii broke new ground in 2008 when it established a robust <u>shield law</u> which some saw as a model law for federal legislation. Just five years later, though, it is poised to set a precedent that in contrast can only be described as distressing and ignominious – becoming the first state to repeal a shield law in its entirety.

How did this dramatic turnaround come about? It may be instructive to examine the legislative history of this rise and fall because, like all laws, statutory protections for the news media must pass through the sausage-making purview of elected officials with their mix of principle, power plays, emotion, individual quirks and ignorance. No process will be identical, but broader patterns and warnings might be gleaned that could be useful elsewhere.

The press and politicians had a contentious relationship in the islands prior to creation of the shield law. As representatives of the news media, we overcame a reluctance to enter the political arena in 2008 because key figures seemed ready to engage in a reasonable and rational discussion. A compromise was worked out after three months of tough

negotiations between us, representing the news media, and then-Attorney General Mark Bennett, with strong support from Rep. Blake Oshiro, a Democrat who was House majority leader.

The bill was finished just before a House-Senate conference committee deadline and progressed smoothly until, at literally the last moment and for reasons that remain unknown, Senate Judiciary Chair Brian Taniguchi added a three-year sunset provision that required a reassessment in 2011. In the afterglow of successfully crafting an otherwise good bill, it did not seem to be a big problem. But it would prove to be a fatal flaw.

Act 210 passed both Democratic-controlled houses unanimously and was signed by then-Gov. Linda Lingle, a

Republican. The state's first-ever law establishing a newsperson's privilege was notable for its comprehensiveness. It created a two-tiered, function-based definition of journalists. The first tier of "traditional journalists" included those "presently or previously employed or otherwise professionally associated" with any newspaper, magazine or radio/television station.

The second tier of "non-traditional journalists" – such as bloggers, freelance writers and filmmakers – included those who can show by "clear and convincing evidence" that they "regularly and materially participated in the reporting of news or information of substantial public interest"; that they hold a position that is "materially similar or identical" to a journalist; that they maintain a "materially similar" interest as

> a journalist in protecting the source or information; and that the public interest is served by affording them the shield.

> The law protected confidential sources, and information that had not been published or broadcast, even if not confidential. Significantly, it provided an absolute privilege in civil cases, except defamation, and a qualified privilege in felony prosecutions. And, in an acknowledgement

of technological advances, it was explicit that digital forms of media are covered. The Student Press Law Center hailed the law as "the best in the country in terms of the clarity and breadth of its coverage," and the Society of Professional Journalists cited it as a model for a federal law.

(Only one case has ever been litigated under Hawaii's law. In 2009, an independent filmmaker who did not work for a company that identified itself as a news organization was preparing a documentary on Native Hawaiian burial practices, and was subpoenaed in a legal dispute over home construction on land where ancient Hawaiian remains were found. He refused to testify or turn over interview outtakes. Represented by the American Civil Liberties Union, he won (Continued on page 25)

Journalists, the ultimate beneficiaries of this legislation, were never consulted, and, indeed, were shut out of the process completely.

### May 2013

### (Continued from page 24)

a ruling from a state judge that the shield law applied, and he would not have to reveal his confidential sources or unpublished work.)

When we returned to the legislature in 2011 seeking repeal of the sunset provision, the political environment had shifted. The new governor, Neil Abercrombie, was the lone Democrat to vote against a federal shield law while in Congress in 2007, arguing the First Amendment was sufficient. His attorney general was unsympathetic to press privilege and questioned the law's scope. A new head of the House Judiciary Committee seemed amenable, but his powerful counterpart in the Senate, Clayton Hee - who would emerge later as a pivotal figure - was openly hostile to the news media. He came close to refusing to hear the repeal

bill at all, and when he did, seized on a request to review the law to extend the sunset provision yet another two years.

The request had come from the state Judiciary's Evidence Committee, comprised of judges, the attorney general, prosecutors, defense attorneys, civil litigators and a law professor. Its December 2011 report said the legislature, "if it were so inclined," could take another look at provisions on unpublished information and the near-absolute privilege in civil cases, and make technical linguistic clarifications. But its unambiguous bottom

line was to recommend the sunset provision be eliminated and the shield law be made permanent, with no changes suggested to its fundamental structure and the inclusion of non-traditional journalists.

As we were to learn, however, such clarity can carry little currency when faced with the vagaries of policymaking. A short, simple bill calling for repeal of the sunset provision, House Bill 622, was introduced at the start of the 2013 legislative session, supported by the Hawaii Shield Law Coalition, a group composed of major media organizations here. Preliminary talks with the staff of the House Judiciary Committee - again under new leadership - indicated no problems, and indeed, there were no questions after the coalition testified at the subsequent hearing. Then the gutting began. The Attorney General's office called for the

Ironically, Hawaii's shield law enters its final days just as there is renewed interest in a federal shield law following revelations about the Justice Department's subpoena of telephone records from The **Associated Press.** 

elimination of protections for non- traditional journalists and unpublished information. And the committee's chair, Rep. Karl Rhoads, surprised us by springing amendments to end protections in all civil cases, and for information that might be related to "potential felony, or serious crime involving unlawful injury to persons and animals."

We were bracing for even more trouble with the Senate Judiciary Committee, which was still chaired by Hee, who earlier in the session showed his loose grasp of First Amendment issues by embracing the so-called "Steven Tyler Act." That proposal, named for Aerosmith's lead singer and owner of a multimillion-dollar home on the island of Maui, would have allowed celebrities to sue paparazzi who photograph their private moments. Senators swooned and passed the bill after Tyler made a personal appearance

> lobbying for it. The House had the good sense to kill the bill.

The Hawaii Shield Law Coalition testified in favor of a simple repeal of the sunset provision and was not questioned. The tenor and direction of the Senate committee was nonetheless clear. Hee said he would be offering amendments even before the hearing began, and badgered a Society of Professional Journalists representative to name stories that would not have been published without a shield law, but refused to let anyone else address the question. He

concluded the media could not come up with any cases. A few days later - after distributing copies of the 1948 photo of Harry Truman holding up a copy of the Chicago Tribune with the headline "Dewey Defeats Truman" as an example of the media lying - the chairman put forth amendments to eviscerate the shield law, contending he disingenuously claimed support from the Judiciary's Evidence Committee and the American Civil Liberties Union (which would later oppose the bill).

The Hee amendments substantially narrowed privilege by replacing a functional definition of journalist with a statusbased one. A journalist would be defined as a person who "for financial gain or livelihood" gathers news for a traditional outlet, such as a magazine "published and (Continued on page 26)

May 2013

## MLRC MediaLawLetter

### (Continued from page 25)

distributed not less than four times a year" or a newspaper "with a paid circulation that is printed and distributed not less than once a week for at least a year." In addition, Hee sought to eliminate protections for unpublished information, and allow exceptions for defendants in criminal cases who have "a constitutional right to the information sought." And the bill did not account for any sort of digital media.

Journalists, the ultimate beneficiaries of this legislation, were never consulted, and, indeed, were shut out of the process completely.

The House-Senate conference committee then met to reconcile a final draft of the bill. What emerged essentially was a bill that removed protections for non-traditional journalists and journalists who worked for non-charging publications and limited the circumstances under which reporters can invoke the privilege. It did, however, restore protections for unpublished information and remove the constitutional right exception.

The coalition was split. Traditional media, such as the daily Honolulu Star-Advertiser and TV stations, thought they could live with the changes. But most – including Media Council Hawaii, SPJ and the online Honolulu Civil Beat – felt no law would be better than an anachronistic one. But everyone agreed that a compromise would be better. We hurriedly lobbied to get a two-year extension to the shield law for a task force review. The House majority leader, Rep. Scott Saiki, stepped up and managed to get the extension amendment passed in his chamber with the clock ticking. We

were told, however, that senators were cautioned they would face repercussions if they tried a similar maneuver. In the end, not one senator was willing to stand up to Hee and propose the amendment. The Senate instead approved the conference bill by a 16-to-9 vote. The net effect was that the House and Senate passed different versions of the bill, negating each other's actions.

With no agreement in the Legislature on an extension, the existing shield law will sail into the sunset on June 30, 2013.

It was terribly sad. We are considering our future course of action. It is unlikely that a shield law would pass in the next legislative session. When the Senate chair holds up "Dewey Defeats Truman" as an example of how journalism is, you know reason and rationality does not stand a chance. Unless there is a change in the political leadership, we do not see any reason to go back to the Legislature. In the meantime, we will have to allow the courts to decide issues on a case-by -case basis.

Ironically, Hawaii's shield law enters its final days just as there is renewed interest in a federal shield law following revelations about the Justice Department's subpoena of telephone records from The Associated Press. We sincerely hope Hawaii is a model for shield laws not because of our recent setback, but of what can be and was for a few shining years. Of that, we will always be proud.

Jeffrey Portnoy is a partner at Cades Schutte LLP in Honolulu, Hawaii. Gerald Kato is a professor at the School of Communications of the University of Hawaii at Manoa.

MEDIA LIBEL LAW 2012-13

#### REPORTS FROM ALL FIFTY STATES, THE FEDERAL COURTS OF APPEALS, U.S. TERRITORIES, CANADA, AND ENGLAND EDITED BY THE MEDIA LAW RESOURCE CENTER, INC



Now available from MLRC and Oxford University Press

# MEDIA LIBEL LAW 2012-13

Media Libel Law 2012-13 is a comprehensive survey of defamation law, with an emphasis on cases and issues arising in a media context.

# www.medialaw.org

May 2013

# Supreme Court Upholds Virginia's Citizen-Requester Only FOIA Provision

### By Kevin J. Goldberg

If someone had taken an exit poll of those leaving the Supreme Court after oral argument in <u>McBurney v. Young</u>, (U.S. April 29, 2013) the only unanimity would be that there was no unanimity. There was split belief as to whether the Virginia FOIA law's citizen-requesters-only provision would be upheld or struck as an unconstitutional violation of the Privileges and Immunities Clause or the "Dormant Commerce Clause." There was certainly no indication that we would have a 9-0 decision either way. The Justices simply appeared to hold too many conflicting views about the purpose and effect of a state FOIA law, especially with regard to the Dormant Commerce Clause issue.

Yet a 9-0 unanimous decision is exactly what we got. **Seriously,** not even Nate Silver himself could have predicted this.

### Background

First, a quick recap of the facts: Petitioners Mark McBurney (a Rhode Island resident) and Roger Hurlbert (a California resident) each filed FOIA requests under the Virginia Freedom of

Information Act, McBurney seeking records relating to an ongoing child support dispute and real estate tax records, respectively. Both requests were denied because of their non-resident status (none of the media-related exemptions applied). These denials were upheld by the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit. *See* <u>McBurney v. Young</u>, 667 F.3d 454 (4<sup>th</sup> Cir. 2012) (Niemeyer, Gregory, Agee, JJ.).

#### **Supreme Court Decision**

Justice Alito, writing for the unanimous Court, upheld as well. He held that the restriction does not violate the Privileges and Immunities Clause because it was not enacted for "the protectionist purpose of burdening out-of-state citizens." As such it didn't affect anyone's ability to "ply [his] trade, practice [his] occupation, or pursue a common calling." Nor does the Virginia FOIA law affect the ability to own and transfer property in Virginia. The law simply exists to ensure that Virginia residents have access to public records so they may oversee the activities of government. Furthermore, the records sought in this case (especially by Hurlburt) are via other means: primarily, the First Amendment right to access judicial records.

But perhaps most importantly with regard to the Privileges and Immunities issue, Alito – with the other 8 Justices implicitly agreeing – went above and beyond simply saying that access to information is not a fundamental right (which is to trigger the Privileges and Immunities Clause at all). No, Justice Alito made it clear that FOIA laws are nowhere near "fundamental," not just because they are not a constitutionally guaranteed right, but also because they are only a relatively recent phenomenon and "there is no

contention that the Nation's unity foundered in their absence, or that it is suffering now because of the citizens-only FOIA provisions that several States have enacted."

While that conclusion – and its delivery – is frustrating, Justice Alito's brief review of the Dormant Commerce Clause issue is

perhaps more surprising. The opinion does not even discuss whether the restriction constitutes an unreasonable burden on citizens of other states – because it quickly concludes that Commerce isn't even implicated. To the Justices, freedom of information laws are entirely political in nature. What makes this quick dismissal of the issue all the more surprising is that most oral argument attendees and commentators agreed that there appeared to be a significant split among the Justices on the Dormant Commerce Clause issue, with discussion of and questioning on this issue being anything but brief.

For the record, Justice Thomas wrote very brief concurring opinion in which he reiterated his view that there is really no such thing as the "Dormant Commerce Clause" (or "negative Commerce Clause" as he calls it).

In the face of this confusing (at least to me) result, it appears there can be only three certainties: (1) the list of (Continued on page 28)

Not even Nate Silver himself could have predicted this.

May 2013

# MLRC MediaLawLetter

### (Continued from page 27)

states with such a citizens-only restriction will almost certainly grow from its current tally of seven (eight if you include Delaware, whose law was thrown out by the Third Circuit); (2) this Supreme Court does not think kindly of access to information (not surprising given its stance on access to information; (3) the most likely cases to receive favorable treatment from this Supreme Court are those in which the information sought via a FOIA law relate to a purely political, government-oversight purpose. Kevin Goldberg is a partner at Fletcher Heald & Hildreath PLC in Washington, D.C., and is counsel to the American Society of News Editors which was part of a media amicus coalition challenging the Virginia law. Petitioners were represented by Deepak Gupta, Gupta Beck PLC, Washington, D.C.; and the Institute for Public Representation Georgetown University. A full list of counsel, merit and amicus briefs is available <u>here</u>.



# MLRC LONDON CONFERENCE

September 23-24, 2013 | Stationers' Hall

International Developments in Libel, Privacy, Newsgathering and Media IP Law

Highlights of this year's conference include: The Leveson Inquiry: Analysis of New Press Regulation Proposals The Practical Impact of the Defamation Bill Where Publishers Fear to Tread: World Hot Spots for the Press Privacy Law Developments: Press Liability After Leveson Newsgathering Challenges: The Fate of Investigative Journalism Data Protection and the Right to Be Forgotten Copyright Reform Legislation Contempt of Court and the Internet

May 2013

# Virginia Supreme Court Set to Interpret Cameras-In-Courtroom Law

### By Drew E. Shenkman

The Virginia Supreme Court is poised to hear the challenge of Virginia Broadcasting Corp. and its station WVIR-TV in Charlottesville, Virginia, to Circuit Court Judge Edward L. Hogshire's ruling barring cameras from the sentencing hearing in the high-profile murder trial of University of Virginia lacrosse player George Huguely.

In Virginia, electronic-media access to courts is controlled by statute, Va. Code § 19.2-266, which says a court may "solely in its discretion" permit cameras in judicial proceedings, but that a judge may prohibit coverage only "for good cause shown." This seemingly-inconsistent language within the statute has led to widely-differing applications of the law in Virginia's trial courts. This case highlights the dispute over the interpretation of that "good cause" standard.

In the Huguely murder trial, Judge Hogshire had previously refused requests by various media outlets to bring in cameras, though none of those denials were appealed. In refusing to permit camera access to the July 25, 2012 sentencing hearing, the judge based his ruling solely upon the speculative arguments of state prosecutors and defense counsel, finding that hearing participants might play to the cameras or be reluctant to testify, and that television coverage would "add fuel to the fire with respect to the intensity of the coverage by allowing graphic images out there to the public, online, on television, wherever they're going to be...." No evidence was presented to the court to support its decision, and Judge Hogshire acknowledged that his ruling was "not in accord with at lot of what other courts do."

In its <u>appeal</u>, Virginia Broadcasting Corp., along with *amici curiae* LIN Media, Gray Television, and Media General, now urge the Virginia Supreme Court to rule that the "good cause" standard does not provide a trial judge with unfettered discretion. Rather, "good cause" requires an evidence-based finding of a compelling need to ban cameras, and that any ban is narrowly tailored.

Guided by bedrock First Amendment access principles, Virginia Broadcasting and *amici* advocated for the Court to establish a strong "good cause" test similar to that applied in *Press Enterprise*. That test would require an evidentiary showing (1) of a specific and compelling need for the exclusion of cameras from the courtroom, which the exclusion of cameras is essential to prevent, and (2) that the cameras are excluded only to the extent necessary, and in the least-restrictive manner possible. Such a test would ensure that the proper balance is struck between the media's right to use cameras in the courtroom under the statute, and any non-speculative fair-trial concerns of the participants. Opposition briefs are expected next month.

Finally, in a potentially-encouraging sign, the Virginia Supreme Court granted Virginia Broadcasting Corp.'s writ petition before any opposition was filed, and before argument on the writ was scheduled, an unusual move for a court that hears very few cases every year. Argument will likely take place in fall 2013.

Drew E. Shenkman, Charles D. Tobin, and Thomas J. McIntosh of Holland & Knight LLP, Washington D.C. represent amici curiae television stations owned by LIN Media, Gray Television, and Media General. Other counsel in the case include: Gregory S. Duncan for appellant Virginia Broadcasting Corp.; Frances McQ. Lawrence for appellee George Huguely; Warner D. Chapman for appellee the Commonwealth of Virginia; and John E. Falcone for amicus curiae Virginia Association of Broadcasters.

# D.C. Cir. Affirms Bin Laden Death Photos Exempt From FOIA Disclosure

Photos Properly Withheld to Prevent Violence

The District of Columbia Circuit this month held that 52 post-mortem images of Osama bin Laden were properly classified and exempt from disclosure under the Freedom of Information Act. *Judicial Watch v. Department of Defense*, No. 1205317, 2013 U.S. App. LEXIS 10143 (D.C. Cir. May 21, 2013) (Garland, Rogers, Edwards, JJ). "[I]t is undisputed that the government is withholding the images not to shield wrongdoing or avoid embarrassment, but rather to prevent the killing of Americans and violence against American interests," the court ruled.

The district court thus concluded that the CIA sustained its burden of proving the procedural and substantive criteria for classification and that the documents were properly withheld under FOIA Exemption 1. <u>Judicial Watch, Inc. v.</u> <u>Dep't of Def.</u>, 857 F. Supp. 2d 44 (D.D.C. 2012). See also "Federal Court Rejects FOIA Request for Bin Laden Photos," MediaLawLetter May 2012.

### Substantive Criteria Met for Exempting Photos

The CIA invoked FOIA exemption 1, maintaining that the

### Background

Shortly after the May 2011 death of Osama bin Laden during an American raid, Judicial Watch filed a FOIA request with the Department of Defense and the Central Intelligence Agency seeking any photographs or videos of bin Laden from the military operation. While the Defense Department had no images, the CIA acknowledged that it had 52 records, but withheld their release because of "Top Secret" classification.

Judicial Watch sued and the CIA

supported its classifications with multiple declarations from top government officials attesting to the national security repercussions should the photos be released.

Judicial Watch further challenged the CIA's classification procedure, as the documents were "derivatively classified" by a CIA official who compared the documents with agency criteria, and the documents were not marked with the name of the individual making the determination. The district court found that review by higher level officials attesting to the need for classification remedied any potential procedural defect.

"[I]t is undisputed that the government is withholding the images not to shield wrongdoing or avoid embarrassment, but rather to prevent the killing of Americans and violence against American interests," the court ruled. photos should remain withheld in the interest of national defense. Executive Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) creates substantive and procedural criteria for classification under Exemption 1. Substantively, the matter (1) must relate to at least one of eight classification categories and (2) must cause some degree of harm to national security.

Substantively, the D.C. Circuit found that the images are "indisputably" within the classification categories because they pertain to foreign activities of the United States and activities of military personnel.

Furthermore, the court found that the declarations established the requisite level of harm. The photographs used to conduct facial recognition analysis could reveal classified intelligence methods and the images depicting members of the special operations unit could endanger personnel involved in the raid. Moreover, the photographs displaying the bullet wounds to bin Laden's head merit classification because the release could lead to violence against American interests.

Judicial Watch argued that the it was mere speculation whether the release of images would cause harm. But the court sided with agency officials, who cited analogous (Continued on page 31)

May 2013

### (Continued from page 30)

disclosures of seemingly innocuous photos that incited violence. For example, the publication of the Danish cartoon of the Prophet Muhammad led to hundreds of injuries and deaths, as well as an attack on a U.S. airbase in Afghanistan.

Because release could "reasonably be expected to trigger violence and attacks" against American interests, personnel, and citizens worldwide, the court found the substantive threshold for denying FOIA disclosure was met.

### **Procedural Criteria Sufficient for Exempting Photos**

Procedurally, Executive Order No. 13,526 requires that information may be classified only by an individual with original or derivative classification authority and that classified documents must be marked with the identity of the classifier and instructions for declassification.

Judicial Watch argued that these procedural requirements were not met because the documents were not classified until after the agency received the FOIA request and because they were not originally marked with the name of the person who classified them.

While the court noted that it could not determine whether the classification of images was proper without a description of the classification guides, it found that the affidavits attesting to the need for classification cured any defect. "[B] ecause the 'affidavits clearly indicate that the documents fit within the substantive standards of [the] Executive Order,' and because the Bennett declaration removes any doubt that a person with original classification authority has approved the classification decision, any failure relating to application of the classification guide would not 'reflect adversely on the agency's overall classification decision.""

Michael Bekesha, Paul J. Orfanedes, and James F. Peterson represented Judicial Watch. Robert M. Loeb, Stuart Delery, Ronald C. Macen Jr., and Matthew Collette of the Department of Justice represented the DOD..



# MediaLawLetter Committee

Michael Berry, Co-Chair Russell T. Hickey, Co-Chair Dave Heller, Editor Robert D. Balin Katherine M. Bolger Tom Clyde Robert J. Dreps Judith Endejan John Epstein Rachel E. Fugate Michael A. Giudicessi Charles J. Glasser Karlene Goller David Hooper Leslie Machado Michael Minnis Deborah H. Patterson Bruce S. Rosen Indira Satyendra

# **Copyright, Fair Use & Orphan Works** Legal Conundrums in the Use and

Misappropriation of Photographs and Visual Images

### By Mickey H. Osterreicher

Copyright is, at its most basic, a property right, that must be assertively protected in order to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." United States Constitution, Article I, Section 8.

There has always been tension between the exclusive rights granted by copyright law to an author of a creative work and those who believe they have a concomitant right to use such work under the "fair use" doctrine. *See* 17 USC \$\$106-107.

There is also much disagreement over whether fair use is a right, a limitation or exception to copyright law, or a defense that may be asserted by a defendant in a copyright infringement lawsuit. Compounding this historically vexing

issue is a concern over the use of copyrighted works where the author cannot be determined or found, otherwise known as "orphan works." Nowhere are these conundrums more profound than in the use and misappropriation of photographs.

The exponential proliferation of visual images on the Internet has only exacerbated this confusing situation. According to reports, 20 million photographs are viewed

on the Internet every minute. Compounding that mind boggling number is the very prevalent belief that the Web is the "public domain." As others know the public domain is not a place but rather a legal term pertaining to a work that is no longer under copyright protection. While works in the public domain may be used freely without the permission of the former copyright owner far too many users believe that if a photograph is posted on the Internet it is there for their use without permission, credit or compensation and any such use is "fair."

As stated by the <u>U.S. Copyright Office</u> (the Office), "the distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined.

There is no specific number of words, lines, or notes that may safely be taken without permission." What makes photographs so unique is that they are rarely used except in their entirety.

### **Orphan Works**

The Office has also articulated the concerns of some in the copyright community regarding "the uncertainty surrounding the ownership status of orphan works" <u>by stating</u> such ambiguity "does not serve the objectives of the copyright system." But there is a countervailing concern that in seeking to address the frustration of "good faith users" of Orphan Works in order to cure their potential liability and "gridlock in the digital marketplace," a far more serious problem comes into play for recently created visual works

that, for whatever reason, appear to be orphaned when, in fact, they are not.

That is because within seconds of its creation an image may be downloaded and re-posted becoming "viral" in short order. *See, e.g., <u>Agence France Presse v. Morel</u>, 10 CIV. 02730 AJN, 2013 WL 146035 (S.D.N.Y. Jan. 14, 2013) (describing how news photos of the Haitian earthquake of 2010, posted online and widely distributed* 

within minutes of being uploaded).

Many applications and websites strip identifying information, known as metadata from digital images when they are uploaded, preventing good-faith users (one who had made a "reasonably diligent effort to find the owner") from identifying the rights holder or being able to legally license the work. Under increased competition some users publish photos without permission under the business model: "use first, beg for forgiveness later." As part of that cost/benefit analysis, publications weigh the probability of discovery and resulting litigation against the time and cost involved in obtaining prior permission and licensing.

(Continued on page 33)

What makes photographs so unique is that they are rarely used except in their entirety.

### May 2013

Page 33

### (Continued from page 32)

Such legislation, limiting existing recovery rights may create unintended harm to photographers that would far exceed any social benefit derived, particularly without any definitions or other requirements for satisfying a "reasonably diligent search." This problem is illustrated best in the resulting furor by photographers over the recently passed Enterprise and Regulatory Reform Act 2013.

For authors, copyright is not just about receiving compensation for use. Copyright also protects them from having their work used in ways they do not approve and in ways that they never intended. This is particularly true for photographers. Subjects depicted in a photograph may have only consented to being photographed for certain purposes. Unauthorized use of photographs, therefore, effects more than just photographers. *See* Alicia Calzada, <u>A strong example of why copyright matters</u>, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, July 13, 2012.

Another important consideration under copyright law and the First Amendment is the right to **not** publish or speak. There are many situations in which a visual work was created solely for private use and was never intended for public consumption. Due to the insidious nature of the Internet, many images so created have found their way there without any identifying information.

### Fair Use

In a number of postings many organizations including libraries and documentary film makers who advocated vociferously for the <u>Sean Bentley Orphan Works Act of 2008</u> now take the position that Orphan Works legislation is no longer necessary. Instead, they assert "fair use" offers the protection they seek. They also state that any legislative remedies should be a minimal, "one sentence amendment to 17 U.S.C. § 504(c)(2) that grants courts the discretion to reduce or remit statutory damages if the user conducted a reasonably diligent search prior to the use." *See* <u>Comments of the Library Copyright Alliance</u>.

They justify these proposals by explaining that "these uses would significantly benefit the public without harming the copyright owner" *Id.* 

The American University School of Communications Center for Social Media <u>asserts</u> that "transformativeness" should be used rather than rely on the four factors traditionally used by the courts in making a fair use determination (those factors being: the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for, or value of, the copyrighted work. But no single factor is determinative. "All are to be explored, and the results weighed together, in light of the purpose of copyright." *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

The American University School of Communications Center for Social Media defines transformativeness" in this way:

• Did the unlicensed use "transform" the material taken from the copyrighted work by using it for a different purpose than that of the original, or did it just repeat the work for the same intent and value as the original?

• Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

They also go on to state that one way to mitigate a copyright claim under fair use is by a good faith showing in providing "credit or attribution, where possible, to the owners of the material being used." Unfortunately such advise runs diametrically opposite of the <u>statement by the Office</u> that "acknowledging the source of the copyrighted material does not substitute for obtaining permission."

### Caselaw

Court rulings in some recent cases may support the transformative argument but once again it is crucial to remember that even slight changes in fact patterns may result in different outcomes. In <u>Associated Press v Meltwater</u>, the (Continued on page 34)

A far more serious problem comes into play for recently created visual works that, for whatever reason, appear to be orphaned when, in fact, they are not.

May 2013

## MLRC MediaLawLetter

### (Continued from page 33)

defendant asserted the affirmative defense of transformative fair use in their appropriation of copyright-protected material from the plaintiff for a new purpose. Despite the court's assumption for purposes of its opinion that Internet search engines are a transformative use of copyrighted work, it still held that Meltwater engaged in copyright infringement and that its copying was "not protected by the fair use doctrine." In rendering its opinion the court found that the purpose and character of the use was not transformative (no commentary or transformation of work in any meaningful way) and distinguished Meltwater News service from Google News as not so much a search engine, but an expensive subscription service marketed as a news clipping service. The court also The lower court had initially granted Cariou's motion for summary judgment, finding that the artwork had infringed upon his copyrighted photographs. The lower court had also entered an injunction compelling "the defendants to deliver to Cariou all infringing works that had not yet been sold, for him to destroy, sell, or otherwise dispose of."

But the court of Appeals disagreed with the lower court analysis of the fair use factors and found that whereas "the district court imposed a requirement that, to qualify for a fair use defense, a secondary use must 'comment on, relate to the historical context of, or critically refer back to the original works," they believed the proper determination is "if 'the secondary use adds value to the original – if [the original work] is used as raw material, transformed in the creation of



The case involved 30 pieces of artwork, but the appeals court was only able to make a determination on 25 of them, remanding the remaining 5 pieces back to the lower court for application of "the proper standard" so as to "determine in the first instance whether any of them infringes on Cariou's copyrights or whether Prince is entitled to a fair use defense with regard to those artworks as well."

found that Meltwater copied too much of the AP articles both quantitatively and qualitatively. Finally, the court found that Meltwater's use of the works detrimentally affected the potential market and value of AP's articles.

In another recent case the U.S. District Court of Appeals for the Second Circuit reversed and vacated a lower court decision in part finding that the appropriation artist Richard Prince infringed on the copyright of Patrick Cariou's photographs when they were used in Prince's work. <u>Cariou v</u> <u>Prince, et al.</u>, No. 11-1197-cv (2d Cir. April 25, 2013) (Parker, Hall, Wallace, JJ.). Once again the question of the "transformative nature" of the new work came into play in deciding the fair use question. new information, new aesthetics, new insights and understandings" (Internal citation omitted). They also found that "for a use to be fair, it 'must be productive and must employ the quoted matter in a different manner or for a different purpose from the original" (Internal citation omitted). With regard to the transformative nature of the work, the court thought it also critical to determine how the work in question may be reasonably perceived by the reasonable observer as compared with the original work.

To illustrate how difficult these types of decisions are, the case involved 30 pieces of artwork, but the appeals court was only able to make a determination on 25 of them, remanding the remaining 5 pieces back to the lower court for application *(Continued on page 35)* 

May 2013

### (Continued from page 34)

of "the proper standard" so as to "determine in the first instance whether any of them infringes on Cariou's copyrights or whether Prince is entitled to a fair use defense with regard to those artworks as well."

In a 5 page dissent Judge John Clifford Wallace agreed that the lower court's finding was flawed, but believed that all of the works in question should be remanded for further reconsideration and factual determination under the legal standard just articulated by majority. He also opined that "perhaps new evidence or expert opinions will be deemed necessary by the fact finder—after which a new decision can be made under the corrected legal analysis."

Judge Wallace also took the majority to task for employing its own "artistic judgment" when comparing the transformative nature between the two works. He cautions

against departing from aesthetic neutrality in that he would feel "extremely uncomfortable" for him do so in his "appellate capacity," let alone his "limited art experience."

Noting the court had appeared to move away from that foundational imperative in determining fair use he cited the admonition by Justice Oliver Wendell Holmes that "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." *Quoting Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

In another case involving fair use the courts have found that the scanning of books for the purposes of indexing meets the transformative requirement even when copying entire written works because it adds value and transforms the work from its original intent by providing full-text searching and access for print disabled individuals. *See <u>Authors Guild, Inc.</u> v Hathitrust, et al*, 11 CV 6351-HB (SDNY 2012).

Another court has also held that at universities the use of copies from unlicensed electronic course reserves in place of traditional printed course packs was permissible under fair use. <u>Cambridge University Press et. al. v. Mark Becker et al</u>, 08-CV-142S-0DE (N.D. Ga. 2012). The 350 page decision also weighed the four fair use factors, with the court finding

that the unpaid use of small excerpts of the works in question to be acceptable given it would not discourage academic creativity in new works. *Id. at 89*.

These cases can all be distinguished from the daily misappropriation of photographs and visual images in their entirety for no other purpose than that they are readily accessible, help illustrate a story or fill a space and serve to monetize page views or sell publications. Such unauthorized and uncompensated misuse of the work of others should not be considered fair use. Rather they are exemplars of precisely the type of creative work that copyright laws were enacted to protect.

### **Recent Legislative Initiatives**

In May 2013, the Subcommittee on Courts, Intellectual

Property and the Internet of the House Committee on the Judiciary held a hearing entitled "<u>A Case Study for Consensus</u> <u>Building: The Copyright Principles</u> <u>Project.</u>" In a <u>statement</u>, Chairman Bob Goodlatte spoke of the invited speakers "as an example of how people with divergent views on copyright law can productively debate a range of copyright issues . . . speaking with a recognition that the person next to them at the witness table has just as much right to advocate their position on copyright law as they do."

As noted in a <u>statement by the</u> <u>Copyright Alliance</u>, "the Project was a self-

convened effort of 'law professors, lawyers from private practice, and lawyers for copyright industry firms," but unfortunately no creators (e.g. photographers) were involved. *See David Lowery, "Getting copyrights right,"* Politico, May 13, 2013.

### Conclusion

As the legal system tries vainly to catch-up with technology and social policy as it relates to copyright protections for photographs and other visual images a few things are hopefully apparent. Those who assert "Fair Use" as a prior rationale for the misappropriation of photographs and (*Continued on page 36*)

some recent cases may support the transformative argument but once again it is crucial to remember that even slight changes in fact patterns may result in different outcomes.

Court rulings in

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © 2013 Media Law Resource Center, Inc.

Page 36

## MLRC MediaLawLetter

### (Continued from page 35)

visual images, do so at their peril. As the U.S. Supreme Court noted, fair use is an "affirmative defense" that must be successfully proved by the named defendants once a copyright infringement lawsuit has been commenced. "Defendants bear the burden of proving that each use was a fair use under the statute. The analysis of the fair use defense must be done on a case-by-case basis, and 'all [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright." <u>Cambridge University Press</u> <u>et. al. v. Mark Becker et al</u>, at 48.

There is a strong argument that an examination of the 4 fair use factors mitigates in favor of the photographer when the use is commercial or for-profit educational purposes. The qualitative and quantitative nature of a photograph is normally self-evident. Given that almost all copyright infringements of photographs involve their entire use rather than just a small portion of the picture, the third factor in considering fair use should favor the photographer in cases where the photographs are used without any transformative changes being made to them. Finally, the effect of the use upon the potential market for, or value of, the photograph may also be summed by Justice Holmes, when he wrote, "that these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights." *Bleistein*, 188 U.S. at 252

The fair use doctrine is meant to protect those wishing to stand on the shoulders of others when creating new works, not on the backs of others, such as photographers, whose works are infringed upon with impunity hundreds, if not thousands of, times a day both intentionally and inadvertently.

To paraphrase U.S. District Judge Denise L. Cote's ruling in *Meltwater* – A defendant misappropriates a photograph in its entirety in order to make money directly from the undiluted use of the copyrighted material; where this use is a central feature of its business model and not an incidental consequence of the use to which it puts the copyrighted material. Photographing newsworthy events occurring around the globe is an expensive undertaking and enforcement of copyright laws permits the photographer to earn the revenue that underwrites that work. Permitting a defendant to take the fruit of the photographer's labor for its own profit, without compensating the photographer, injures the photographer's ability to perform this essential function of democracy.

Rather than advising users about a potential fair use safe harbor, many suggest following the golden rule of "do unto others" by first seeking permission, offering to credit and expecting to pay when using photographs and visual images on the web. It might make a rather complicated legal issue much simpler and less costly in the long run.

Mickey H. Osterreicher is of Counsel to the law firm of Hiscock & Barclay and serves as general counsel to the National Press Photographers Association (NPPA).

# UPCOMING EVENTS 2013-14

MLRC LONDON CONFERENCE September 23-24, 2013 | London, England

MLRC ANNUAL DINNER & FORUM November 13, 2013 | New York, NY

LEGAL ISSUES CONCERNING HISPANIC AND LATIN AMERICA MEDIA May 10, 2014 | Miami, FL

MLRC/NAA/NAB MEDIA LAW CONFERENCE

Setpember 17-19, 2014 | Reston, VA

# **Ninth Circuit Affirms that Righthaven Lacks Standing to Pursue Copyright Claims** *Declines to Rule on Fair Use Defense*

Noting that "merely calling someone a copyright owner does not make it so," the Ninth Circuit this month held that Righthaven, a copyright holding copy, lacked standing to pursue copyright infringement claims. <u>*Righthaven LLC v.*</u> <u>*Hoehn*</u>, No. 11-16751, 11-16776, 2013 U.S. App. LEXIS 9413 (9th Cir. May 9, 2013) (O'Scannlain, Trott, Clifton, JJ). The Court held that the "bare right to sue for infringement, without the transfer of an associated exclusive right, is impermissible under the Copyright Act and does not confer standing to sue."

## Background

Righthaven was founded as a vehicle to receive limited, revocable copyright assignments to bring actions against

alleged copyright infringers. The company partnered with Stephens Media, owner of the *Las Vegas Review-Journal*, in May 2010 before expanding to involve other publications. Righthaven has filed hundreds of claims, most in the District of Nevada.

At issue in the instant case were two copyright infringement cases brought separately by Righthaven over copying of *Las Vegas Review-Journal* articles. Defendant Wayne Hoehn pasted a *Review-Journal* opinion about public pensions into a comment on MadJackSports.com.

Defendant Thomas DiBiase, a former Assistant United States Attorney, reproduced a *Review-Journal* article on his blog about murders in which the victim's body was never found.

After Righthaven discovered the alleged infringement, it entered a copyright agreement with Stephens Media, granting it copyright ownership for the purpose of seeking redress for past, present, or future infringement. Righthaven and Stephens Media also were bound by a Strategic Alliance Agreement (SAA) providing that the two entities would split any recovery and that if Righthaven did obtain a settlement or initiate litigation, it had to reassign the copyright back to

The court closely scrutinized the terms of the copyright agreement and SAA in determining that the copyright rights granted to Righthaven, in fact, provided no rights at all.

Stephens Media. Furthermore, the SAA provided that Stephens Media retained "an exclusive license" to exploit the copyrights for any purpose and that it could revert the ownership of any assigned copyright back to itself with three days notice.

Though earlier Righthaven district court decisions focused on the reach of fair use on the Internet, the Ninth Circuit focused on whether Righthaven had a sufficient copyright in the material to have standing.

## **Standing Issue**

The court closely scrutinized the terms of the copyright agreement and SAA in determining that the copyright rights granted to Righthaven, in fact, provided no rights at all.

> "Under the Copyright Act, only the 'legal or beneficial owner of an exclusive right under a copyright' has standing to sue for infringement of that right." *See* 17 U.S.C. § 501(b); *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005). While the Copyright Act lists the "exclusive rights" that can be transferred, absent from the list is the right to sue for infringement.

> "Exclusive rights" include the right to reproduce the work, the right to distribute copies of the work, and the right to create

derivative works based on the copyrighted work. *See* 17 US.C. § 106. The Court previously held in *Silvers* that the assignment of the right to sue for infringement, without the transfer of an associated "exclusive right" is impermissible under the Copyright Act, and does not grant standing to sue.

Though Righthaven argued that it owned one or more "exclusive rights" under the Copyright Act, the court looked beyond the terms of the contract to examine its substance and effect. "The SAA provided that any copyrights transferred to Righthaven were subject to the terms of the SAA, and many (Continued on page 38)

May 2013

# MLRC MediaLawLetter

#### (Continued from page 37)

of these terms placed limits on what Righthaven could do with any copyright assigned to it." It was these terms that led the court to conclude no "exclusive rights" were transferred and therefore Righthaven lacked standing.

The court further found that it had no power to reach the merits of the fair use defense. In *Hoehn*, the district court granted defendant's motion for summary judgment on fair use even after granting the defendant's motion to dismiss for lack of standing.

Righthaven was represented by Erik S. Syverson, Miller Barondess, LLP, Los Angeles, CA; and Shawn A. Mangano, Las Vegas, NV. Defendant Thomas DiBiase was represented by Kurt Opsahl and Corynne McSherry, Electronic Frontier Foundation, San Francisco, CA; and Colleen Bal and Caroline E. Wilson, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA. Defendant Wayne Hoehn was represented by Marc J. Randazza, J. Malcolm DeVoy IV, and Jason A. Fischer, Randazza Legal Group, Las Vegas, NV.

# **Recent MLRC Publications**

# MLRC Bulletin 2013 Issue 1: Legal Frontiers in Digital Media

Selected Issues Regarding Patent Infringement Lawsuits Brought by Non-Practicing Entities • Standing Up to Privacy Class Actions • How Clapper Fortifies the Available Defense • The Lanham Act as a Weapon Against Internet Speech • Distinctions With a Difference: Search Engines and Online News Aggregators

# **Risks and Tips for Digital Images**

The Pre-Publication/Pre-Broadcast Committee's latest paper – Risks and Tips for Digital Images – explores various risks likely to be encountered with the use of digital images and summarizes cases and new issues in this area, all within the framework of a handy checklist full of tips for the expert and general practitioner alike.

# **Discovery Roadmap**

In 2004, the Pre-Trial Committee, now known as the Litigation Committee, put together a "Discovery Roadmap" to help media law practitioners strategize discovery in defamation/invasion of privacy lawsuits. Since that time, the increased prevalence of electronically stored information (ESI) has transformed the discovery process in a number of ways. The Litigation Committee decided to update the Discovery Roadmap to encompass the unique issues presented by ESI.

# Implications for the News Media of "Anti Leaks" Proposals in Congress

A report on the various Congressional anti-leaks measures, with analysis of their political context and implications for newsgathering.

# Basic Guide to Employment Defamation and Privacy Law

This pamphlet is intended to acquaint its user with legal concepts related to the subjects of defamation and privacy in the workplace. It addresses defamation and privacy in general terms and then explains how these issues can arise at various stages of the employment relationship.

## www.medialaw.org

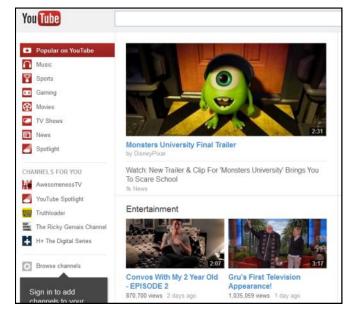
# YouTube Wins Summary Judgment Again in Battle with Viacom

Video Sharing Platform Protected By DMCA Safe Harbor Provision

Last month, the Southern District of New York found for YouTube in the latest round of the *Viacom v. YouTube* copyright litigation. The court held that YouTube was entitled to the DMCA's safe harbor protection for service providers unless it actually knew of, or was willfully blind to, specific cases of infringement and that, as a matter of fact no such knowledge could be established. <u>Viacom Int'l Inc. v.</u> <u>YouTube, Inc.</u>, 07 CIV. 2103, 2013 WL 1689071 (S.D.N.Y. Apr. 18, 2013) (Stanton, J.). Two years later the Second Circuit remanded the case back to the District Court. *See* 676 F.3d 19 (2012). The Second Circuit affirmed the District Court's determination that knowledge of specific infringements was necessary to overcome the safe harbor, but held that a factual issue still remained as to whether YouTube had such knowledge. The Second Circuit also reversed the District Court's finding that the "right and ability to control" provision of §512(c) required "item specific" knowledge, and remanded for further consideration as to whether YouTube had the "right and

## Background

In 2007, Viacom and various affiliates filed a onebillion-dollar copyright infringement suit against YouTube alleging massive copyright infringement of content that had been uploaded by third party users to the YouTube video-sharing platform. Viacom's complaint against YouTube included claims of both direct and secondary infringement, as well as inducement claims. The major issue in the suit has been the scope of the safe harbor



ability" to control infringing activity on its site.

According to the Second Circuit, more general control would suffice as long as it met the standard of "something more" than the simple ability -possessed by all service providers -- to control access to materials on the website. Further, the court held that the text of §512(m) does not foreclose a claim of willful blindness on its face, and that such can be made in "appropriate circumstances."

On remand, defendant renewed its motion for

protections of §512(c) of the DMCA, upon which the defendant has relied.

Three years ago, Judge Stanton granted summary judgment in favor of YouTube. The court found that YouTube fell within the DMCA safe harbor, and granted summary judgment in favor of YouTube. In that opinion, the court held that "actual knowledge" of infringement requires knowledge of a specific instance of infringement and not merely a general awareness that infringement may or is likely to happen. *See* 718 F. Supp. 2d 514, 523 (S.D.N.Y. 2010).

summary judgment, with both parties addressing the issues raised in the Second Circuit's opinion.

## Specific Knowledge and Willful Blindness

The first issue considered was whether, as a factual matter, YouTube had specific knowledge of the infringements such that it should lose protection under \$512 (c)(a)(1). The court held in favor of YouTube, citing the *(Continued on page 40)* 

May 2013

## MLRC MediaLawLetter

#### (Continued from page 39)

plaintiff's own statement that "Viacom has failed to come forward with evidence establishing YouTube's knowledge of specific clips-in-suit." Viacom had argued that YouTube bore the burden of proving lack of knowledge for the affirmative safe harbor defense to apply.

The court called that argument "ingenious," but nevertheless, found it unpersuasive in light of the purposes of the DMCA safe harbor, including the legislative intent to not place a broad "monitoring duty" upon service providers.

Next, the court determined whether YouTube could be found to have been "willfully blind" to the infringements that were taking place and purposefully chose to allow the same to continue for its financial benefit. The court held that in order for willful blindness to be found "one must not impute more knowledge than the fact conveyed."

The court further stated that "under appropriate circumstances the imputed knowledge of the willfullyavoided fact may impose a duty to make further inquiries that a reasonable person would make—but that depends on the law governing the factual situation". Given that, the court determined that it must apply the standard it had outlined in 2010 for the §512(c) safe harbor protection, i.e., "specific and identifiable cases of infringement," again foreclosing Viacom's argument for a lack of specific evidence.

## **Control and Syndication**

To determine whether YouTube had the "right or ability to control," as provided in \$512(c)(1)(b), the court deferred to

the Second Circuit's determination that there must be "something more than just ordinary power over the provider's website." This "something more," the court found, was not present here, citing the absence of active involvement by YouTube in, e.g., prescreening content or providing user advice or suggestions. Further, the court expressly held that a service provider's decision to restrict its monitoring actions to certain videos is not alone sufficient to establish "something more" under the safe harbor.

Consistent with its determination with respect to establishing YouTube's "right or ability to control," the court found that YouTube's syndication of its content to other online platforms did not extinguish YouTube's safe harbor protection. According to the District Court, third-party syndication to parties such as AT& T and Sony "serve[s] the purpose of § 512(c)," given its primary purpose of providing increased options to users and the lack of manual selection or delivery of videos by YouTube.

For these reasons, the court once again granted summary judgment in favor of YouTube. Viacom has announced that it will once again appeal the decision.

YouTube was represented by David Kramer and Brian M. Willen of Wilson Sonsini Goodrich & Rosati, Palo Alto, CA; and Andrew Shapiro and David Schwartz, Quinn Emmanuel Urqhart & Sullivan LLP, New York. Plaintiffs were represented by Paul Smith, Jenner & Block, Washington, D.C.; Stuart J. Baskin, Shearman & Sterling LLP, New York; and Matthew McGill, Gibson Dunn & Crutcher LLP, New York.

# MLRC Bulletin 2013 Issue 1: Legal Frontiers in Digital Media

Selected Issues Regarding Patent Infringement Lawsuits Brought by Non-Practicing Entities

Standing Up to Privacy Class Actions: How Clapper Fortifies the Available Defense

The Lanham Act as a Weapon Against Internet Speech

Distinctions With a Difference: Search Engines and Online News Aggregators

Fair Use and Implied License Issues in AP v. Meltwater

www.medialaw.org

# The New Defamation Act 2013 What Difference Will It Really Make?

## By David Hooper, Brid Jordan, Kim Waite and Oliver Murphy

The <u>Defamation Act 2013</u> received Royal Assent on 25 April 2013. The big question for all practitioners and publishers is how much difference will it really make?

The key changes, virtually all of which favor defendants, are:

- The introduction of the test of serious harm something which is likely to prevent trivial libel claims and which will underpin all defenses to libel complaints. This is a stronger test than the requirement of "substantial harm" in the original Bill.
- Companies can only sue if they prove serious financial loss – a hurdle they will find difficult to surmount.
- A defense of public interest is introduced, which provides that the statement must be a matter of public interest and the defendant must have reasonably believed the statement was in the public interest. This is wider rather

than the *Reynold's* defense which is abolished, but in deciding whether the defendant's belief was reasonable, the court is likely to consider a question of whether the journalism was responsibly conducted. The law is simplified and made more flexible.

• The defenses of truth and honest opinion replace the defenses of justification and fair comment. They are codified and simplified, but the burden of proof remains upon the defendant and the rule against repetition of a libel remains.



- There is a new defense for operators of websites where the operator can show that he did not publish the statement on the website. Regulations will be made by Statutory Instrument to define the steps the complainant and operator must take where the poster of the liable cannot be identified.
- Qualified privilege is extended to peer-reviewed statements in scientific or academic journals which should prevent cases such as that brought by the *British Chiropractic Association v Simons Singh*.
- Various categories of statutory privilege are extended

worldwide rather than being limited to EU bodies or courts or international courts or organizations to which the UK belongs.

• A single publication rule is introduced providing for a proper one year limitation period provided the subsequent publication is not materially different from the original.

• Abolition of libel tourism. Cases can only be brought against a non-EU or Lugano Convention country citizen (also European) unless it can be shown that England and Wales is clearly the most appropriate jurisdiction for the libel action to be heard in.

- Trial by jury for libel actions is affectively abolished which will shorten and reduce the cost of libel actions.
- The court now has power to order a summary of its judgement in a defamation claim to be published and where judgment has been given for a claimant to

(Continued on page 42)

May 2013

The Act was nearly

derailed by the

amendment introduced

by Lord Puttnam in the

House of Lords which

sought to graft onto the

**Defamation Act the** 

changes recommended

by Lord Justice Leveson;

recommendations which

for the most part had

limited connection with

the changes to the

defamation law.

# MLRC MediaLawLetter

(Continued from page 41)

order the operator of a website where the defamatory statement is published to take it down or for a person who was not the author of the statement to cease distributing the defamatory statement.

• These changes do not apply to Northern Ireland so there may be a growth of libel tourism cases in Northern Ireland – a prospect viewed with no small degree of equanimity by Paul Tweed. The changes have only limited application in Scotland where the law of defamation is different from that in England and Wales.

## Background

The draft Defamation Bill was published by the Ministry of Justice in March 2011. It was the subject of extensive scrutiny, discussion and debate in the form of a period of public consultation and detailed hearings by a Parliamentary Committee. As a consequence it was significantly amended whilst passing through Parliament.

The Act was nearly derailed by the amendment introduced by Lord Puttnam in the House of Lords which sought to graft onto the Defamation Act the changes recommended by Lord Justice Leveson; recommendations which for the most part had limited connection with the changes to the defamation law. They were

subsequently detached from the Defamation Bill and the relevant legislation relating to Leveson and the Royal Charter was tacked onto the Crime and Courts and Enterprise and Regulatory Reform Acts.

No commencement date has been fixed for the Act.

#### **Serious Harm**

Under Section 1 of the Defamation Act 2013 a statement is not be treated as defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. The existing definition of what is defamatory is not changed, but the bar has been raised before a libel action can be brought. This bar itself had been raised during the course of the legislation passing through Parliament in that the published Bill had the lower threshold of "substantial harm". In effect the requirement of serious harm builds upon the requirement of a "threshold of seriousness" suggested in *Thornton v Telegraph Media Group Ltd*, [2010] EWHC 1414, and for the requirement of "a real and substantial tort" as indicated in *Jameel v Dow Jones & Co* [2005] EWCA 75.

Increasingly courts have thrown out trivial libel cases or those that were felt to be an abuse of the processes of the court. For example, a complaint about an article headlined "The Return of The Man Eater" was struck out on the basis that it did not cross the threshold of seriousness, i.e. the words complained of were not capable of being defamatory, see *Dell'olio v Associated Newspapers*, [2011] EWHC 3272.

> The requirement of serious harm permeates all aspects of the new law of defamation and is likely to lead to an increasing number of claims being struck out or simply not brought. Whenever the court will be exercising its discretion as to whether to allow a case to proceed, it will be asking itself whether the publication has caused or is likely to cause serious harm. Equally when the court is considering whether or not to permit service of proceedings outside the jurisdiction which in the first instance and at the ex parte stage has normally not proved much of an obstacle for claimants, the court will now be considering the question of serious harm. Equally claims may be held not to reach the serious harm threshold where

publication is limited in extent, where there is evidence of general bad reputation or if the claimant can only establish an innuendo meaning which would be understood only by a limited group of people.

The new test may also be of considerable significance in relation to claims of defamation published on the internet where the courts have already taken the view where appropriate that publication, for example in chat rooms, does not have the gravity of a libel in written form. In *Tamiz v Google*, [2012] E.M.L.R. 24 and [2013] E.M.L.R. 14, a number of the allegations which on the face of it were defamatory were considered by the court to be insufficiently *(Continued on page 43)* 

## May 2013

Page 43

#### (Continued from page 42)

serious to merit a legal action. The likelihood is that defendants will increasingly argue that in certain instances not too much weight should be attached to what appears on the internet and that the threshold of serious harm is not triggered.

In other cases the contrary argument will be as to the permanence and spread of the internet. Over the years many trivial libel actions have been successfully brought and the requirement of serious harm is likely to change that. Additionally the requirement of serious harm will assist the process of pre-publication advice in that the likelihood of a libel claim being brought in relation to a very minor or trivial matter will have been substantially reduced.

#### Companies

Under Section 1(2) companies which trade for profit will have to establish that the defamatory statement has caused or is likely to cause the company serious financial loss in order to bring successful proceedings. Important to bear in mind is that actions can still be brought by officers of the company if they can establish that the statement reflects upon them However, this is a very personally. significant change which will assist potential defendants in defamation actions. It changes the law in that the House of Lords in the Jameel case declined to

extend the principles of *Derbyshire County Council v Times Newspapers Limited*, [1993] A C 534, to companies.

This was a provision introduced into the Bill in the House of Lords in February 2013. The House of Lords amendment would also have extended the *Derbyshire County Council* ruling to companies which were performing a public function so that, for example, a company performing the governmental function of running a prison would not have been able to sue for libel. The House of Commons rejected this amendment on 16 April 2013 but the requirement of proving serious financial loss was ultimately reinstated in the Act.

The threat prior to this change of being sued by a company was a very significant one. Not only did companies tend to have deep pockets and the cost of bringing a libel

Under Section 1(2) companies which trade for profit will have to establish that the defamatory statement has caused or is likely to cause the company serious financial loss in order to bring successful proceedings.

action was likely to be set off against the company's profits for tax purposes and the Value Added Tax could be reclaimed, neither of which advantage tended to be available to non-corporate defendants. In practice, proving such financial loss is likely to be very difficult for companies. The mere fact that the company's share price may have fallen is insufficient – *Collins Stewart Ltd & Anor v The Financial Times*, [2004] EWHC 2337. There the company brought a special damages claim quantified by reference to the fall in the company's share price. The special damages claim was struck out with the court observing "*the reasons why a share is traded at a particular price... are unknown, or, at best, matters of conjecture.*"

## Truth

In effect Section 2, the defense of truth, codifies the existing law of justification. The defense of truth will apply where the defendant can show that the imputation conveyed by the statement complained of is substantially true. The repetition rule survives, as does the requirement that the burden of proof remains upon the defendant.

The issues are likely to be what the words mean and whether that meaning can be proved to be substantially true. If the defendant can prove that part but not all of what he said was substantially true the issue would then arise whether that part of

the defamatory statement has or would be likely to cause serious harm (s 2(3)). Section 5 of the Defamation Act 1952 which had previously dealt with the situation where part only of the defamatory statement could be shown to be true is now otiose.

#### **Honest Opinion**

Section 3 repeals the common law defense of fair comment and in effect builds upon the ruling of the Supreme Court in *Joseph v Spiller* [2010] UKSC 53, which had sought to rename the defense of fair comment as honest comment.

(Continued on page 44)

May 2013

## MLRC MediaLawLetter

#### (Continued from page 43)

The law has not significantly changed but some of its complexity is cut away.

The conditions for the defense are set out in Section 3. A statement must be one of opinion rather than fact, the basis of the opinion must be indicated in general or specific terms and the opinion must be one which an honest person could have held on the basis of any fact which existed at the time the statement complained of was published or was derived from something asserted to be a fact in a privileged statement published before the alleged defamatory statement.

The defense is defeated if the claimant shows that the defendant did not hold the opinion – something which is likely to be difficult to prove. The law of malice is not expressly abolished but would appear to fall away.

It remains to be seen whether the complexities of the

defense of fair comment will in fact fall away, but the indications are that the defense will be simplified in accordance with the ruling in Joseph v Spiller. Once the defense is established it is a very significant defense as it extends to any honest expression of opinion however bigoted. Equally if a defendant formed an opinion on facts which turned out to be erroneous or not to exist at the time of making the statement, he could still have a defense if other facts were later discovered by him which existed at the relevant time on the basis of which an honest person could have held that opinion. The

defendant cannot, however, rely on facts which came into existence subsequent to the making of the comment. Such facts might, however, show that any harm suffered arising from the comments was not serious.

Under s 3(6) where the defendant is not the author of the statement, for example, where an action is brought against a newspaper editor in respect of a comment piece rather than against the person who wrote it the defense would be defeated if the claimant could show that the defendant knew or ought to have known that the author did not in fact hold the opinion. That too would be a heavy burden on the claimant to establish.

The public interest defense as now adopted is wider than the Reynolds defense and more flexible. It also has the potential advantage of reducing the likelihood of preliminary issues as to how the material came to be published.

#### **Publication on Matter of Public Interest**

In place of the *Reynolds* defense, which is now abolished, the Act provides a public interest defense which applies whether the statement is a matter of fact or opinion. In the Bill as originally published the *Reynolds* defense was effectively codified and, had it been enacted, the *Nicholls* criteria would have been part of the Act albeit that the ten factors were reduced to eight.

The public interest defense as now adopted is wider than the *Reynolds* defense and more flexible. It also has the potential advantage of reducing the likelihood of preliminary issues as to how the material came to be published.

The ingredients of this defense are that the statement complained of was or formed part of a statement on a matter of public interest (which is not defined) and the defendant

> must have reasonably believed that publishing the statement was in the public interest. In determining whether the defense is made out, the court is directed to have regard to all the circumstances of the case. The court in having regard to all circumstances is likely to be looking to see if the journalism was conducted in a responsible manner and is likely to apply an approach which is not dissimilar to that adopted in the *Reynolds, Jameel and Flood* [2012] UKSC 11 cases.

> It is notable that public interest is not defined. Under the defense of fair comment where the comment had to be on

a matter of public interest, public interest was very widely defined. The choice that seems to face the court is either of taking a wide view and deferring in significant measure to editorial judgement as to what was in the public interest or taking the more restrictive view of the European Court of Human Rights that the article must be said to add to public debate. It seems reasonably certain that the court would be inclined to the view that matters of celebrity gossip would not amount to public interest and would clearly differentiate from matters that simply happened to interest the public. However, there are grounds to think that a reasonably wide view would be taken of what constitutes public interest. There is both a *(Continued on page 45)* 

May 2013

#### (Continued from page 44)

subjective element in that the defendant must believe that the statement was in the public interest and an objective element, namely that the court must be satisfied that the statement was on a matter of public interest and that the defendant's belief was reasonable.

In deciding whether the defendant's belief was reasonable the court is likely to look at a number of the *Reynolds*' factors. The approach may well be that adopted by Lord Brown in *Flood v Times Newspapers*: "[c]ould whoever published the defamation, given what they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?"

What is of some significance is that under Section 4(4)

the court in determining whether it was reasonable for the defendant to believe that the statement complained of was in the public interest should make such allowance for editorial judgement as it considers appropriate. One of the original criticisms of the *Reynolds*' defense was that it was applied in too strict a fashion and almost involved putting a judge in the editor's office. Sub-section 4 appears to follow the observation in Flood: "*While the Court must have the last word in setting the boundaries of what can* 

properly be regarded as acceptable journalism, within those boundaries the judgement of a responsible journalist and an editor merits respect". This was in line with the approach of the European Court of Human Rights in cases such as Jersild v Denmark 19 EHRR 1. "It was not for national Courts or the European Court of Human Rights to substitute their own views for those of the press as to what techniques of reporting should be adopted by journalists. In essence, article 10 leaves journalists to decide what details it is necessary to reproduce to ensure credibility."

Section 4(3) recognises the common law doctrine of reportage. Reportage, as Lord Phillips noted in Flood, "*is a* special kind of responsible journalism but with distinctive features of its own. In such cases there would be public interest which would justify the publication of facts which carried defamatory inferences without imposing on the *journalist any obligation to attempt to verify the truth of those inferences*".

#### **Operators of Websites**

The aim of Section 5 is to deal with the changes in communications since the passing of the Defamation Act 1996 and to update the innocent dissemination regime of Section 1 of the Defamation Act 1996.

Section 5 creates a new defense for operators of websites for claims regarding statements posted on a website when the operator can show that he did not post the statement on the website. The defense is defeated if the claimant shows that:

(a) it was not possible for him to identify the person who posted the statement;

(b) he gave the operator a notice of complaint in relation to the statement; and

(c) the operator failed to respond to the Notice of Complaint in accordance with any provision contained in the Regulations.

These Regulations are to be made by Statutory Instrument. It is unfortunate that with all the consultation and debate that has taken place these regulations have not yet been published. This part of the Act

cannot come into effect until the Regulations have come into force. It remains to be seen whether it will all come into effect at the same time or whether – which would scarcely be satisfactory – the internet provisions come into force at a later stage.

Section 5(5) indicates the likely content of the regulations. Essentially the Notice of Complaint will have to specify the complainant's name, set out the statement complained of and explain why it is defamatory and specify where it was posted. Likewise the regulations will specify what action the operator has to take in relation to the Notice of Complaint as regards identifying the person who made the statement setting a time limit for such action.

While a definition of "website" was posted during the consultation period, no definition has made its way into the (Continued on page 46)

Section 5 creates a new defense for operators of websites for claims regarding statements posted on a website when the operator can show that he did not post the statement on the website.

## May 2013

**Claimants in seeking** 

permission to serve

proceedings out of the

jurisdiction will now have

to address matters such

as the extent of the

publication in this

country as opposed to

elsewhere and

demonstrate that

England and Wales is

clearly the most

appropriate jurisdiction.

## MLRC MediaLawLetter

#### (Continued from page 45)

Act and there is also no definition of "operator of a website". These terms are likely however to be interpreted broadly to include mobile platforms. Similarly, statements which are "posted on a website" are likely to include statements made on mobile platforms and via social media applications.

The defense will fail if the claimant can show that the website operator acted with malice in relation to the posting of the statement concerned but malice has, on the whole, been something which is difficult to prove. The defense is not defeated by reason only of the fact that the operator moderates the statement (s 5(12)). This removes the dilemma that operators may have had as to whether they can safely moderate the site.

Without yet being able to review the Regulations it is

difficult to see how effective the procedure under Section 5 may be to both website operators and complainants. Any attempt to impose an unrealistically short time limit on website operators to take action is likely to be met with resistance due to the size and international reach of many such operators. The Regulations may also not require a complainant to provide sufficient detail so as to put a website operator on notice of unlawful (rather than merely defamatory) material. In such a case, a website operator would likely have a defense under Regulation 19 of the E-Commerce Regulations 2002 without the need to rely on Section 5.

However, this is a welcome step for many operators and complainants. The

operators need not be troubled by litigation merely due to their deep pockets where the original poster of the statement can be identified. Complainants may also find a more streamlined process to complain and ultimately have information removed from websites where they assert it is defamatory and the original poster is not identifiable. We await the publication of the Regulations to assess whether the detail of the process will facilitate the aims of s 5 or whether website operators will be burdened too far with the procedure so as to encourage a reliance on Regulation 19 over this regime.

The Act further provides, under Section 10, that a court "does not have jurisdiction to hear and determine an action

for defamation brought against a person who was not the author, editor or publisher of the statement complained of". This is subject to the condition that a court may have jurisdiction where it is satisfied that "*it is not reasonably practicable for an action to be brought against the author, editor or publisher of the statement*". What might be considered "reasonably practicable" is a matter for the courts, but for s 10 to have any real effect it must be hoped that this derogation from the general rule is used sparingly. A wide interpretation here, which is to be preferred, is that if the person in question is identifiable (by whatever means, including by a Norwich Pharmacal order), a website operator should not have an action commenced against it – as it will generally not be a publisher until it has been put on notice and had a reasonable time to respond. Even after notice a

website operator may still have a defense under Regulation 19. A pure ISP which does not host any potentially defamatory statements should always be able to avail itself of this defense.

The final section of the Act which is directly applicable to the operators of websites is Section 13. This provides that where a court gives judgment for a claimant in a defamation action it may order the operator of a website on which the defamatory statement is posted to remove the statement. This wording may be troubling to website operators for several reasons, which were highlighted during the consultation period of the Act but which have not been implemented into the enacted legislation.

The power applies even where the court does not grant an injunction to prevent republication of the words complained of. As such, this section has the effect of granting an injunction even where the court has not undertaken an exercise to determine whether an injunction is appropriate.

Furthermore, the section could be interpreted to allow a claimant to ask a website operator to remove all instances of the defamatory words, whether or not they form part of the original article complained of. This could potentially have the effect of allowing the claimant to remove all instances of the defamatory material, even though he has only complained in respect of one specific publication. It is to be hoped that the *(Continued on page 47)* 

whether the claimant to or whether the defamat procedure original artic over this effect of all

May 2013

#### (Continued from page 46)

courts are alive to this potential chilling effect on freedom of expression and ensure such orders are narrowly framed.

If they are not, the further logistical problem caused is that it may simply not be practical for a website operator to remove all instances of the defamatory words, without being directed to the precise locations where the words appear, by reference to a URL. Again, claimants seeking such orders, and the courts in granting them, should be made aware that a blanket order to remove the words is likely to be too onerous and therefore ineffective and an order should be as precise as possible to enable a website operator to comply.

# Peer-reviewed Statements in Scientific or Academic Journals

This is a new area of qualified privilege which relates to peer-reviewed material in scientific or academic journals. The term scientific is said in the explanatory notes to include medical and engineering journals. There are two conditions, the first is that the statement relates to a scientific or academic matter and the second is that before the statement was published an independent review of the statement's scientific or academic merit

should have been carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned (the peer-review). There is also provision in the section for privilege to attach to the publication of such assessments.

This section was a product of considerable lobbying following the case brought by the British Chiropractic Association against Simon Singh for his comment that the BCA "happily promotes bogus treatments." The BCA dropped their case after an unfavourable ruling in the Court of Appeal where Lord Judge adopted comments of Judge Easterbrook in *Underwager v Salter*, a US libel action over a scientific controversy, that the plaintiffs "*cannot, by simply filing suit and crying that 'character assassination!' silence those who hold divergent views no matter how adverse those views may be to the Plaintiffs' interest.*"

There had been a similar action brought by a US company in NMT Medical against the Cardiologist Peter Wilmshurst for defamatory statements that he had made to the press questioning the findings of a clinical trial of one of their products. That case collapsed after NMT experienced financial difficulties. There had been a similar claim by a vitamin entrepreneur Dr Matthias Rath against Ben Goldacre for criticisms he had made of Rath's promotion of vitamin pills to AIDS suffers in South Africa which was published in *The Guardian*. Rath dropped his action.

The section does not perhaps go as far as the lobbyists had hoped and is confined to peer-reviewed scientific or academic material rather than all scientific debate. Claims in respect of general scientific debate may however be easier to defend as honest opinion or on the basis that no serious harm can be established or that the company in question cannot prove serious financial loss.

## **Reports Protected by Privilege**

This extends and updates the circumstances in which defenses of absolute and qualified privilege are available under Sections 14 and 15 of the Defamation Act 1966. The reports themselves must be fair and accurate and of public interest and for the benefit of the public. Absolute privilege attaching to fair and accurate contemporaneous reports of court proceedings is extended to any court

established under the law of a country or territory outside the United Kingdom as opposed to the previous limitation which was to courts in member states, the European Court of Human Rights, the European Court of Justice and certain international tribunals.

Of particular interest is extension of qualified privilege to a fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest. The privilege that previously related only to UK public companies is now extended to listed companies within the meaning of Part 12 of the Corporation Acts 2009. There are corresponding extensions of qualified privilege under s 15 in paragraphs 9 and 10 of Schedule 1 for fair and accurate reports of notices issued by legislators, governments or international organisations or documents made available by courts of the European Union or certain international organisations so that the privilege now extends to all countries. The same principle is applied to findings of certain *(Continued on page 48)* 

Trial will be without a jury unless the court rules otherwise. This reflects the increasing reluctance of the courts to permit trial by jury. For exclusive use of MLRC members and other parties specifically authorized by MLRC. © 2013 Media Law Resource Center, Inc.

Page 48

May 2013

# MLRC MediaLawLetter

#### (Continued from page 47)

associations listed in paragraph 14 of Schedule 1 formed in the United Kingdom or another member state which are now extended to associations formed anywhere in the world.

There is also under paragraph 14 a qualified privilege for a fair and accurate report of proceedings of a scientific or academic conference held anywhere in the world or a summary of material published by such conference.

#### **Single Publication Rule**

This is one of the most significant changes in the Act and abolishes the rule in the *Duke of Brunswick* case which enabled claimants to rely on continuing publication on the internet to circumvent the one year limitation period.

The Act replaces the principle that each publication gives rise to a separate cause of action. Under Section 4A of the Limitation Act 1980 the cause of action is to be treated as having accrued on the date of the first publication provided that the statement subsequently published is substantially the same as the first publication. The obvious advantage to defendants is that they will normally be able to rely upon the limitation period expiring one year after first publication even if the article remains online. The court's discretion under Section 32A of the Limitation Act 1980 to extend the time limit remains.

The Act does not introduce a "deemed

date of publication," preferring instead to tie limitation with "first publication." This may prove to be a shortcoming but it is to be assumed that the concept of first publication will require some positive action by a publisher (as opposed to the passive role played by a publisher when material is accessed on its website). In the case of newspapers, the publication date is already deemed to be the date of the paper, as it has been traditionally assumed that a newspaper is read on the day that it is first published. For online publication, the first publication date should be the date upon which the material is first uploaded or made available via the internet, as is the position in most American states today.

A critical question will arise under Section 8(5) as to whether the manner of a subsequent publication is materially

So far as media defendants are concerned, gains must be viewed against the burdens likely to be imposed upon them as a result of Leveson in terms of regulation, an arbitration system free for claimants but bankrolled by the media and a significant costly regulation structure.

different from the manner of the publication of the first publication and the matters to which the court may have regard include:

• The level of prominence that a statement is given and the extent of the subsequent publication. If, for example, the written publication was somewhere relatively obscure and, as the official explanatory notes suggest, requires several clicks to access it but has subsequently been promoted to a position where it can be directly accessed from the home page, that could amount to a materially different publication.

If a new edition of a book is published, there may well be an issue as to whether its publication is

> materially different, something that the US courts have grappled with for some time. In determining whether or not there is a new publication there will be a tension between whether this is simply the original publication or whether it has been repackaged or represented in a different form so as to render it a new publication for the purpose of limitation. There is no reason why the first publication date should not mirror the US model and be the date of publication of the hardcopy edition of a book, with a second publication date for any subsequent paperback edition and for e-books, the date upon which a particular edition is made available for download.

The issues to be determined will inevitably be fact specific and there is scope for considerable litigation in this area. Questions to be answered will probably include: does the addition of a new link to archived material change the level of prominence or the extent of the subsequent publication from a relatively difficult matter to access to a more prominent item on a home page? Is the repeat of a broadcast simply a republication of the existing material outside the limitation period or is it materially different?

Where any content is retransmitted in a different format, or is modified or changed in a material way, such as to (Continued on page 49)

## May 2013

Page 49

#### (Continued from page 48)

change its meaning or context as opposed to a mere change in its presentation, then the modified version will almost certainly be considered to be a new publication which triggers the start of a fresh limitation period. However, for the purpose of calculating limitation the original publisher should be considered only to be liable as a publisher of the republished, altered content where he authorised or intended it and not for any republication by a third party outside of his control. (As explained by Gatley, the question is whether the defendant authorised "the substance and the sting". Para 6.38 11th Ed.)

The new rule will not, on its face, assist republication of material by another party. In such a case, any claim in defamation must be commenced against the third party responsible for the publication of the altered content within 12 months of the first publication of this content.

## Action against a Person Not Domiciled in the UK or Member State

The changes introduced in Section 9 are of substantial benefit to foreign defendants. Contrary to a number of assertions libel tourism has been a significant concern in this jurisdiction. There may not have been that many cases since Boris Berezovsky sued Forbes magazine for its profile of his criminal activities in Russia and Switzerland but in advisory terms the existence of the potential of the libel action in the United Kingdom has had a distinctly chilling effect on publishers who had assets in the United Kingdom notwithstanding the passing of the Speech Act in the USA.

The previous law was particularly iniquitous in respect of publications which, for all intents and purposes, were not published in the United Kingdom but could be downloaded in the UK, for example, where the publication simply arose out of worldwide searches against a name of a given and often controversial individual. Under the Act, provided that the defendant is not domiciled in the UK or another member state or a Lugano Convention country, a libel action cannot be brought unless the court is satisfied that of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring the action.

It will no longer be sufficient simply to point to a not insubstantial amount of publication including on the internet, to prevent the claim being struck out as an abuse of process nor to assert that a real and substantial tort has been committed within the jurisdiction; international businessmen were in the nature of things able to point to business and social contacts in England and Wales. Claimants in seeking permission to serve proceedings out of the jurisdiction will now have to address matters such as the extent of the publication in this country as opposed to elsewhere and demonstrate that England and Wales is clearly the most appropriate jurisdiction. The claimant will have to deal with issues such as the amount of damage to the claimant's reputation in this jurisdiction compared to elsewhere and the extent to which the publication was targeted at a readership in this jurisdiction and whether there was reason to think that the claimant would not receive a fair hearing elsewhere. Additionally, the claimant would have to show that the defamatory statement had caused or was likely to cause serious harm to his reputation. The mere fact that in reality the claimant would have difficulty in successfully suing an American publication in the United States is likely to be insufficient, although it will no doubt, be a factor relied upon by claimants.

There will be a dual approach to claims by foreign claimants. Under the Brussels Regulation (Articles 2 and Articles 5(3)) and the Lugano Convention the claimant has the choice of suing the defendant in the court of the member state in which it is domiciled for all the damage which he has suffered through publication throughout the European Union (giving the defendant home advantage but an inability to contest jurisdiction). Alternatively, the claimant can sue in any contracting state of his choice where the harmful event had occurred but this is limited to the extent of publication in that country. However, following the Court of Justice decisions in Joined Cases C-509/09 and C-161/10 Olivier Martinez v MGN Limited and EDate Advertising GmbH [2012] Q.B 654, the claimant can now sue in respect of all damage he has suffered as a result of publication on the internet throughout the European Union in the jurisdiction where he can establish his centre of interests.

#### **Trial by Jury**

The presumption in favour of trial by jury as envisaged under Section 69 of the Senior Courts Act 1981 has now been removed. Trial will be without a jury unless the court rules (Continued on page 50)

May 2013

# MLRC MediaLawLetter

#### (Continued from page 49)

otherwise. This reflects the increasing reluctance of the courts to permit trial by jury. Over the last five years jury trials have been rare. While one can think of cases where juries may have been thought to be helpful to media defendants such as the claim brought by Jonathan Aitken against The Guardian it is advantageous to defendants that trial by jury will cease, unless the court orders otherwise. Trial by jury has been calculated to be at least 30% more expensive. Many libel actions hinge upon rulings as to meaning. Such rulings have hitherto been hamstrung by the fact that the judge would be ruling on what decisions would be open to the jury, now the judge will be able to determine what the words actually mean.

#### **Publication of Judgment**

The Act gives the courts, for the first time, the power to order a summary of a judgment in defamation generally in favour of a claimant to be published. This can be contrasted to the provision in the 1996 Act which limited the power to summary disposal proceedings where the parties were unable to agree the terms of an apology or correction. (The procedure under the 1996 Act survives in respect of summary disposal procedure which is a separate procedure that can continue to be used where appropriate.)

Section 12(2) provides that the wording of any summary, time, manner, form and place of publication are matters for the parties to agree. The court can give such directions as necessary when the parties cannot agree.

It is unclear how this procedure will operate where the defendant is not a publisher or broadcaster and it is arguable that it will have no effect in such circumstances. Indeed it is difficult to see how the court can order someone to publish a summary in a publication that it has no control over. The threat of court interference will no doubt be used by claimants as leverage in discussions with publishers, who are unlikely to welcome judicial interference in such matters.

### Northern Ireland and Scotland

The Act does not apply to Northern Ireland, a matter of some concern for UK publishers who have a presence in the

jurisdiction as well as local publishers. Until now, and in contrast to Scotland, the law has been the same in Northern Ireland and reports in local press suggest that the decision was taken by the Finance Minister without reference to or consultation with the media. There appears to be no rationale justification for the decision not to accept the Act. In theory it paves the way for more claimant actions in Belfast although whether or not the floodgates will open is hard to tell.

The Act's application in Scotland is limited, with only certain limited provisions set to come into force there. The only real change is the extension of privilege under ss 6 and 7 of the Act. These provisions, as in England, have not come into force yet and are awaiting appointment by Scottish Ministers.

#### Conclusion

The Act is a welcome and long overdue reform of the law of defamation. It is disappointing that after all the effort and lobbying that important issues around website operator's liability have been hived off for another day with the resulting uncertainty about how these important provisions will operate in practice.

Overall the changes to the law of defamation introduced by the Act will largely favour defendants. The changes in relation to serious harm, the operator of website defense, the public interest defense, the single publication rule, the restrictions on libel tourism and the virtual abolition of jury trials will all significantly assist the defense of libel action. However, so far as media defendants are concerned, gains must be viewed against the burdens likely to be imposed upon them as a result of Leveson in terms of regulation, an arbitration system free for claimants but bankrolled by the media and a significant costly regulation structure. While defendants will fare better in the High Court, they are likely to face a considerable growth in small but costly defamation claims under the Leveson arbitration. In what turn out to be a fairly rough and ready form of justice with an emphasis on speedy resolution, defendants may find it difficult to secure all the benefits conferred by the changes of the Defamation Act 2013.

David Hooper, Brid Jordan, Kim Waite, and Oliver Murphy are lawyers with RPC in London.

	MLRC	MediaL	LawLetter
--	------	--------	-----------

# **The Legal Ethics of Social Networking** (Part I of II)

## By Nicole Hyland[\*]

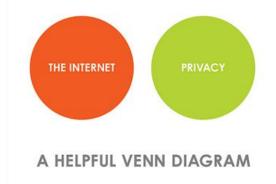
Social networking has become so ubiquitous it is easy to forget that it is a relatively recent development. Friendster, considered the "Grandaddy" of social networks, was launched in 2002.[1] 2003 saw the birth of MySpace and LinkedIn.[2] Twitter was launched in 2006, the same year that Facebook became available to the general public.[3] 2009 appears to have been a tipping point: Facebook hit the 200 million users mark; Twitter broke a major news story; the Oxford English Dictionary selected "Unfriend" as the word of the year.[4] Time spent on social networking sites exceeded time spent on email for the first time.[5] Even if you expand the definition of social networking to include blogging, chat rooms, or internet bulletin boards, these platforms were not generally available to the public until the 1990s.

The perception of social media as a realm inhabited exclusively by teenagers, college students and Internet geeks is also long gone. A 2012 Pew Research Center study found that 77 percent of Internet users between ages 39 and 49 use some form of social media.[6] The same is true for 52 percent of Internet users aged 50 to 64.[7] Lawyers are no exception. A 2012 study by the American Bar Association reported an increase in social media use by lawyers over the previous two years.[8] Of the 823 ABA members who responded to the questionnaire, 96 percent reported that they use a social network or online community for non-professional purposes. As for professional purposes, 38 percent used Facebook (up from 34 percent in 2011), 94 percent of respondents used LinkedIn (a slight drop from 95 percent in 2011), and 11 percent used Twitter (up from 6 percent). Twenty-two percent of respondents reported that their law firms maintain a blog, up from 15 percent in 2011.

As lawyers expand their presence on social media, some of them are starting to face disciplinary charges, sanctions, and embarrassing publicity for a variety of missteps.[9] As I have previously written, I believe most mistakes lawyers make on social media are driven by four basic errors.[10] First, they falsely believe that much of their on-line behavior exists in a kind of privacy bubble, which allows them to control who can see their activities. Second, they fail to appreciate that their social media activities are governed by the same ethics rules as their "real world" conduct.[11] Even when they are aware of this fact, however, they lack clarity on how to apply those rules to social media. Third, they underestimate or misuse social media. The first two categories primarily affect lawyers who use social networking for personal or professional reasons, whereas the last two categories affect all lawyers, even those who do not engage in social networking.[12] Part One of this article will look at examples of the first two categories and discuss how courts, ethics committees, and disciplinary committees are responding. Part Two of the article will examine the third and fourth categories and will conclude with practical tips on how to stay out of trouble on social media.

## Error No. 1: "The Internet Privacy Bubble Allows Me to Control Who Sees My Social Media Activity"

At a CLE program on social media, one of the other panelists shared the following useful slide on privacy and the Internet:[13]



May 2013

# MLRC MediaLawLetter

#### (Continued from page 51)

Anyone who uses the Internet will instinctively recognize the fundamental (and quite serious) truth behind this humorous diagram. Yet, even experienced social media users routinely forget this basic principle. One notorious example involved a public defender, Anya Cintron Stern, who posted a photo of her client's leopard-print underwear on her Facebook page.[14] The client's family had brought fresh clothes to the defendant during his murder trial and, while a corrections officer was inspecting the clothes, Ms. Stern took a photo of the briefs with her cell phone. She posted the photo during a break in the proceedings, along with the comment that her client's family believed it was "proper attire for trial."[15] The incident evidently came to light when someone in Ms. Stern's Facebook network reported it to the judge. The judge declared a mistrial and Ms. Stern was fired from her job as a public defender. Although she had set her Facebook privacy settings to "friends" only, that precaution did not shield her from public scrutiny. Once you put something on the Internet, you lose control over where it goes and who can see it.

A research lawyer for a Kansas appeals court, Sarah Peterson Kerr, learned this lesson the hard way after posting several critical tweets about former Attorney General, Phill Kline during an ethics proceeding.[16] According to news reports, Kerr referred to Kline as a "naughty, naughty boy" and criticized his facial expressions during the hearing. She tweeted "Why is Phil Klein [sic] smiling?" and "There is nothing to smile about, douchebag." She also predicted that Kline would be disbarred for seven years as a result of the ethics charges, which included misleading others during an investigation of abortion providers. The following statement by Kerr after she was fired from her job encapsulates the flawed thinking behind Error No. 1:

*I didn't stop to think that in addition to communicating with a few of my friends on Twitter I was also communicating with the public at large*, which was not appropriate for someone who works for the court system. . . . I apologize that because the comments were made on Twitter – and thus public – that they were perceived as a reflection on the Kansas courts.[17]

Kerr's tweets may have implications that extend far beyond her individual conduct. In January 2013, Kline filed a motion to stay any decision on his disciplinary charges on the ground that Kerr's tweets reflect a "pervasive" and "very public anti-Kline bias" within the court system.[18] The motion seeks production and in camera review of "all internal files and all electronic and social media communications of the law clerks and research attorneys" assigned to any judges or other participants in the disciplinary process in any phase of Kline's case. Misguided tweeting also got Arizona attorney, Rachel Alexander, into hot water during a disciplinary proceeding.[19] Alexander had been suspended for six months and a day as a result of certain ethical violations she committed in her handling of a RICO lawsuit. On appeal, the Arizona Supreme Court rejected Alexander's argument that "remorse" for her conduct was a mitigating factor that should reduce her punishment.[20] The Court pointed to the fact that, during the disciplinary hearing, Alexander "posted to her personal website and published on her Twitter account another person's column describing the disciplinary proceedings as 'nothing but a trumped-up, meritless witch hunt' that unfairly targeted Alexander for her conservative views."[21] Based at least in part on her tweets, the Court held that "[r]easonable evidence supports the panel's finding that Alexander is not remorseful."[22]

Admittedly, the cases described above are extreme examples, which tend to receive disproportionate media attention.[23] The problem with extreme examples is that most lawyers who read about them fail to identify with the bad behavior. They believe – in most cases correctly – that they would never do something as imprudent as posting their client's underwear on Facebook or tweeting inflammatory remarks about a pending case. Nevertheless, intelligent and cautious lawyers may inadvertently commit milder forms of Error No. 1. Consider whether the following behavior may be problematic:

• A sleep-deprived corporate associate posts a Facebook update complaining about working late on a closing for a demanding and unappreciative client.

(Continued on page 53)

May 2013

Page 53

(Continued from page 52)

- A lawyer posts about an off-color remark made by a judge during a court conference.
- A lawyer conducting legal research comes across a recent court decision she thinks is idiotic. She tweets a snarky comment about the decision to her Twitter followers. Unbeknownst to her, many lawyers in her firm routinely appear before the judge that issued the decision.
- A lawyer obtains an adjournment of a Friday court hearing claiming she has to leave town unexpectedly for a family emergency. The following Monday, she is tagged in Facebook photos of her best friend's bachelorette party in Las Vegas.

Some of these examples may violate specific ethics rules, while others probably do not. The larger question is whether the lawyers would reconsider their behavior if they knew their social media posts were being reviewed by clients, employers, colleagues, adversaries, or judges. That should be the default assumption when using social media.

## Error No. 2: "The Ethics Rules Don't Apply to Informal Social Media Activities"

The casual nature of social networking can create a false impression that it is exempt from the formal ethical rules that govern lawyer conduct. This misconception is compounded by the lack of clear guidance on how to apply existing ethics rules to social media. Most of our current ethics rules were created in the early days of the Internet, before anyone had heard of social media. As lawyers grow more dependent on the Internet and all it has to offer, bar associations and grievance committees are struggling to fit the square peg of the ethics rules into the round hole of social networking. This task becomes more challenging as social media platforms evolve and expand their features. One day, ethics lawyers were debating whether tweets should be regulated as advertisements or solicitations, given that the 140 character limitation makes it virtually impossible to include disclaimers.[24] The next day, they were debating whether lawyers can ethically accept LinkedIn endorsements, a feature that was introduced in September 2012.[25]

Leaders in the ethics world have also become stymied over whether the ethics rules should be updated to account for this increased reliance on technology. Some believe the ethics rules are hopelessly outdated and must be revised. Others believe the rules reflect high-level principles that can be interpreted and applied to new technologies.[26] This second school of thought places the burden primarily on bar associations and ethics committees to provide the necessary guidance on how to apply the existing rules to social networking. Yet, it is difficult for state and local ethics committees to keep pace with rapid technological changes. As a result, some ethics committees are reluctant to issue opinions on social media (or other technology-related subjects) out of concern that their opinions will quickly become outdated. [27] Even when ethics committees do tackle social media issues, they try to limit references to specific platforms, technologies or features, which may become obsolete within a few years. Consequently, ethics opinions on social media tend to focus on general, overarching principles, which may be of limited use to someone looking for concrete guidance. Given all this uncertainty, a lawyer trying to navigate the social media landscape can start to feel like a driver armed with a malfunctioning GPS unit loaded with a foreign roadmap.[28] Having said that, attorneys should be mindful of the following ethical pitfalls on social media.

#### **Advertising and Solicitation**

One of the biggest hazards for lawyers on social media is the potential to violate advertising or solicitation rules.[29] There are several reasons for this. First, advertising rules tend to be drafted broadly and can be interpreted to cover a variety of seemingly innocuous communications. Second, lawyers are generally less familiar with advertising rules than they are with rules they interact *(Continued on page 54)* 

May 2013

# MLRC MediaLawLetter

#### (Continued from page 53)

with on a daily basis, such as confidentiality rules. It is much easier for a well-intentioned lawyer to inadvertently violate an advertising rule online than to reveal client confidential information (although that happens too, as discussed below). Third, First Amendment issues may impact the enforceability or interpretation of advertising and solicitation rules, making it difficult to predict outcomes. Courts have held certain attorney advertising rules to be unconstitutional or have limited their application.[30] This area of constitutional law remains in flux, making the enforceability of certain advertising and solicitation rules uncertain.

A recent case from Virginia illustrates this last point. The case involved a Virginia criminal defense attorney, Horace Frazier Hunter, who writes for his law firm blog "This Week in Richmond Criminal Defense."[31] Most of Hunter's blog posts reported on the positive outcomes of cases he handled, although these were interspersed with some "generalized, legal posts and three discussions about cases that he did not handle."[32] The Virginia State Bar charged Hunter, *inter alia*, with violating ethical rules that prohibit advertisements that are likely to create an "unjustified expectation about the results the lawyer can achieve" and require disclaimers to be included on certain legal advertisements.[33] Hunter appealed the case to the Virginia Supreme Court, arguing that his blog posts constituted protected political speech under the First Amendment. The Court held that Hunter's blog constituted "commercial speech" and was, thus, subject to regulation by the state bar.[34]

One thing that the *Hunter* case makes clear is that reasonable minds can disagree over where the line should be drawn between commercial and non-commercial speech.[35] Consequently, a lawyer can cross that line without realizing it. A fundamental question that has not yet been answered is whether an attorney's social media site constitutes attorney advertising. Although ethics committees have long held that law firm websites constitute attorney advertising, [36] few so far have taken a position on social media. The opinions that exist focus - rightly in my view - on specific statements, rather than on whether social media sites, as a rule, constitute lawyer advertising. For example, a California ethics opinion issued in late 2012 analyzed five social media posts by an attorney to determine whether they violated the state's advertising rules.[37] Under the California rules, a communication qualifies as advertising if it concerns the lawyer's "availability for professional employment."[38] Applying that standard, the Committee concluded that a post stating "Case finally over. Unanimous verdict! Celebrating tonight." did not constitute a regulated "communication" under California's advertising rules.[39] By contrast, adding the phrase "Who wants to be next?" to a similar post transformed it into a regulated "communication," because it suggested the attorney's "availability for professional employment."[40] Likewise, posts that included statements such as "tell your friends to check out my website" and "call me for a free consultation" constituted "communications" under the advertising rules. On the other hand, a post announcing "Just published an article on wage and hour breaks. Let me know if you would like a copy." was not a "communication" because it did not "concern 'availability for professional employment," but merely related "information regarding an article that she has published and is offering to provide copies."[41]

Your mileage may vary depending on your jurisdiction. Slight variations in definitions or regulations could lead to different results. For example, in contrast to California's definition, the ABA Model Rules of Professional Conduct (the "RPCs") defines "Advertisement" as a "public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm."[42] In addition, even among states that have adopted the Model Rule, there may be significant differences in how advertisements are defined or regulated. Consider whether any of the following activities would violate the advertising or solicitation rules in your state:

• Excited after a string of courtroom victories, a lawyer hastily posts on Facebook "Just won another motion to dismiss! Looks like I'm on a roll." [43]

(Continued on page 55)

May 2013

Page 55

(Continued from page 54)

- A friend, wishing to be supportive and perhaps hoping for reciprocation, posts a glowing recommendation of a lawyer's legal services on LinkedIn.[44]
- An attorney who primarily practices Intellectual Property law includes "Intellectual Property Law" in LinkedIn's "specialties" field.[45]
- A lawyer retweets the following tweet from one of her clients without comment: "my lawyer just got me a huge settlement. She's the best lawyer in town!"[46]
- A landlord-tenant lawyer posting a response to a question in a chat room devoted to tenants' rights issues adds: "feel free to e -mail me directly if you have more questions about this issue or are looking for representation." [47]
- A personal injury lawyer searches on Twitter for tweets by victims of a recent mass disaster and tweets back "I have represented other victims of similar disasters. Contact me if you need a lawyer." [48]
- A lawyer offers a prize as an incentive to join his social media network.[49]

If an attorney's online communication is deemed to be an advertisement or solicitation, it may not necessarily be prohibited. It may, however, be subject to strict regulations, such as the inclusion of certain types of information, disclaimers or notices such as "Attorney Advertising." In addition, some jurisdictions require lawyers to get preapproval for advertisements, file copies with their local bar association, or maintain copies in their own files for several years. Complying with these rules may be overly burdensome, if not impossible, given the fast-moving pace of most social media activity. As California ethics attorney, Diane Karpman, has observed "[t]he mechanisms and basic ideas of social media are almost fundamentally incompatible with many states' rules on attorney advertising."[50] More than one commentator has noted that including a disclaimer in a tweet is virtually impossible: "A tweet has only 140 characters, so you can't comply with the disclosure rules and say anything meaningful . . . Some disclosures are longer than 140 characters."[51]

Given the lack of clear guidance, it may be tempting to rely on a marketing or social media consultant to ensure compliance with state advertising rules. This is generally a mistake. Consultants – even those with a law degree – are unlikely to understand or know how to apply the ethics rules. A young lawyer, Dannitte Mays Dickey, was publicly reprimanded based on statements he made in several online profiles, including describing himself as a "specialist," misstating his law school graduation date as 2005 instead of 2008, listing approximately 50 practice areas in which he had little or no experience, and making unsubstantiated statements about the quality of his services and comparisons to other lawyers' services.[52] According to the opinion, the lawyer "relied on company representatives who were lawyers and non-attorney web designers who assured him that the advertisements would comply with respondent's ethical requirements."[53] Such assurances may be comforting when you are building your online presence, but are meaningless when you are staring down the barrel of a disciplinary complaint.[54]

## Other Ethical Risks of Using Social Media

In addition to potential advertising violations, lawyers on social media face a wide range of ethical risks. These may include violating rules that protect client confidentiality, inadvertently creating attorney-client relationships, engaging in the unlicensed practice of law, violating rules about communicating with third parties who either are – or are not – represented by counsel, engaging in deception,[55] and more.

(Continued on page 56)

May 2013

## (Continued from page 55) Disclosing Client Confidential Information

It goes without saying that lawyers should not disclose confidential information relating to their clients on social media. Historically, the dual obligations of confidentiality and loyalty have been the hallmarks of the attorney-client relationship. Every jurisdiction has adopted a professional ethics rule protecting the confidentiality of client information. Yet, distinguishing between what is and is not a protected client confidence is not always simple. Many attorneys believe they can discuss public information about a client matter or even nonpublic information as long as they do not reveal the client's identity. Others may erroneously believe that client confidentiality is coextensive with attorney-client privilege.

Yet, the scope of client confidentiality is far broader than many attorneys realize. RPC 1.6, for example, extends the duty of confidentiality to any "information relating to the representation of a client." Even in jurisdictions that have narrowed the definition of confidential information, the duty of confidentiality extends far beyond the attorney-client privilege. In New York, for example, confidential information is defined to include "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."[56] These confidentiality rules apply equally to online and "real life" behavior. The main difference is that an indiscrete but private conversation with a close friend is less likely to come to light than a status update posted to 495 of your Facebook "friends." The other drawback of the Internet is that, once you put something up there, you can never really take it down. The evidence is there. Forever.

Blabbing about client information online can be a costly mistake. A notorious example involved Illinois public defender, Kristine Ann Peshek, who posted detailed blog entries about several of her cases in 2007 and 2008.[57] She referred to her clients either by first name, a derivative of their first name, or their jail identification number. In one post, she wrote "[t]his stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch."[58] In another, she wrote "Dennis,' the diabetic whose case I mentioned in Wednesday's post, did drop as court ordered, after his court appearance . . . . Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge . . . swearing he was clean."[59] Ms. Peshak was charged with improper disclosure of client confidential information and received a 60-day suspension in Illinois and reciprocal discipline in Wisconsin.[60] Although the disciplinary consequences were relatively light, the professional fallout was more significant. Not only was Ms. Peshek fired from her job of 19 years, but her name will forever be associated with this embarrassing incident.[61]

There is no doubt that Ms. Peshak's posts contained confidential information about her clients. But what about closer calls? Under the broad definitions of confidentiality, would it be unethical for an attorney to retweet an article about the anticipated corporate restructuring of a high profile corporate client? Are lawyers permitted to post Facebook updates on courtroom victories they achieve for their clients? The *Hunter* case, discussed above, takes a small step towards answering these questions. There, in addition to being charged with advertising violations, Hunter was charged with violating his duty of confidentiality under Rule 1.6 by posting information about his past cases. The Virginia Supreme Court held that, to the extent the information was publicly available, it was protected by the First Amendment and was not subject to state regulation. It is important to keep in mind, however, that this is just one decision by one state court. Unless you hope to become the next test case for the constitutional limits of client confidentiality, you should avoid posting anything on social media that falls within your state's definition of client confidential information. In many cases, this means refraining from posting even publicly-available information. While ethics commentators correctly advise lawyers to be familiar with privacy settings and other features,[62] the best practice is to steer clear of posting any client information without express written consent. Once client information has been posted on the Internet, even the most stringent privacy settings will not keep it secure inside the mythical "privacy bubble."

(Continued on page 57)

May 2013

Page 57

(Continued from page 56)

### Unintentionally Creating Attorney-Client Relationships

Attorneys who engage in social networking may inadvertently create prospective or actual attorney-client relationships. By doing so, these attorneys unwittingly assume duties of loyalty, confidentiality, and competence towards virtual strangers. Of course, similar risks have existed for as long as lawyers have attended cocktail parties or other social events, where casual conversations may lead to discussions about personal legal issues. In addition, the advent of lawyer websites in the 1990s, which allowed non-clients to submit unsolicited messages about their legal problems, created new opportunities for lawyers to inadvertently create attorney-client relationships.[63] Similar concerns also arose with Internet chat rooms, where attorneys could answer legal questions posed by laypersons in "real time." Ethics opinions on the subject caution lawyers not to offer legal "advice" or answer specific legal questions, but suggest that providing legal "information" may be permissible.[64] One such opinion elucidates the distinction between legal "advice" and legal "information" as follows:

Providing legal information involves discussion of legal principles, trends, and considerations – the kind of information one might give in a speech or newspaper article, for example. Providing legal advice, on the other hand, involves offering recommendations tailored to the unique facts of a particular person's circumstances. Thus, in discussing legal information, lawyers should be careful to emphasize that it is intended as general information only, which may or may not be applicable to an individual's specific situation.[65]

These same principles should apply to social media communications. The safest way to avoid forming an attorney-client relationship is to refrain from giving legal advice or answering specific legal questions. Using adequate disclaimers will help as well, but they will not override the substance of the communication itself.[66]

The consequences of inadvertently creating an attorney-client relationship online are serious. The unwelcome new relationship may create a conflict with an existing client that will – at best – necessitate an embarrassing conversation with the client, and could lead to the loss of an important or lucrative representation. In addition, the lawyer may face liability for failing to protect the new client's interest in some way, such as advising the client of an important deadline or necessary course of action.

Even if no formal attorney-client relationship is created, social media interactions may give rise to prospective client relationships, which are covered by RPC 1.18. Although a detailed discussion of that rule is beyond the scope of this article, a 2012 New York ethics opinion provides helpful guidance for lawyers attempting to navigate New York's version of RPC 1.18.[67] A threshold issue under Rule 1.18 is whether the individual involved qualifies as a "prospective client." As the New York opinion explains, a "prospective client" is one "who discusses with a lawyer 'the possibility of forming a lawyer-client relationship with respect to a matter," even though the discussion does "not result in a lawyer-client relationship."[68] The rule makes clear, however, that not everyone who communicates with a lawyer concerning a potential matter is a "prospective client." Specifically, the rule excludes "a person who communicates unilaterally to a lawyer without any reasonable expectation that the lawyer from handling certain material adverse representations."[69] Therefore, if a lawyer receives an unsolicited message on social media containing the details of a potential legal matter, the sender will likely not be considered a "prospective client."[70] If, however, the lawyer encourages the communication or continues to discuss the legal matter over the Internet, there is a much greater likelihood that the sender will be considered a "prospective client." [70] If, however, the lawyer encourages the communication or continues to discuss the legal matter over the Internet, there is a much greater likelihood that the sender will be considered a "prospective client." [70] If, however, the lawyer encourages the communication or continues to discuss the legal matter over the Internet, there is a much greater likelihood that the sender will be considered a "prospective client." [70] If, however, the lawyer encourages the communication or continues to discuss the legal matter over the Internet, there is a much greater likelih

Again, the consequences of triggering a prospective client relationship are serious. A lawyer who has had discussions with a prospective client about a matter: (1) "is restricted from using or revealing information learned in the consultation to the same extent *(Continued on page 58)* 

Р	age	58	
_			

May 2013

#### (Continued from page 57)

that a lawyer would be restricted with regard to information of a former client" and (2) "may not represent a client with materially adverse interests in the same or a substantially related matter if the information received from the prospective client could be significantly harmful to the prospective client in that matter" unless certain criteria are met.[71]

## Unauthorized Practice of Law

A lawyer whose social media practices put her at risk of forming attorney-client relationships is, by extension, at risk of committing unauthorized practice of law ("UPL"). The borderless nature of the Internet makes it easy to communicate with people all over the country and the world. An attorney might not know where all of her social media contacts are located. Although the Internet is global, however, "the practice of law is still bound by jurisdictional limits."[72] All U.S. jurisdictions have rules and, in some cases, criminal statutes that prohibit lawyers from practicing law where they are not licensed.[73] The same precautions that help lawyers avoid forming inadvertent relationships should protect them from inadvertently committing UPL. As noted above, lawyers should refrain from providing legal advice or answering specific questions posted by social media connections. Lawyers should also be careful not to hold themselves out as being available or willing to practice law outside the jurisdictions where they are licensed.

\* \* \*

Part II of this article will address the third and fourth errors of social networking: the misuse of social media as an investigatory or discovery tool and the failure to advise clients adequately about their own social media use. It will conclude with some practice tips on how to stay out of trouble on social media.

## <u>Notes</u>

[\*] Nicole Hyland is counsel to the Litigation Group and Professional Responsibility Group at Frankfurt Kurnit Klein & Selz PC; and is the vice-chair of the MLRC Ethics Committee.

[1] <u>http://en.wikipedia.org/wiki/Friendster</u>; *The Brief History of Social Media* [hereinafter Brief History], available at <u>http://</u>www.uncp.edu/home/acurtis/NewMedia/SocialMedia/SocialMediaHistory.html.

[2] Brief History, supra note 1.

[3] Before 2006, Facebook was available only to college students (2004) and high school students (2005). Id.

[4] See id.; Belinda Goldsmith, "Unfriend" Named Word of 2009, Reuters, Nov. 17, 2009, available at <u>http://www.reuters.com/</u> article/2009/11/17/us-words-unfriend-idUSTRE5AG09H20091117.

[5] Sannon Awsumb, *Social Networking Sites: The Next E-Discovery Frontier*, Bench & Bar of Minnesota, Vol. 66, No. 10, Nov. 2009, available at <u>http://www.mnbar.org/benchandbar/2009/nov09/networking.html</u>.

[6] Maeve Duggan & Joanna Brenner, *The Demographics of Social Media Users – 2012*, Feb. 14, 2013, available at http:// pewinternet.org/Reports/2013/Social-media-users/Social-Networking-Site-Users.aspx?view=all. The study focused on Facebook, Twitter, Instagram, Pinterist, and Tumblr. Facebook was found to be the most popular among all age groups.

(Continued on page 59)

May 2013

Page 59

(Continued from page 58) [7] Id.

[8] Robert J. Ambrogi, *ABA Survey Shows Growth in Lawyers' Social Media Use*, Aug. 16, 2012, available at <u>http://</u>www.lawsitesblog.com/2012/08/aba-survey-shows-growth-in-lawyers-social-media-use.html.

[9] Attorneys are not the only ones committing costly social media gaffes. In 2009, a North Carolina judge was publicly reprimanded for "friending" an attorney on Facebook and exchanging posts about a pending case. *Matter of Terry*, Inquiry No. 08-234, N.C. Jud. Standards Comm. (2008), available at <u>http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf</u>. By contrast, a Texas judge recently handled an unwelcome *ex parte* communication on Facebook in textbook fashion, by refusing to engage in the discussion, immediately disclosing the message to counsel, and reporting it to the appropriate authorities. See Stephanie Francis Ward, *Judge's Facebook Friendship Didn't Indicate Bias*, State Appellate Court Rules, ABA Journal, May 21, 2013, available at

http://www.abajournal.com/news/article/jurists facebook friendship doesnt indicate bias says appellate court/. Several ethics opinions from around the country have addressed judges' use of social media and have reached varying conclusions. *Compare* Okla. Jud. Ethics Adv. Panel Op. 2011-3 (2011) (judges may not "friend" anyone who appears them in court), Mass. Jud. Ethics Comm. Op. 2011-6 (2011) (judges may not "friend" lawyers who may appear before them), Cal. Judges Ass'n Jud. Ethics Comm. Op. 66 (2010) (judges may not "friend" lawyers with cases pending before them), *and* Fla. Jud. Ethics Adv. Comm., Formal Op. 2009-20 (2009) (judges may not "friend" lawyers who appear before them), *with* ABA Formal Op. 462 (2013) (social media connection with a lawyer, absent other connections, will not generally require recusal), Md. Jud. Ethics Comm., Formal Op. 2012-07 (2012) (same), Ohio Bd. Of Comm'rs on Grievances and Discipline, Formal Op. 2010 -7 (2010) (judges may have social media connections with lawyers as long as relationship otherwise comports with ethics rules), Ky. Jud. Ethics Comm., Formal Op. JE-119 (2010) (judges should consider whether social media connections with lawyers, along with other factors, require disclosure or recusal), S.C. Jud. Dep't Adv. Comm. on Standards of Jud. Conduct, Op. 17-2009 (magistrate judge may have social media connections with lawyers as long as they do not discuss anything related to judge's judicial position), and N.Y. Jud. Ethics Comm., Informal Op. 08-176 (2009) (approving judges' use of social media but advising appropriate discretion).

[10] Nicole Hyland, *The Ethics of Social Media Use*, Legal Ethics Forum, Jan. 14, 2013, available at <u>http://</u>www.legalethicsforum.com/blog/2013/01/prudent-social-media-practices-for-lawyers.html.

[11] While the main focus of this article is the application of legal ethics rules, this principle also applies to other rules and laws that govern online behavior, such as privacy, publicity, intellectual property, and defamation laws. Attorneys should be careful to comply with all such substantive laws, as well as any social media policies adopted by their employers and terms of service imposed by the social media platforms themselves.

[12] Naturally, there is significant overlap among the four categories. Error No. 1 can lead an attorney directly into an ethical violation, thereby committing Error No. 2. In addition, many instances of Error No. 3 are subsets of Error No. 2 – in other words, lawyers may misuse social media as an investigatory or discovery tool in ways that violate the ethics rules.

[13] Image courtesy of Dave Hoffman, available at <u>http://www.flickr.com/photos/buriednexttoyou/5095255302/in/set-72157622392282137/</u>.

[14] David Ovalle, *Lawyer's Facebook Photo Causes Mistrial in Miami-Dade Murder Case*, The Miami Herald, Sep. 13, 2013, available at <a href="http://www.miamiherald.com/2012/09/12/2999630/lawyers-facebook-photo-causes.html">http://www.miamiherald.com/2012/09/12/2999630/lawyers-facebook-photo-causes.html</a>.

(Continued on page 60)

May 2013

(Continued from page 59) [15] See id.

[16] John Milburne, Kansas Court Staffer Suspended Over Kline Tweets, A.P., Nov. 17, 2012, available at <a href="http://www.kansascity.com/2012/11/16/3920875/kansas-court-staffer-suspended.html">http://www.kansascity.com/2012/11/16/3920875/kansas-court-staffer-suspended.html</a>; Steve Fry, Kline Attorney Wants Probe Into Law Clerk's Anti-Kline Tweets in Supreme Court Hearing, Nov. 16, 2012, Topeka Capital Journal, available at <a href="http://cjonline.com/news/2012-11-16/kline-attorney-wants-probe-law-clerks-anti-kline-tweets-supreme-court-hearing">http://cjonline.com/news/2012-11-16/kline-attorney-wants-probe-law-clerks-anti-kline-tweets-supreme-court-hearing</a>; Jack Cashill, Court Clerk Suspended After Tweeting Pro-Abortion Comments, WND, Nov. 16, 2012, available at <a href="http://www.wnd.com/2012/11/court-clerks-suspended-after-tweeting-pro-abortion-comments/">http://cjonline.com/2012/11/court-clerks-anti-kline-tweets-supreme-court-hearing</a>; Jack Cashill, Court Clerk Suspended-after-tweeting-pro-abortion-comments/.

[17] Fry, supra note 16 (emphasis added).

[18] <u>http://klinecasefile.com/documents/Kline%20-%20Motion%20to%20Stay%20Action%20+%20Appendices%20-%2001-17-2013.pdf</u>, at 2.

[19] *Matter of Alexander*, No. SB-12-0039-AP (Az. 2013), available at <u>http://www.azcourts.gov/Portals/0/OpinionFiles/</u> Supreme/2013/SB-12-0039-AP.pdf.

[20] Id. at 35-36.

[21] *Id.* at 36.

[22] *Id.* at 1.

[23] *Id.* Another case that received significant media attention concerned a Florida lawyer, Sean Conway, who agreed to a public reprimand for posting negative comments online about a judge. *See* John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. Times, Sept. 9, 2009, available at <a href="http://www.nytimes.com/2009/09/13/us/13lawyers.html?r=0">http://www.nytimes.com/2009/09/13/us/13lawyers.html?r=0</a>. Frustrated with what he viewed as the judge's biased attitude against criminal defendants, Conway posted a blog entry calling her an "evil, unfair witch" with an "ugly condescending attitude." *Id.* The Florida Supreme Court upheld the sanction, holding that Mr. Conway's comments were not protected by the First Amendment. *Id.; see also* John Kindley, *Judges to blogging lawyers: Don't call us 'Evil, Unfair Witches' or we'll put a hex on you*, Sept. 13, 2009, available at <a href="http://www.peoplevstate.com/?p=258">http://www.peoplevstate.com/?p=258</a>; Steven Seidenberg, Seduced: *For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous*, ABA Journal, Feb. 1, 2011, available at <a href="http://www.abajournal.com/magazine/article/seduced\_for\_lawyers\_the\_appeal\_of\_social\_media\_is\_obvious\_dangerous/">http://www.abajournal.com/magazine/article/seduced\_for\_lawyers\_the\_appeal\_of\_social\_media\_is\_obvious\_dangerous/</a>.

[24] See, e.g., Seidenberg, supra note 23.

[25] See, e.g., Rachel M. Zahorsky, *Do LinkedIn Endorsements Violate Ethics Rules*, ABA Journal, May 21, 2013, available at <a href="http://www.abajournal.com/news/article/do linkedin endorsements violate legal ethics/">http://www.abajournal.com/news/article/do linkedin endorsements violate legal ethics/</a>; Andrew Perlman, *The Ethics of Accepting LinkedIn Endorsements*, Legal Ethics Forum, Jan. 3, 2013, available at <a href="http://www.legalethicsforum.com/blog/2013/01/the-ethics-of-accepting-linkedin-endorsements.html">http://www.legalethicsforum.com/blog/2013/01/the-ethics-of-accepting-linkedin-endorsements.html</a> (cautioning lawyers against accepting endorsements outside their competencies or conditioned on reciprocity).

[26] For example, the ABA Commission on Ethics 20/20, which was formed specifically to review the ABA Model Rules of Professional Conduct ("RPCs") in light of technological advances, proposed no revisions to Rule 7.2, which governs lawyer (Continued on page 61)

May 2013

Page 61

#### (Continued from page 60)

advertising, and virtually no substantive revisions to its comments. *See* Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, Touro L. Rev. Vol. 28: No. 1, Art. 7, at p. 161 (2012). According to the article a "co-chairwoman of the ABA Commission explained that '[t]hough the Model Rules were written before these technologies had been invented, their prohibition of false and misleading communications apply just as well to online advertising and other forms of electronic communications that are used to attract new clients today." Id. (citation omitted). Some states have begun to take modest steps towards revising their rules to account for new technologies. In April 2013, for example, the Pennsylvania Disciplinary Board proposed changes to the ethics rules based on recommendations by the ABA Commission. *See* Notice of Proposed Rulemaking (Apr. 13, 2013), available at <u>http://www.pabulletin.com/secure/data/vol43/43-15/652.html</u>.

[27] Although numerous ethics opinions discuss websites, email, chat rooms, and other Internet-based activities, only a handful of opinions deal directly with social networking. Given the wide range of ethical issues raised by social networking, many questions remain unanswered. *See*, e.g., Or. Op. 2013-189 (seeking to connect on social media with party represented by counsel violates "no contact" rule); Cal. State Bar Comm. on Prof'l Resp. and Conduct ("Cal") Formal Op. 2012-186 (2012) (determining whether social media posts violate attorney advertising rules); N.Y. City Bar Ass'n Comm. on Prof'l and Jud. Ethics ("NYCBA") Formal Op. 2012-2 (2012) (addressing attorney use of social media to research jurors); N.Y. State Bar Ass'n Comm. on Prof'l Ethics ("NYSBA") Op. 873 (2011) (addressing whether lawyers may offer prize to people to join lawyers' social network); ABA Formal Op. 10-457 (2010) (online activities that promote law practice constitute advertising); NYSBA Op. 843 (2010) (accessing public portion of individual's social media network does not violate ethics rule prohibiting deception); NYCBA Formal Op. 2010-2 (2010) (attorney may use real name and profile to send "friend request" to unrepresented party without disclosing purpose for seeking information); Phil. Bar Ass'n Prof'l Guidance Comm. ("Phil.") Op. 2010-6 (2010) (addressing ethical implications of social media interactions); S.C. Ethics Adv. ("S.C.") Op. 09-10 (2009) (discussing ethics of client testimonials on social media sites such as LinkedIn); Phil. Op. 2009-02 (2009) (lawyer seeking access); Or. State Bar Legal Ethics Comm. ("Or.") Op. 2005-164 (2005) (accessing opposing party's public website does not violate "no contact" rule).

[28] Attorneys in a supervisory position also face the daunting task of figuring out how much responsibility they have for supervising the social media activities of subordinate lawyers and nonlawyers. *See* RPC 5.1 (supervisory lawyers must make "reasonable efforts to ensure that other lawyers in the law firm conform to these Rules"); RPC 5.3 (supervisory lawyers "shall adequately supervise the work of the nonlawyer, as appropriate").

[29] RPCs 7.1 through 7.5 relate to lawyer advertising and solicitation. Some form of the RPCs have now been adopted by 49 states and the District of Columbia. California is the sole exception, but has its own advertising and solicitation rules at Cal. Bus. & Prof. Code §§ 6157-6159.2 and Cal. Rules of Prof. Conduct 1-400. Individual versions of the rules in each state can vary significantly, so attorneys should look to their own state rules for guidance.

[30] See, e.g., Shapiro v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (ban on direct mail solicitations held unconstitutional); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (attorney advertising constitutes commercial speech).

[31] The April 2013 issue of MLRC MediaLawLetter included an article about the decision in *Hunter v. Virginia State Bar* entitled "Virginia Supreme Court Rules Lawyer Blog is Commercial Speech," by James L. McGuire.

[32] Hunter v. Virginia State Bar, No. 121472, 2013 WL 749494, \*6 (Va. Feb. 28, 2013).

(Continued on page 62)

May 2013

(*Continued from page 61*) [33] *Id.* at \*3.

[34] *Id.* at \*5. It is important to note that *Hunter* does not hold that all lawyer blogs constitute commercial speech. Many lawyer blogs lack the characteristics that convinced the majority in Hunter to treat the blog as legal advertising. *See, e.g.*, Richard Zitrin, *Viewpoint: Court Struggles to Regulate Attorney Blogging*, The Recorder, May 17, 2013, available at <a href="http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202600303577&Viewpoint\_Court\_Struggles\_to\_Regulate\_Attorney\_Blogging&slreturn=20130422121421">http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202600303577&Viewpoint\_Court\_Struggles\_to\_Regulate\_Attorney\_Blogging&slreturn=20130422121421</a> (noting that Hunter is "very unusual, if not unique, on its facts").

[35] Two Virginia Supreme Court justices, Lemons and McClanaham, dissented from the majority opinion, arguing that Hunter's blog posts "are political speech that is protected by the First Amendment."

[36] *See, e.g.*, ABA Formal Op. 10-457 (Information that typically appears on lawyer websites constitutes "communication about the lawyer or the lawyer's services" and is, therefore, "subject to the requirements of Model Rule 7.1").

[37] Cal. Formal Op. 2012-186, available at <u>http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202012-186%20%2812</u> -21-12%29.pdf.

[38] Cal. Rules of Prof'l Conduct, R. 1-400.

[39] Cal. Formal Op. 2012-186, at 4.

[40] *Id*.

[41] *Id.* at 6.

[42] RPC 1.0(a).

[43] One might argue that such a post could be misleading if it is "presented in a way that might give the reader the unjustified expectation of getting the same result." Thomas A. Gillgian, Jr., *Social Networking Sites and the Ethical Issues They Create*, DRI Today, Sep. 12, 2011, available at <u>http://dritoday.org/feature.aspx?id=143</u> (citing RPC 7.1, cmt. 3).

[44] Lawyers may be responsible for ensuring that third party content complies with the relevant advertising rules, particular where the lawyer either controls the content or relies on it in some way. *See, e.g.*, S.C. Op. 09-10.

[45] Several jurisdictions prohibit attorneys from using words such as "specialist," "certified," or "expert" unless they possess specific qualifications. *See, e.g.,* N.Y. Rules of Prof'l Conduct, R. 7.4(a) (2011); Az. Comm. on Ethics & Prof'l Resp. ("Az.") Informal Op. 97-04 (1997) (lawyer may not state in an online chat that he "specializes" in an area of law unless he is certified by the state bar in that practice area). On the other hand, a lawyer is generally permitted to "communicate the fact that the lawyer does or does not practice in particular fields of law." RPC 7.4(a).

[46] This statement may be prohibited by rules that bar lawyers from making unsubstantiated comparisons to other lawyers' services. See Susan Cartier Liebel, *12 Social Media Ethics Issues for Lawyers*, May 11, 2010, available at <u>http://</u>solopracticeuniversity.com/2010/03/11/a-dozen-social-media-ethics-issues-for-lawyers/.

(Continued on page 63)

May 2013

Page 63

## (Continued from page 62)

[47] A New York ethics opinion concluded that, although lawyers "may provide general answers to legal questions" in Internet chat rooms, they may not "engage in 'solicitation' in violation of Rule 7.3." NYSBA Op. 899 (2011). Thus, a lawyer may not "post a proposal offering his or her legal services" on a chat room or "post a response that encourages everyone on the site to retain the lawyer." *Id.* Surprisingly, the opinion does not address whether answering questions in a chat room may give rise to an actual or prospective attorney-client relationship. This issue is discussed further below.

[48] Most states' solicitation rules would prohibit this communication, unless the recipient was a former or current client or had some other prior relationship with the tweeter. *See* Liebel, *supra* note 46. A California ethics opinion addressed similar conduct by a lawyer in an Internet chat room dedicated to victims of a mass disaster. Cal. Formal Op. 2004-166 (2004).

[49] This was the subject of a New York ethics opinion, which concluded that offering a prize may constitute an "advertisement" if the "primary purpose of the prize offer is the retention of the attorney." NYSBA Op. 873. If the offer is targeted to specific recipients and if a significant motive is pecuniary gain, it will also constitute a "solicitation" and be subject to additional requirements. *Id.* 

[50] Seidenberg, *supra* note 23 (quoting California ethics attorney Diane Karpman).

[51] *Id.; see also* Lackey & Minta, supra note 26, at 150; Thomas A. Gillgian, Jr., *Social Networking Sites and the Ethical Issues They Create*, DRI Today, Sep. 12, 2011, available at <u>http://dritoday.org/feature.aspx?id=143</u> ("If a tweet regarding a trial victory constitutes an advertisement, it would be nearly impossible to incorporate a state-specific disclosure or disclaimer in 140 characters.").

[52] Matter of Dickey, No. 27090 (S.C. 2012), available at http://www.sccourts.org/opinions/displayOpinion.cfm?caseNo=27090.

[53] *Id*.

[54] In Mr. Dickey's case, the outcome would likely be the same, regardless of whether his statements constituted "advertisements." Any content posted by lawyers on social media must not be false or deceptive. *Compare* RPC 7.1(a)(1) (prohibiting advertisements that contain "statements or claims that are false, deceptive or misleading), *with* RPC 8.4(c) (prohibiting lawyers from engaging generally in "conduct involving dishonesty, fraud, deceit or misrepresentation").

[55] These last two examples are covered in Part Two of this article, which will discuss the use of social media as an investigatory and discovery tool. In addition, certain fee-based services, such as attorney referral and crowdsourcing websites, also raise ethical issues about fee-splitting. Those issues are beyond the scope of this article.

[56] N.Y. Rule of Prof'l Conduct, R. 1.6. It expressly excludes "(i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." *Id.* 

[57] *Matter of Peshek*, Complaint, No. 6201779 (Wis. 2009) [hereinafter Peshek Complaint], available at <u>https://www.iardc.org/09CH0089CM.html.</u>

[58] *Id*.

(Continued on page 64)

May 2013

(Continued from page 63) [59] Id.

[60] In re Disciplinary Proceedings against Kristine Ann Peshek, No. 2011AP909–D, (Wis. 2011), available at <u>http://</u>caselaw.findlaw.com/wi-supreme-court/1572272.html.

[61] Peshek Complaint, supra note 57.

[62] *See*, e.g., Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, ABA, July 28, 2011, available at <u>http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html</u> (discussing privacy settings and noting that "[t]o effectively protect client and other confidential information, lawyers need to be . . . familiar with how each social media tool or application functions").

[63] Ethics opinions recommend using "click though" disclaimers stating that the website content does not constitute legal advice and that no attorney-client relationship is formed as a result of any communications that occur through the website. *See, e.g.*, ABA Formal Op. 10-457 (discussing risk of creating attorney-client relationship through attorney website). *But see* Cal. Formal Op. 2005-168 (2005) (disclaimer may not be sufficient to prevent formation of attorney-client relationship); NYCBA Formal Op. 1998-2 (1998) (use of a "disclaimer may not necessarily serve to shield Law Firm from a claim that an attorney-client relationship was in fact established by reason of specific on-line communications"); Utah State Bar Ethics Op. 96-12 (1997) (attorney-client relationship cannot be disclaimed where other indicia of relationship exist).

[64] *See, e.g.*, Fla. State Bar Comm. on Advertising, Adv. Op. A-00-1 (2010) (responding to specific legal questions online may create attorney-client relationship); D.C. Bar Ass'n ("D.C.") Ethics Op. 316 (2002) (lawyer answering questions in chat room should avoid giving legal advice); Az. Ethics Op. 97-04 (1997) (lawyers should not answer specific legal questions online, but may provide general information); Ill. State Bar Ass'n Comm. on Prof. Conduct Op. 96-10 (1997) (lawyers giving legal advice in chat rooms "should be mindful that the recipients of such advi[c]e are the lawyer's clients, with the benefits and burdens of that relationship").

[65] D.C. Ethics Op. 316 (2002).

[66] ABA Formal Op. 10-457 (disclaimer may be "undercut" if lawyer acts "contrary to its warning").

[67] See NYCBA Formal Op. 2012-03 (2012). The opinion does not, unfortunately, address whether and to what extent social media interactions may implicate Rule 1.18.

[68] *Id*.

[69] *Id*.

[70] *See, e.g.*, S.D. Bar Ass'n Ethics Op. 2006-1 (2006); Az. Ethics Op. 04-02 (2004) (no duty of confidentiality to individuals who unilaterally email information to attorneys). *But see* ABA Formal Op. 10-457 (law firm website that invites submission of information may give rise to prospective client relationship); N.H. State Bar Ass'n Ethics Op. 2009-2010/1 (2009) (law firm websites that invite members of the public to email attorneys may trigger prospective client duties); Mass. State Bar Ass'n Op. 07-01 (in absence of website disclaimer, unsolicited email sent through a law firm website imposes duty of confidentiality).

(Continued on page 65)

MLRC MediaLawLette	er
--------------------	----

May 2013

(Continued from page 64) [71] NYCBA Op. 2012-03.

[72] Lackey & Minta, *supra* note 26, at 162.

[73] *See, e.g.*, RPC 5.5(a) (prohibiting lawyers from practicing "in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction"); N.Y. Jud. L. § 478 (making the unauthorized practice of law a criminal violation).