



MEDIA LAW LETTER

Reporting Developments Through May 25, 2016

MLRC

From the Executive Director's Desk.....02
Apple and U.S. Attorneys Square Off at MLRC Digital Conference

MLRC Media Law Conference Program.....36

LIBEL & PRIVACY

D.C. Cir. D.C. Circuit Decides Long-Running Action In Favor Of Non-Profit.....07
Rejects Libel Claim By Serbian Billionaire
Milan Jankovic v. International Crisis Group

S.D.N.Y. Documentary Interviewee Hit With Sanctions for Making False Allegations
Against Center for Investigative Reporting.....12
Almeciga v. Center for Investigative Reporting

INTELLECTUAL PROPERTY

Cal. App. Court Utilizes Copyright-Like Standard of Substantial Similarity in
Affirming Dismissal of Idea Submission Claim.....17
Ryder v. Lightstorm Entertainment

ACCESS

Fla. Cir. Judge Denies Defense Motion to Seal Court Records.....21
Motion Included Psych Professor's Testimony on Juror Bias
Florida v. Lopez

D.C. Cir. Court Rejects FIOA Suit to Obtain Full Senate "Torture Report"24
Congress Never Relinquished Control of Full Report
ACLU v. CIA

NEWSGATHERING

NTIA Drone Privacy Best Practices Include Protections for Journalists.....28

INTERNET

Legal Frontiers in Digital Media 2016: Beyond the Crypto Conversation.....30

M.D. Fla. Company States Claim Against Google for De-Indexing Its Websites.....34
Court Rejects Section 230 and First Amendment Defenses
e-ventures v. Google

From the Executive Director's Desk

Apple and U.S. Attorneys Square Off at MLRC Digital Conference

And Bloomberg and Koch Weigh In On Student Speech

As I wrote in my last column, we were very happy to have quickly pivoted and put together a very timely program on the Apple/FBI San Bernardino encryption confrontation at our Digital Law Conference held last week in Mountain View, Ca. By all accounts, it was a fantastic panel. Though at times it was heated and certainly gave rise to an intense articulation of opposing views, it was throughout very professional and collegial.

Ted Boutrous of Gibson Dunn, who represented Apple in the litigation, and Daniel Kahn Gilmour, a Senior Staff Technologist of the ACLU, enthusiastically argued the Apple side of the case, arguing that the Government could not and should not force Apple to write code to enable the FBI to get access to a allegedly vital iphone to get evidence against terrorists in the case. On the contrary, U.S. Attorney Eileen Decker for the Central District of California, the office which handled the dispute for the Government, and Stephen Larson, a former federal judge now in private practice, who represented the victims in the case, contended that this situation was exactly what the All Writs Act was meant to apply to and that the need to get evidence and track terrorists made it paramount for the FBI to get inside the iphone. Somewhere in the middle was Jim Dempsey, Executive Director of the Berkeley Center for Law & Technology, our partner in putting on the Conference. And moderating the panel was Sarah Jeong, a contributing editor of Vice Motherboard who covered the case, and who handled the panelists with a deft touch and was totally up on the legal theories of the case.



George Freeman



U.S. Attorney Eileen Decker and Ted Boutrous of Gibson Dunn. Though at times the discussion was heated and certainly gave rise to an intense articulation of opposing views, it was throughout very professional and collegial.

It was the first public gathering of these adversaries since their appearances in court during the now-withdrawn case. And, as such, it provided a wonderful public airing of both the public policy arguments and the more technical (if not arcane) legal niceties.

Ted Boutrous began by explaining that any new



The Crypto-Controversy panel, left to right: Sarah Jeong, Hon. Eileen M. Decker, Theodore J. Boutros, Jr., Hon. Stephen G. Larson, Daniel Kahn Gillmor and Jim Dempsey

Credit: Cyrus Farivar/Ars Technica

(Continued from page 2)

code written by Apple for this iPhone would have the potential of opening up lots of other iPhones, and that such a code could get into the hands of people other than legitimate Government agents, perhaps even terrorists. As such, any code could pose a serious security risk. He added that Congress was in the midst of debating a bill that would require “back door access” to such iPhones, and that a court order requiring access in this case should not be allowed to overrule the Congressional debate on the topic. He also noted that any compelled order would go directly against the fundamental values of Apple, to keep such customer information secure and confidential.

Judge Larson countered that one “can’t hide criminal information anywhere, including on your iPhone,” and noted that the search warrant application was appropriate and had been ruled so by a judge. Hence, he argued, the court order was being “frustrated” by Apple. He contended that the All Writs Act was an enabling statute to enforce exactly such orders, and that in this case the court simply needed Apple’s help to help enforce the order.

Boutros responded that in no case since the origin of the All Writs Act in 1789 was the Act used in a manner approaching this. He said that far more than “filling a gap”, the court was creating a mechanism to carry out the order. Worse, he argued that the mechanism compelled speech, violated basic company policy and was creating security risks to its customers and potentially the country.

U.S. Attorney Decker weighed in on the argument about the All Writs Act, claiming that it was intended to be fluid in effectuating orders and that it ought to apply to the evolving needs of the court. Going back to Aaron Burr, she contended that it had long compelled people to do things, including writing codes.

Jim Dempsey focused on the reasonableness of what the order sought to compel. He said, on the one hand, that the labor to be used to produce the code was not unreasonable for a company the size of Apple. On the other hand, he emphasized that it would be unreasonable to force

(Continued on page 4)

(Continued from page 3)

Apple to sign a code against its basic policy and values; he added that the company had made a huge commitment to security in an insecure world, and that people ought to be able to rely on that commitment to security.

On the First Amendment point, Boutrous noted that the Government's compelling speech was no different constitutionally than Government's preventing speech, a classic prior restraint. He analogized that telling Apple to write a code was no different than ordering a journalist to write an article the Government wanted, which the reporter feared would harm people.

And so it went. In the end, both sides claimed victory, Apple because it didn't have to create the code, the Government because it ultimately got into the iPhone. I should note no one asked or answered what was the supposedly critical information the FBI thought it would get from this one phone, nor whether they succeeded in getting it – and the Government undoubtedly wouldn't have answered those questions even if asked.

In the end, however, most attendees thought the debate had been informative, engaging and on a high level. And in keeping with the MLRC's mission, the program clearly was a vehicle for greater understanding on what will inevitably be an ongoing, contentious issue.

* * *

The column I received the most response to so far was one I wrote last November entitled "[Free Speech in Jeopardy on Campuses](#)." It discussed the trend at our colleges and universities of punishing or banning unpopular and politically incorrect speech, providing "safe spaces" for students to keep them immune from ideas they don't share and protecting them from having to grapple with contrary thoughts and ideologies in the marketplace of ideas.

My article pointed to the incident at the University of Missouri where demonstrators sought to shut down unpopular speech and where a faculty member tried to ban a press photographer from viewing an otherwise public meeting. And sadly, it took to task my alma mater Amherst College for seeking to terminate Lord Jeffrey Amherst as the College's mascot for the sin – while at war close to 250 years ago – of heading the forces which gave smallpox-laden blankets to the enemy Indians. And it bemoaned the fact that all this was taking place in the academy – which if anywhere – should be the bedrock of free speech and debate between contrary viewpoints.

I note this because just last week I came across an article in the Wall Street Journal written by two (somewhat) richer and very strange political bedfellows: former New York Mayor Michael Bloomberg and conservative billionaire Charles Koch which made essentially the

On the First Amendment point, Boutrous noted that the Government's compelling speech was no different constitutionally than Government's preventing speech, a classic prior restraint.

(Continued on page 5)

(Continued from page 4)

same points, albeit much more eloquently. The article's lede was "Our advice is this: Stop stifling free speech and coddling intolerance for controversial ideas, which are crucial to a college education – as well as to human happiness and progress." It went on: "Across America, college campuses are increasingly sanctioning so-called "safe spaces," "speech codes," trigger warnings," "microaggressions" and the withdrawal of invitations to controversial speakers. By doing so, colleges are creating a climate of intellectual conformity that discourages open inquiry, debate and true learning."

Indeed, I teach at journalism schools, and just recently was advised I should give such trigger warnings before discussing subjects which might be sensitive or uncomfortable for students. For example, give them forewarning that race might come up in my teaching of *Times v. Sullivan*, that rape might come up in lecturing about invasion of privacy, or that homosexuality might be discussed when categorizing what terms may be defamatory. In a journalism school. Guess what? No way!

Bloomberg and Koch cited Salman Rusdie as observing that without the freedom to offend, freedom of expression ceases to exist. And they quoted Frederick Douglas saying in 1860 that "To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker."

They went on to argue that "this new dynamic...threatens not only the future of higher education, but also the very fabric of a free and democratic society", noting that the purpose of a college education "isn't to reaffirm students' beliefs" but, rather, to "challenge, expand and refine them – and send students into the world with minds that are open and questioning, not closed and self-righteous", better to prepare them for a diverse, pluralistic society.

The authors interestingly point out that many ideas which have become mainstream, such as women's suffrage, equal rights for all, and, more recently, same sex marriage, were once very unpopular minority views held to be heinous and offensive by many. It was the wide-open and robust debate which Justice Brennan, the Supreme Court and our country's First Amendment ethos were committed to which allowed for such change and progress – dialogue which will disappear in this new campus culture. Bloomberg and Koch conclude that the lack of debates and the freezing of uncomfortable speech will make social progress all the harder to achieve. They point out that "an unwillingness to listen to those with differing opinions is already a serious problem in America's civic discourse", and that this will only get worse if debate is disfavored among the young.

It's hard to argue with any of this, and, indeed they paint a glum picture. The only bright side is that in this inanity we see again the importance and the brilliance of the First Amendment and its principles – and hope that, as so often before in our history, it will overcome the short-run obstacles placed in its path and prevail.

We welcome responses to this column at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.



MLRC Media Law Conference

September 21-23, 2016 | Reston, Va.

***Registration for the MLRC
Media Law Conference is now open.***

In addition to the usual timely and topical breakouts and boutiques, this year's conference will feature plenaries commemorating the 25th anniversary of the Rodney King case – looking at both the copyright/fair use/First Amendment and police/press aspects; a Fred Friendly hypothetical case program starring Washington insiders on the eve of the election; a panel of once active MLRC members who are now federal judges; Floyd Abrams talking about his new book, "Why the First Amendment Matters"; as well as a rousing game of Family Feud: Journalism Edition; and a twist on the Next Big Thing, looking at the hits and misses of NBT sessions of the last ten years.

The full [Program](#) is also now available.

We hope you will [register soon](#).

Sponsorship opportunities are still available. If you have any questions, please feel free to contact George Freeman gfreeman@medialaw.org or Dave Heller (dheller@medialaw.org).

D.C. Circuit Decides Long-Running Action In Favor Of Non-Profit

Rejects Libel Claim By Serbian Billionaire

By Thomas Curley

The D.C. Circuit has affirmed the grant of summary judgment in a long-running defamation action which pitted a Serbian billionaire against a non-profit group devoted to promoting international peace and stability. [*Milan Jankovic a.k.a. Philip Zepter v. International Crisis Group*](#), 2016 U.S. App. LEXIS 8552 (D.C. Cir. May 10, 2016).

Although the action did not involve a media defendant, the decision by the Court of Appeals reaffirmed the D.C. Circuit's robust commitment to the protection of speech involving matters of public concern in the context of the limited purpose public figure doctrine, the quantum of proof necessary to establish actual malice, and the protection of confidential sources.

Background

In 2004, Philip Zepter sued the International Crisis Group following the issuance of a report by the non-profit organization which questioned the degree to which wealthy Serbian businessmen were exerting influence over that country's fledgling democracy.

In particular, Crisis Group observed that certain businessmen, which it described as oligarchs, were believed to have amassed wealth and power during the era of strongman Slobodan Milosevic, and continued to remain influential as Serbia attempted a turbulent transition to democratic rule.

The Crisis Group publication referenced more than a dozen such businessmen and their companies in passing, Zepter among them. Zepter contended that his inclusion in such a list was defamatory, falsely implying Zepter was a supporter of Milosevic who had benefitted financially from his association with the now-disgraced political leader.

As the Court of Appeals framed the implication, "a reasonable reader could construe the statement as asserting that Philip Zepter, personally, was a crony of Milosevic who supported the regime in exchange for favorable treatment."

Although it has faded from prominence in light of more recent conflicts, in the 1990s the eyes of the international community were focused upon the former Yugoslavia as it devolved

Although the action did not involve a media defendant, the decision by the Court of Appeals reaffirmed the D.C. Circuit's robust commitment to the protection of speech involving matters of public concern.

(Continued on page 8)



Founded by diplomats from various countries including the United States, the non-profit group had analysts in war-torn areas and regularly published lengthy reports addressing local conditions and making recommendations.

(Continued from page 7)

into several separate countries in a series of violent disputes related to the drawing of national boundaries and the treatment of ethnic minorities within them.

Milosevic, an ex-communist turned nationalist, became Serbia's dominant political figure and engaged in bloody conflicts with his neighbors which prompted the United States to impose financial sanctions on his regime and triggered a NATO bombing campaign.

Milosevic was driven from office in a popular uprising in 2000 and a reformist parliament and new prime minister, Zoran Djindjic, ultimately took power. However, the violence and instability continued. Djindjic would be assassinated in 2003; Milosevic was extradited to the Hague to stand trial on war crimes, but died in prison of a heart attack.

At the time of the challenged publication in 2003, Crisis Group was closely monitoring events in the former Yugoslavia consistent with "its mission to influence policymakers and to prevent and resolve deadly conflict." *Jankovic* at *3. Founded by diplomats from various countries including the United States, the non-profit group had analysts in war-torn areas and regularly published lengthy reports addressing local conditions and making recommendations.

In Serbia, Crisis Group wrote of the "inability of the post-Milosevic Serbian government to achieve political and economic reform," including with respect to the continuing "influence of wealthy businessmen, some of whom were considered to have been closely connected to [the] power structures" of the old regime. *Id.* at *4. In short, the "concern [expressed by Crisis Group] was that without meaningful political and economic reform the prospect of further ethnic violence and national conflict in Serbia and the Balkans was likely." *Id.*

Zepter is a Serbian-born businessman who made a fortune through a cookware company which bears his name and expanded into other commercial areas, including banking. He lives

(Continued on page 9)

(Continued from page 8)

in Monaco. Zepter took issue with the implication that he was allegedly associated with the former dictator and initiated legal proceedings which have now lasted twelve years and have involved extensive discovery in the United States and in Europe.

Procedural History

Twice the District Court dismissed Zepter's case on preliminary motions directed at the face of the complaint, with the Court of Appeals twice reinstating the case, albeit narrowing the action until only the allegedly defamatory implication described above remained at issue. *Id.* at *2. Following discovery, District Judge Reggie B. Walton entered judgment for Crisis Group in 2014 following cross motions for summary judgment. Zepter then appealed again.

The record on appeal demonstrated that Zepter was an immensely successful businessman, with operations in Serbia and elsewhere in Europe. Indeed, he had been referred to in the media as the Serbian Bill Gates. Similarly, the record indicated that Zepter had been active in Serbian political life, publicly aligning himself with the reform movement.

As the Court observed, “[c]ontrary to his suggestion, [Zepter] was not a mere bystander engaged in civic duties but was an advisor to and financial supporter of Prime Minister Zoran Djindjic, who came into power following Milosevic's ouster.” *Id.*

For example, Zepter had “paid over \$100,000 to a lobbyist to support [Djindjic's] effort to improve relations between the United States and Serbia.” *Id.* at *14. Zepter also spoke publicly of entering the political arena himself in an open letter addressed to the Serbian people published on the front page of two newspapers. *Id.* at *15.

Notwithstanding this public profile, Zepter contested his public figure status and in so doing urged the D.C. Circuit to re-examine the three-part limited purpose public figure test set forth in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980).

On appeal, a coalition of non-profit groups from across the ideological spectrum filed an *amicus* brief urging the D.C. Circuit to reject Zepter's narrow interpretation of the limited purpose public figure doctrine as inconsistent with *Waldbaum* and its progeny.

Concisely stated, the widely followed *Waldbaum* test requires the Court to identify an existing public controversy, the extent of the plaintiff's participation in that controversy, and to determine whether or not the allegedly defamatory statement is “germane” to the plaintiff's participation in the controversy. *Jankovic*, 2016 U.S. App. LEXIS 8552, at *9.

Although Zepter contended none of these elements were satisfied, at oral argument he focused in particular on germaneness, arguing that – whatever Zepter's degree of participation in Serbian political life after the reform movement took hold – there was nothing in the record to establish that Zepter had assumed any such role during the Milosevic era and it was Zepter's

(Continued on page 10)

(Continued from page 9)

alleged association with that regime which was the sting of the defamatory implication. *Id.* at *19-20.

The D.C. Circuit rejected this approach, holding that Zepter was essentially arguing that the defendant “has not offered sufficient evidence of a relationship between Zepter and Milosevic for the defamatory statement to be germane.” *Id.* at *20.

In this regard, the Court reiterated that the challenged statement need only be generally related to the plaintiff’s role in the public controversy – here, the direction of the reform movement following the downfall of the old regime. Thus, “[l]inking Zepter to Milosevic would be relevant to understanding Zepter’s role and why he wanted to be involved in the reform effort led by Prime Minister Djindjic.” *Id.*

Having determined Zepter to be a limited purpose public figure, the Court next turned to the actual malice inquiry. The challenged publication was researched and drafted by a Crisis Group analyst, Dr. James Lyon, an American who worked and lived in the former Yugoslavia for many years and had a Ph.D. in the region’s history. The report was reviewed prior to publication by experienced ex-diplomats, including Crisis Group’s president at the time, who had formerly served as both the foreign minister and attorney general of Australia.

With respect to Zepter’s inclusion among those who allegedly “supported the [Milosevic] regime in exchange for favorable treatment,” *id.* at *5 (citation and internal quotations omitted), Crisis Group and its analyst Lyon relied upon a variety of sources including the inclusion of Zepter’s Belgrade bank as among the commercial entities which had its assets frozen by the U.S. Treasury Department at one time in an attempt punish the Milosevic regime. *Id.* at *27-29.

As the Court noted, “[b]ecause his research revealed that it was not possible that any significant commercial entity, particularly a bank, could operate independently of [the Milosevic] regime, Lyon believed that the bank’s assets were frozen due to its relationship with the Milosevic government.” *Id.* at *29 (citation and internal quotations omitted).

Zepter contended that Crisis Group misinterpreted the meaning of the Treasury Department sanction because the frozen asset list swept so broadly that it could not reasonably justify the conclusion that his bank’s inclusion signified his proximity to the regime. Even accepting that such a contention was true, and Crisis Group argued it was not, the Court held that “[a]n honest misinterpretation does not amount to actual malice.” *Id.* at *35.

Crisis Group also relied upon local media reports and interviews with confidential sources associated with Balkan governments and the embassies of NATO nations. *Id.* at *27. Lyon testified these were sources he had relied upon previously and they had proven reliable. *Id.*

Zepter attacked Lyon’s reliance on confidential sources but his argument was rejected by the Court. *Id.* at *32. (“[T]here is no merit to Zepter’s argument that [Crisis Group] could not rely on confidential sources because [it] had failed to disclose their identity to him.”).

(Continued on page 11)

(Continued from page 10)

The Court of Appeals held that Zepter was obligated to first attempt to overcome the so-called “reporter’s privilege,” which Zepter failed to do in the trial court, belatedly filing a motion to compel disclosure only after discovery had ended. *Id.* at *33. Among other arguments, Zepter contended the privilege did not apply to Crisis Group because it is not a news media organization. The trial court rejected Zepter’s motion as untimely, a decision upheld on appeal.

Finally, Zepter also contended that actual malice could be found because, according to Zepter, Lyon had met with him and attempted to extort money from him in exchange for not writing about him. *Id.* at *38-39. This event was alleged by Zepter to have occurred “either before or after” the issuance of the challenged publication in 2003. *Id.* at *38.

As the Court noted, however, this explosive charge was only mentioned by Zepter “some nine years after its alleged occurrence.” *Id.* Zepter had otherwise been sharply critical of Lyon in court pleadings during the many years of this hotly contested litigation without previously making such a charge. For his part, Lyon denied the event ever took place.

Reviewing the record in the context of summary judgment, the Court noted it “must assume that the extortion attempt occurred.” *Id.* However, the Court of Appeals observed that even Zepter’s own testimony concerning his alleged interaction with Lyon underscored that Lyon “believed what he wrote was true and that he had reliable sources to prove it. In view of all the other evidence supporting Lyon’s conclusion about Zepter and the evidence that [Crisis Group] had a strong motive to publish truthful, carefully prepared reports that were even better than many embassy reports, no reasonable jury could find that Lyon’s extortion attempt indicated he published a falsehood either willingly or recklessly, much less that there was such clear and convincing evidence.” *Id.* at *41.

Michael D. Sullivan of Washington, D.C. argued the case for the defendant-appellee, which was also represented by Celeste Phillips, Thomas Curley, Mara Gassmann of Levine Sullivan Koch & Schulz, LLP and Jonathan Greenblatt and Neil H. Koslowe of Shearman & Sterling, LLP of Washington.

Hashim M. Mooppan and Anthony J. Dick of Jones Day in Washington represented amici The Brookings Institution, The Cato Institute, The Center for Strategic and International Studies, The Competitive Enterprise Institute, The Council on Foreign Relations, The Hudson Institute, Human Rights First, Human Rights Watch and The PEN American Center.

Professor Rodney A. Smolla of Wilmington, Delaware argued the case for the plaintiff-appellant, who was also represented by William T. O’Brien, Lisa Norbett Himes, John W. Lomas Jr. of Dentons US LLP in Washington, and Malcolm I. Lewin and Joaquin Ezcurra of Morrison Cohen LLP of New York City.

Documentary Interviewee Hit With Sanctions for Making False Allegations Against Center for Investigative Reporting

By Thomas R. Burke and Alison Schary

In May, Judge Rakoff of the Southern District of New York issued a blistering, 65-opinion tossing a plaintiff's suit against the Center for Investigative Reporting and labeling it a "fraud upon the court." [*Almeciga v. Center for Investigative Reporting et al.*](#), Case No. 1:15-cv-4319-JSR, 2016 WL 2621131 (S.D.N.Y. 2016)

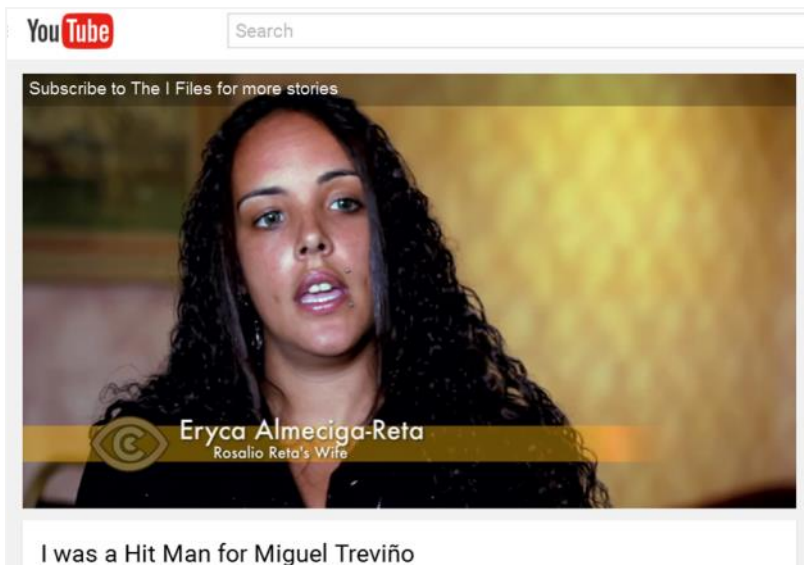
Background

Plaintiff Erica Almeciga was interviewed by the Center for Investigative Reporting (CIR) in August 2012 for a documentary concerning Rosalio Reta, a former hitman for the Los Zetas cartel currently serving a prison sentence in Texas. CIR interviewed Ms Almeciga because she represented to CIR that Mr. Reta was her husband. Ms. Almeciga willingly participated in the

approximately 30 minute interview and signed a release in the presence of CIR's producers, and the story – titled "I was a Hitman for Miguel Treviño" -- was published online in July 2013. A Spanish-language version of the story was also broadcast by Univision and viewed by millions.

Nearly a year later, in June 2014, Ms. Almeciga began calling CIR claiming that she wanted her identity obscured in future uses of her interview footage. Ms. Almeciga hired counsel, Kevin Landau, of The

Landau Group (with offices in New York and Michigan), who demanded that CIR obscure Ms. Almeciga's identity in the existing, published piece. After CIR advised Mr. Landau that his client had signed a full release, Ms. Almeciga insisted that the release was forged. Mr. Landau sent CIR an opinion letter that he had obtained from a purported "handwriting expert," claiming that the signature on the release was not Ms. Almeciga's.



(Continued on page 13)

(Continued from page 12)

On April 23, 2015, Ms. Almeciga filed a complaint in New York state court, asserting claims for breach of oral contract, fraud, and fraudulent concealment against CIR and the individual producers who worked on the piece, as well as a claim for negligence against Univision on the grounds that it should have personally verified her consent to participate in the report, notwithstanding the signed release.

CIR removed the case to the Southern District of New York. Hearing Univision's motion to dismiss the negligence claim – the only claim brought against it – along with CIR's opposition to the motion to remand on the grounds that Univision was fraudulently joined, the Court agreed that there was no duty owed by Univision to the plaintiff and, thus, no plausible negligence claim. The Court dismissed Univision from the case, finding that it had been fraudulently joined, and rejected the plaintiff's remand motion. *See* 121 F. Supp. 3d 379 (S.D.N.Y. 2015).

After Ms. Almeciga amended her complaint to add a claim for unjust enrichment, CIR filed a motion for judgment on the pleadings on the grounds that Plaintiff's breach of oral contract claim -- based on an alleged oral agreement to conceal her identity in perpetuity -- is barred by New York's Statute of Frauds. CIR also argued that Ms. Almeciga's remaining claims -- fraud, fraudulent concealment, and unjust enrichment -- were duplicative of the deficient contract claim.

In the meantime, CIR discovered court papers filed by Ms. Almeciga in a local Georgia court seeking and then withdrawing a request for a restraining order. These certified court papers contained numerous examples of Ms. Almeciga's distinctive signature – a clear match for her signature on the release she claimed was “forged.” The court documents also contained Ms. Almeciga's home address, phone number, and date of birth, as well as the names and dates of birth of her children. CIR provided these court documents to Ms. Almeciga and her counsel, demanding that the case be withdrawn on threat of sanctions.

Rather than withdraw her case, Ms. Almeciga doubled down on her claim that the CIR release was forged – and now insisted that she never filed the Georgia court documents either. Ms. Almeciga then replaced her first “handwriting expert” with a second purported expert, Wendy Carlson, who submitted a Rule 26 expert report stating that Ms. Almeciga did not sign the release. However, Ms. Almeciga and her counsel chose not to provide their new expert with the Georgia court documents that were the basis of CIR's threatened sanctions motion. Instead, the new proffered expert relied solely on five signatures provided by Ms. Almeciga, none of which pre-dated her legal claims and many of which appeared to have been created expressly for the purpose of comparison.

CIR moved for Rule 11 sanctions on September 14, 2015. Along with the Georgia court documents, CIR's motion included documents indicating that Ms. Almeciga was aware of the

Rather than withdraw her case, Ms. Almeciga doubled down on her claim that the CIR release was forged.

(Continued on page 14)

(Continued from page 13)

story at the time it was initially published in July 2013, and had even publicized the interview (and her role in it) via Twitter. (When the Tweet in question was brought to her attention, Ms. Almeciga claimed that her account had been “hacked” – and promptly changed the name of her account from “Eryca Reta” to “hacked,” though she still maintained the same Twitter handle (@eryca_reta).)

CIR also attached footage from the full interview, which contains no circumstantial evidence that – as Ms. Almeciga claimed – there was an oral agreement to conceal her identity for fear of retribution from the cartel. Ms. Almeciga’s interview was shot in full light, with no screen or other concealing device, and she confirms on camera that she is not afraid of retribution for her participation in the interview.

The Court convened a full two-day evidentiary hearing on CIR’s sanctions motion and, relatedly, the admissibility of Ms. Almeciga’s expert under *Daubert* and *Kumho Tire*. The Court used this hearing to grill Plaintiff’s expert on her qualifications and the basis for her opinion that Ms. Almeciga’s release was “forged.” (Ms. Carlson also showed up at the first day of the hearing with a chart belatedly offering her opinions on the Georgia court filings, despite having not addressed them in her Rule 26 report.)

At the hearing, in addition to the Georgia court documents, CIR confronted Ms. Almeciga with documents filed in various Massachusetts court proceedings, which contained copious examples of her distinctive handwriting and several signatures that were contemporaneous with – and nearly identical to – her August 2012 signatures on the CIR release. During her testimony, Ms. Almeciga denied filing any of the documents containing a signature identical to the release, but admitted to filing the remainder. When it came time for Ms. Almeciga’s fiancé to take the stand, he was asked to identify Ms. Almeciga’s signature in the same set of documents – and the Court’s clerk caught Ms. Almeciga attempting to coach his responses on the stand, prompting an admonishment from Judge Rakoff that Ms. Almeciga not make any further eye contact with the witness.

The Court granted CIR’s motion for judgment on the pleadings by order dated March 31, 2016, noting that a written opinion would follow. On May 6, 2016, the Court issued its Opinion and Order explaining the basis for its dismissal on the pleadings; excluding the plaintiff’s expert under *Daubert* and *Kumho Tire*; and granting CIR’s Rule 11 motion against the plaintiff, terminating the case as a sanction.

The Court’s opinion was a full-throated vindication for CIR and its producers, and provides a helpful roadmap for the types of behavior that may be subject to Rule 11 sanctions.

Analysis

The Court’s opinion was a full-throated vindication for CIR and its producers, and provides a helpful roadmap for the types of behavior that may be subject to Rule 11 sanctions. The

(Continued on page 15)

In sum, in view of all of the evidence adduced through the two-day evidentiary hearing and the copious submissions before the Court, the Court finds by clear and convincing evidence that plaintiff perpetrated a fraud on the Court by pressing critical and serious allegations that she knew to be false. Where a fraud upon the court is shown by clear and convincing evidence, courts consider five factors in fashioning an appropriate sanction: "(i) whether the misconduct was the product of intentional bad faith; (ii) whether and to what extent the misconduct prejudiced the injured party; (iii) whether there is a pattern of misbehavior rather than an

59

(Continued from page 14)

Court found CIR's witnesses to be credible and noted that there was "no discernible motive" for CIR and its producers to breach a promise to conceal Ms. Almeciga's identity – nor any evidence that such a promise existed in the first place. In contrast, the Court found the plaintiff to be "not remotely credible." The Court provided a litany of examples where Plaintiff failed to offer any plausible explanation for her various allegations, which "collapse[d] under scrutiny," and noted that she was "caught in several apparent lies at the evidentiary hearing," further reinforcing the Court's finding that she was an "incredible and unreliable witness." In light of the evidence presented, the Court found "by clear and convincing evidence that [the] plaintiff perpetrated a fraud on the Court by pressing critical and serious allegations that she knew to be false." Given the plaintiff's indigent circumstances, the Court imposed only the non-monetary sanction of dismissal with prejudice. [*Almeciga v. Center for Investigative Reporting*](#), 2016 WL 2621131 (S.D.N.Y. 2016), at *18-*22.

Regarding CIR's claim for sanctions against Ms. Almeciga's counsel, Mr. Landau, the Court noted that the motion "raises the thorny issue of where vigorous advocacy ends and punishable disregard of the facts begins." *Id.* at *23. Finding that "counsel (barely) satisfied his obligation under Rule 11," the Court declined to impose sanctions. The Court explained: "Counsel's pursuit of this lawsuit in the face of mounting evidence indicating his client was lying is certainly questionable and borders on unreasonable, but the Court does not find that it quite meets the high standard that must be satisfied to impose sanctions." *Id.*

The opinion also wades heavily into the debate over the admissibility of handwriting experts under Rule 702. The Court included a lengthy discussion of the history of handwriting analysis and forensic document examination, expressing healthy skepticism about the reliability of such

(Continued on page 16)

(Continued from page 15)

analysis under Rule 702 as a general matter. After this introduction, the Court found that Ms. Carlson’s testimony did not meet the standards of either *Daubert* or *Kumho Tire*, finding it “fundamentally unreliable and critically flawed.” *Id.* at *17.

In particular, the Court noted that Ms. Carlson relied solely on the plaintiff’s representation that the “known” signatures she reviewed – all of which were created after the dispute arose -- were accurate representations of Ms. Almeciga’s signature, and were not intentionally disguised to obtain a favorable result. The Court considered this assumption to be a “critical flaw” in Ms. Carlson’s methodology, rendering her analysis “effectively pre-ordained” and thus unreliable under Rule 702. *Id.* at *16. The Court punctuated its analysis with images of the contested signatures and handwriting samples, noting “strong similarities to the naked eye” that “any layperson” could identify. *Id.* at *19-*20.

The decision may also provide helpful precedent in cases involving disputes over alleged promises to sources. The Court held that an oral agreement to conceal an individual’s identity in perpetuity – as the plaintiff alleged here – is void under the statute of frauds because it cannot be completed within a year. Accordingly, a promise to shield a subject’s identity must be in writing to be enforceable. The Court also affirmed well-established law that a plaintiff “may not bootstrap a breach of contract claim into a fraud claim by simply including ... an allegation that the defendant never intended to uphold his end of the deal.” *Id.* at *4 (internal citations omitted).

Defendants Center for Investigative Reporting, Bruce Livesey, and Josiah Hooper were represented by Thomas R. Burke, Alison Schary, and Jeremy Chase of Davis Wright Tremaine LLP.

Recent MLRC Bulletins

Legal Frontiers in Digital Media

The Test of Time: Section 230 of the Communications Decency Act Turns 20; The Good, the Bad & the Ugly of Recent CDA Decisions; The Potentially Serious Implications of Federal Court Injunctions that Purport to Bind Non-Party Internet Service Providers in Trademark and Copyright Infringement Actions; Preparing for the EU General Data Protection Regulation; An Overlooked First Amendment Milestone: The Copyright Fight Over the Rodney King Beating Video

Report on Trials and Damages

MLRC's 2016 Report on Trials and Damages updates our study to include 9 new cases from 2014 and 2015. Our trial database now includes trial and appellate results in 641 cases from 1980-2015.

Court Utilizes Copyright-Like Standard of Substantial Similarity in Affirming Dismissal of Idea Submission Claim

By David Aronoff

On Friday, April 22, 2016, the California Court of Appeal, following a request for publication submitted by the Motion Picture Association of America, Inc., agreed to publication of its March 25, 2016 opinion affirming summary judgment for defendants in [*Ryder v. Lightstorm Entertainment, Inc.*](#), 2016 WL 1615574 (Cal. Ct. App. April 22, 2016).

Ryder involved idea submission claims arising from allegations that in breach of express and implied-in-fact contracts between plaintiff and defendants James Cameron and Lightstorm Entertainment, ideas taken from plaintiff's sci-fi short story and treatment "KRZ 2068" were used by defendants in their hit film "Avatar."

Utilizing an analytical framework borrowed from copyright law, the Court of Appeal in *Ryder* affirmed the trial court's grant of summary judgment for defendants on the grounds that "Avatar" and "KRZ 2068" were not substantially similar by: (a) applying a filtration analysis to weed out from the court's evaluation of the works creative elements that the defendants had developed before being exposed to plaintiff's work, and (b) analyzing the alleged "similarities" of the works based on the particular details of the ideas that they utilized, not based on generalized abstractions. Further, the Court held that the same analysis of substantial similarity applied to both plaintiff's express and implied-in-fact contract claims.



Analysis

To establish a claim for breach of an implied-in-fact contract based on the submission of a screenplay under California law, the plaintiff must establish that: (1) he or she submitted the screenplay for sale to defendants; (2) the plaintiff conditioned the use of the screenplay on payment; (3) defendants knew or should have known of the condition; (4) defendants voluntarily accepted the screenplay; (5) defendants actually used the screenplay; and (6) the screenplay had value. *Mann v. Columbia Pictures, Inc.*, 128 Cal. App. 3d 628, 647 n.6 (1982); see also *Faris v. Enberg*, 97 Cal.App.3d 309, 318 (1979).

(Continued on page 18)

(Continued from page 17)

The Court in *Ryder* held that the fifth element of “actual use” applies equally to breach of express contract claims in which a party allegedly has agreed to pay compensation for the rights to a motion picture or TV show “based on” a submitted work. *See also Fink v. Goodson-Todman Enterprises, Ltd.*, 9 Cal. App. 3d 996, 1010 (1970) (requiring actual use in the context of express oral contract).

The fifth element of “actual use” requires proof of access and similarity. *Benay v. Warner Bros. Ent., Inc.*, 607 F.3d 620, 630 (9th Cir. 2010) (“Similar to the inference of copying in copyright law, California contract law ‘permits actual use of a plaintiff’s idea to be inferred from evidence of access and similarity....’”) (quoting 4 M. & D. Nimmer, *Nimmer on Copyright* (“Nimmer”), § 19D.08[A]). Specifically, in cases where the contract is implied-in-fact rather than explicit, “the weight of California authority is that there must be ‘substantial similarity’ between plaintiff’s idea and defendant’s production to render defendant liable.” *Id.* at 631 (quoting 4 *Nimmer*, § 19D.08[A]). “The requirement of substantial similarity for implied-in-fact contract claims ‘aligns this field with copyright infringement [and] also means that copying less than substantial material is non-actionable.’” *Id.* “Courts have specifically rejected the contention that liability could be imposed on defendants on the basis of less than substantial similarities.” *Id.*

However, some courts have held that the standard of “substantial similarity” in idea submission cases is lower than in copyright cases, apparently assuming that similarities in “idea” exist at a higher level of abstraction than similarities of copyright-protected expression. *See Benay*, 607 F.3d at 631. These decisions hold that “because the claim is based in contract, unauthorized use can be shown by substantially similar elements that are not protected under copyright law.” *Id.* (concluding that “our holding ... that [plaintiffs’] [s]creenplay and the [f]ilm [The Last Samurai] are not substantially similar for purposes of copyright infringement does not preclude a finding of substantial similarity for purposes of an implied-in-fact contract under California law.”); *see also Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967 (9th Cir. 2004) (affirming summary judgment for defendants on copyright claim due to lack of substantial similarity because “[t]he works do not have substantially similar genre, mood, and pace; their themes, settings, and characters are different; their plots and sequences of events are not parallel,” but remanding claim of breach of an implied-in-fact contract because of allegations that defendants “stole the ideas and themes” of plaintiff’s work); *accord Fink*, 9 Cal. App. 3d at 1012 (finding sufficient substantial similarity in the “structural spine” of two stories, one involving a 1960’s N.Y. police officer and the other involving an itinerant cowhand in the American West of the 1850’s).

“The requirement of substantial similarity for implied-in-fact contract claims ‘aligns this field with copyright infringement [and] also means that copying less than substantial material is non-actionable.’”

(Continued on page 19)

(Continued from page 18)

This approach, however, is undercut by *Ryder*, which filtered out preexisting creative elements that had been written by defendants prior to their exposure to plaintiff's work and then evaluated the remaining 12 purported instances of substantial similarity alleged by plaintiff not based on abstract generalizations of plaintiff's ideas or the "structural spine" of the stories, but by comparing "Avatar" and "KRZ 2068" based on the specific concrete ideas that they each embodied. The Court in *Ryder* expressly admitted that this approach followed in the footsteps of cases evaluating substantial similarity in protectable expression under the Copyright Act. *Ryder*, 2016 WL 1615574 *5 & fn.5.

For example, in *Ryder*, plaintiff contended that one instance of substantial similarity supporting his allegations of use was that both works featured as an element "The protagonist is enlisted as a spy by the corporation." However, the Court examined the details articulated in the works to reject this "similarity" by finding:

Both protagonists are not acting as "spies." Jake in Avatar arguably becomes a "spy" when Quaritch enlists him to gather clandestine intelligence about the Na'vi. In KRZ, while at points Shepherd is called a spy for Malloc, she is not acting as a spy on Europa and her mission is always known – she has gone to investigate Wells's death. Further, the clandestine aspect of Jake's mission in Avatar is a significant plot point leading to Neytiri's rejection of Jake. In KRZ, because there is no clandestine aspect to Shepherd's Europa mission, her job description as a spy has no impact on the plot. *Ryder*, 2016 WL 1615574 *7.

By thus parsing the details of the specific ideas embodied in the respective works at issue, the decision in *Ryder* adopted a copyright-like approach to substantial similarity,

Likewise, another claimed substantial similarity – i.e., "The protagonist survives a life-threatening situation by escaping into a rushing torrent of water" – was discounted by the Court in *Ryder* based on the specific details of the works as follows:

This element does not appear at all in KRZ. In Avatar, during Jake's first foray into the wilds of Pandora in his Na'vi avatar, he is attacked by a panther-like creature and escapes by jumping over a waterfall into a rushing river. In KRZ, Shepherd does not "escape" a dangerous situation by water at all. In [plaintiff's] short story, she is sucked into a tube of water. In the KRZ screenplays, while submerged in the ocean, she blasts her way into an underwater elevator shaft and rides the resulting wave of water down to the base's nuclear reactor.

(Continued on page 20)

(Continued from page 19)

Ryder, 2016 WL 1615574 *8. The remaining 10 similarities in idea alleged by the plaintiff were likewise rejected by the Court based on similar close analyses of the works' respective creative elements. *Id.* at *8-9.

By thus parsing the details of the specific ideas embodied in the respective works at issue, the decision in *Ryder* adopted a copyright-like approach to substantial similarity, thus setting a higher bar for plaintiffs than such cases as *Benay*, *Grosso* and *Fink*. *Ryder* is not the first case to adopt this approach. See, e.g., *A Slice of Pie Prods., LLC v. Wayans Bros. Entm't*, 487 F. Supp. 2d 41 (D. Conn. 2007) (applying California law); *Reginald v. New Line Cinema Corp.*, 2008 WL 588932 (Cal. App. Mar. 5, 2008) (unpublished and non-citable under Cal. Rule of Court 8.1115(a)). However, because *Ryder* seems to be the first officially published California Court of Appeal decision to expressly adopt such a "copyright-like" approach to evaluating substantial similarity in idea submission cases, it is an important development for entertainment media defendants seeking to ward off idea submission claims.

David Aronoff is a partner at Fox Rothschild LLP in Los Angeles. Plaintiff was represented by Rincon Venture Law Group; and King, Cheng & Miller. Defendants were represented by Mitchell, Silberberg & Knupp, Los Angeles.

EMPLOYMENT LIBEL & PRIVACY LAW 2016

50-STATE SURVEY

REPORTS FROM ALL FIFTY STATES,
THE DISTRICT OF COLUMBIA & PUERTO RICO

MLRC | LexisNexis®

**Now Available
in Print and
E-book Formats!**

**Employment Libel and
Privacy Law** examines
defamation and privacy claims
in an employment context, an
increasing concern to labor
and employment practitioners.

MLRC Member Price

\$195 - print

\$195 - e-book

\$335 - print/e-book combo

Judge Denies Defense Motion to Seal Court Records

Motion Included Psych Professor's Testimony on Juror Bias

By Karen Williams Kammer

In late 2015 a Broward County grand jury indicted Fidel Lopez on first degree murder and sexual battery in connection with the death of his girlfriend. The circumstances of her death -- including Lopez's detailed description to investigators of the sex acts and mutilation which allegedly killed her, and his actions afterward -- all are in the court file. Lopez told police he became enraged when she uttered her ex-husband's name during intercourse, he violated her with a beer bottle and hair iron, inserted his fist inside her and disemboweled her. She bled to death on the floor of a closet, and, as he admitted to police, he tried to clean up the blood, went outside to smoke a cigarette, and then called 911. These details, as well as the contents of the 911 call, a video recording of his first appearance in open court, the indictment, and other information as well as comments from persons who knew the couple appeared in published news reports locally, nationally and internationally.

In December 2015 Lopez's public defender filed a "Motion For Protective Order To Seal Discovery To Ensure A Fair Trial" asking the court to prohibit the release of a broad range of material, much of it already widely known. Although at the evidentiary hearing on his motion he narrowed his request, the remainder nevertheless was tantamount to asking for wholesale closure, including, among other things, sealing evidence upon which the state intended to rely, materials exchanged in discovery, items tested for DNA, and Lopez's statements.

Lopez argued the reporting about his case on television, online and in print was so pervasive and inflammatory he could not receive a fair trial anywhere, let alone in Broward County, unless the court were to grant his motion. WPLG, Inc., CBS Television Stations, Inc. and the Sun-Sentinel Company moved to intervene for the purpose of opposing Lopez's closure efforts and filed memoranda in opposition.

Under Florida law, court records and proceedings are presumptively open and the public's access may be restricted *only* when the proponent of closure produces evidence to meet each

Victim in Sunrise killing a 'wonderful person'; police release 911 recording

By Erika Pesantes, www.sun-sentinel.com
September 15th, 2015

[View Original](#)

Sunrise police on Tuesday released a 911 recording of a hysterical murder suspect calling for help while the woman he's accused of slaying in a vicious sexual attack lay dead near him.

(Continued on page 22)

(Continued from page 21)

prong of the three-part test the Florida Supreme Court established in 1982 in *Miami Herald Publishing Company v. Lewis*: closure is necessary to prevent a serious and imminent threat to the administration of justice, there are no alternatives to closure short of a venue change, and closure will be effective.

At the April 2016 evidentiary hearing the defense produced a witness with a doctorate in cognitive psychology, Christine Ruva, whose self-described area of study is the effect of pretrial publicity on jurors. The defense also introduced a report Ruva had prepared in which she concluded the reporting on Lopez's case has been so highly charged and portrayed Lopez so negatively Lopez could not get a fair trial. Ruva testified highly emotional testimony "sticks with people" and, in her opinion, jurors who are aware of such reporting are more likely to convict a defendant than jurors not exposed to such publicity. She also opined that traditional correction by the court does not work.

On cross-examination Ruva admitted the information she had testified would "disgust" potential jurors was already part of the publicly available online court file. She also admitted the evidence to be presented at trial itself – such as police testimony recounting the sexual mutilation and disemboweling Lopez had described – itself would "disgust" jurors.

Ruva also conceded the research on which she based her opinion in this case was the creation and study of small mock juries made up primarily of college students whose demographics did not reflect those of Broward County. She admitted she had never interviewed real jurors or studied actual trials. She also admitted that in a prior publication she had concluded a mixture of positive and negative reporting can eliminate or reduce the effect of anti-defendant bias.

The defense produced a witness with a doctorate in cognitive psychology whose self-described area of study is the effect of pretrial publicity on jurors.

The Court found Lopez failed to meet the *Lewis* test. [*Florida v. Lopez*](#). With a county as large as Broward with nearly 2 million residents, Lopez had not proved prejudicial publicity had "undermine[d] the administration of justice" or that no measures could be taken to "ameliorate issues that could arise." Nor had Lopez demonstrated no less restrictive alternatives were available. The Court recognized a number of alternative procedures could be employed such as voir dire, admonishing the jury once seated, and the use of peremptory challenges (the latter technique being one Ruva admitted she had never considered in rendering her opinion).

Finally, the Court found Lopez had not shown closure would be effective in protecting against the perceived harm. Much of the information about which the defense complained was already public, including the gruesome details in the probable cause affidavit, the indictment, and the 911 call, among other things. The Court denied his closure motion.

What is unusual here is Lopez's production of witness testimony and documentary evidence

(Continued on page 23)

(Continued from page 22)

to try to meet *Lewis*' three-part test. While *Lewis* requires the production of evidence, parties seeking closure rarely do so. Most rely solely on their lawyers' arguments and the existence of reporting about their cases, neither of which is legally sufficient under Florida law to overcome the presumption of openness. Only a handful of instances come to mind from the last 30 years in which the proponent of closure in a case pending in South Florida presented a witness to try to meet the evidentiary test.

For example, more than 25 years ago William Kennedy Smith's lawyer called a pollster to testify in support of Smith's motion to seal discovery. The witness had polled residents in Palm Beach County where Smith was being tried, testifying most of those polled knew of the case, and had read about it in the newspaper and/or

had seen reporting about it on television, the implication being Smith could not get a fair trial in Palm Beach County. On cross-examination the witness admitted he could not say the individuals actually chosen to sit on Smith's jury could *not* render a verdict based solely on the evidence presented in court and on the judge's instructions.

Years later tennis great Boris Becker tried to exclude the camera and seal court records in a case his estranged wife had filed seeking alimony and child support in Miami-Dade County. In 1979 Florida became the first state to permit cameras in its courtrooms unless the person who wanted to limit its use or exclude it altogether (whether a party, witness or juror) met the two-part evidentiary test the Florida

Supreme Court established in *In re Petition of Post-Newsweek Stations* in 1979: that the presence of the camera has a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general, and such effect is qualitatively different from coverage by other forms of media such as print.

Both Becker and the head of his security detail took the stand to try to explain why the judge should exclude the camera and seal records. However, the irony of a world-famous athlete and international marketing icon who had been in the spotlight since he was teenager claiming the presence of a single television camera at the back of the courtroom would have a qualitatively different effect on him was not lost on the judge. The court denied Becker's closure motion.

Karen Williams Kammer of Karen Williams Kammer, P.A., Mitrani, Rynor, Adamsky & Toland, P.A., represented intervenors WPLG, Inc. and CBS Television Stations, Inc.; and Dana J. McElroy of Thomas & LoCicero PL represented intervenor Sun-Sentinel Company.

Broward County Assistant State Attorney Tom Coleman represented the State of Florida, and Broward County Assistant Public Defender Melisa McNeil represented Defendant Fidel Lopez.

Lopez had not proved prejudicial publicity had “undermine[d] the administration of justice” or that no measures could be taken to “ameliorate issues that could arise.”

D.C. Circuit Rejects FIOA Suit to Obtain Full Senate “Torture Report”

Congress Never Relinquished Control of Full Report

By Raymond Baldino

The D.C. Circuit Court of Appeals held this May that the CIA and other agencies are not required to disclose the complete Senate “Torture Report” authored by the United States Senate Select Committee on Intelligence, which detailed at length and criticized the CIA’s post 9/11 detention and torture program. [*ACLU v. CIA*](#), No. No. 15-5183 (May 13, 2016) (Edwards, Tatel, Srinivasan, JJ.).

A redacted version of the Report’s 525-page Executive Summary has been made publically available, but the ACLU sued for disclosure of the full 6,000 page report under the federal FOIA. The D.C. Circuit rejected the ACLU’s lawsuit, concluding that because Congress (which is not subject to FOIA) never relinquished control over the Full Report when it distributed it to certain agencies, the Full Report in their possession did not become an “agency record” that is subject to FOIA.

Background

Completed in 2012, the Full Report was released to Executive agencies in 2014 by Democratic-controlled Senate, with the intention that the agencies review it “to help make sure that this experience is never repeated.” However after Republicans took the Senate that year, they sought to retract its dissemination. As reported in the *New York Times* on November 9, 2015, the Committee’s succeeding Chair, Republican Richard M. Burr, requested that the Obama administration return all copies of the Full Report.

At that time, the Department of Justice prohibited agencies from opening the report, and it sat unread in the putative possession of the agencies (or in some cases Justice Department safes). The ACLU had brought suit for release of the Full Report, and the DOJ defended the restrictions on the grounds that if agencies reviewed the Full Report, it could be construed as being subject to agency control, and therefore “agency records” subject to FOIA. As the *Times* wryly reported of Burr’s attempt to recall the Report and the DOJ’s instructions: “It was always clear that the full report would remain shielded from public view for years, if not decades. But Mr. Burr’s demand, which means that even officials with top security clearances might never read it, has reminded some officials of the final scene of ‘Raiders of the Lost Ark,’ when the Ark of the Covenant is put into a wooden crate alongside thousands of others in a government warehouse of secrets.”

The Torture Report included a number of incendiary findings,

(Continued on page 25)

(Continued from page 24)

The Torture Report included a number of incendiary findings, and as listed in the first 3 of 20 findings in the Executive Summary these included that 1) “The CIA’s use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees”; 2) “The CIA’s justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness”; and 3) “The interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers and others.” The Torture Report details how the CIA misled Congress and the public about the nature of the CIA’s torture program and its effectiveness. It debunks the CIA’s representations of purported intelligence successes attributed to the program. It described the role of psychologists in designing certain torture techniques to induce “learned helplessness” in detainees. Perhaps most saliently of all, it describes incidents of torture in lurid detail.

The report describes the use of sleep deprivation, water boarding, stress positions and rectal feeding (in the absence of medical necessity) as torture techniques. Torture was applied without authorization by the CIA in certain instances, including techniques such as “water dousing, nudity, [] abdominal slap, and dietary manipulation.” As one example, it described the torture of Arsala Khan, an individual who the CIA determined was apparently non-culpable, and likely detained based on false reports. The CIA recommended Khan be released to his village after determining from the initial rounds of torture that he should not be detained. The Executive Summary describes this initial torture: “After 56 hours of standing sleep deprivation, Arsala Khan was described as barely able to enunciate, and being ‘visibly shaken by his hallucinations depicting dogs mauling and killing his sons and family.’ [he] ‘stated that [the interrogator] was responsible for killing them and feeding them to the dogs.’” Despite the CIA recommendation that Khan be released to his village, Khan was thereafter transferred to U.S. Military Custody for an additional 4 years.

As stated in the forward of the Executive Summary, the 6,000-page Full Report “is more than ten times the length of the Executive Summary and includes comprehensive and excruciating detail.”

The ACLU first sought access to the Full Report in February of 2013, and after being denied access on the grounds that it was a “Congressionally generated and controlled document that is not subject to [FOIA]” brought suit later that year. In May of 2014 the District Court upheld the denial of access, which the ACLU appealed to the D.C. Circuit.

Potential release of the Full Report depended on whether it would be considered an “Agency Record” that is subject to FOIA. Not all records possessed by agencies are “Agency Records” – only those under agency control. Generally, the D.C. Circuit recognizes a four part test to determine if an agency has control over a document sufficient to make it subject to FOIA:

(Continued on page 26)

(Continued from page 25)

1) the intent of the document’s creator to retain or relinquish control over the records; 2) the ability of the agency to use and dispose of the record as it sees fit; 3) the extent to which agency personnel have read or relied upon the document; and 4) the degree to which the document was integrate into the agency’s record system or files.” *Judicial Watch v. U.S. Secret Service*, 726 F. 3d 208, 218 (D.C. Cir. 2013).

However, “when an agency possess a document that it has obtained from Congress, the answer to the question whether the document is an ‘agency record’ subject to disclosure under FOIA ‘turns on whether Congress manifested a clear intent to control the document.’ This focus renders the first two factors of the standard test effectively dispositive.” *Id.* at 221.

In determining that Congress had not relinquished control of the Report, the D.C. Circuit focused on a June 2009 letter from the Senate Committee Chairman and Vice Chairman to the Director of the CIA. That letter stated of documents created by the Committee pursuant to its authorship of the Report: “documents remain congressional records in their entirety and disposition and control over these records, even after the completion of the Committee’s review, lies exclusively with the Committee...these records are not CIA records under the Freedom of Information Act or any other law.”

However, the letter was authored in 2009, in connection with the Senate Committee’s initial work on the Report being conducted on CIA computers. Its review of CIA records was on-site at CIA facilities and in a secure reading room, where the Committee also created initial drafts of the Report on a CIA network drive. *Later, however, the Full Report was completed in the Senate Committee’s workspace.*

In 2014 the Report was released, and no limitations restricting the Report as a Congressional record like that contained in the 2009 letter was attached to the final Report. The Committee Chair’s Foreword indicated that the Report was released so “[t]his and future Administrations [could] use this Study to guide future programs, correct past mistakes, [and] increase oversight of CIA representations to policymakers.” In addition, a transmittal letter that accompanied the Report stated “[T]he full report should be made available within the CIA and [] the Executive Branch for use as broadly as appropriate to help make sure that this experience is never repeated...I hope you will encourage use of the full report...as you see fit.”

The ACLU argued that the Court should look to this language and “the circumstances surrounding the transmittal of the Full Report” and also be skeptical about “‘pre-existing agreements’ that foreclose agencies from disclosing documents that are in their possession.”

“The Senate Committee could hardly have been more clear or precise in claiming control over all of the work produced during its investigation of the CIA’s former detention and interrogation program.”

(Continued on page 27)

(Continued from page 26)

The D.C. Circuit, rejected this argument, pointing to the Committee's public release of the Executive Summary, as contrasted with the limited transmittal of the Full Report. It noted:

“The Senate Committee could hardly have been more clear or precise in claiming control over all of the work produced during its investigation of the CIA's former detention and interrogation program.” Thus the Court upheld the District Court's decision that the Full Report is not an “Agency Record” subject to FOIA.

The ACLU told the press in the initial aftermath of the decision that it was considering options for appeal.

Raymond Baldino is a attorney in New Jersey and a member of MLRC's Next Generation Committee.



520 Eighth Avenue, North Tower, 20 Floor, New York, NY 10018

medialaw@medialaw.org | www.medialaw.org | 212-337-0200

BOARD OF DIRECTORS

Lynn B. Oberlander (Chair); Jonathan Anschell; Marc Lawrence-Apfelbaum;

Gillian Phillips; Kenneth A. Richieri; Randy Shaprio; Mary Snapp;

Regina Thomas; Susan E. Weiner; Kurt A. Wimmer;

Charles D. Tobin (DCS President)

George Freeman (MLRC Executive Director)

MLRC STAFF

George Freeman, Executive Director

Dave Heller, Jeff Hermes, Deputy Directors

Michael Norwick, Staff Attorney

Jake Wunsch, Production Manager

Debra Danis Seiden, MLRC Administrator

Andrew Keltz, Assistant MLRC Administrator

Drone Privacy Best Practices Include Protections for Journalists

By Charles D. Tobin, Joel E. Roberson, and Christine N. Walz

The National Telecommunications and Information Administration (NTIA) has announced [privacy “best practices”](#) for drone use that explicitly recognize that the First Amendment protects the use of drones—or unmanned aircraft systems (UAS)—for newsgathering.

The document resulted from nine months of multistakeholder meetings of representatives of the news media, privacy advocates, manufacturers and other industry groups, convened by the NTIA following a White House directive. A News Media Coalition of 21 news organizations represented journalists’ interests in the discussions, with support from the Newspaper Association of America, the National Association of Broadcasters, the Radio, Television and Digital News Association, and Digital Context Next,

Early in the NTIA process, a coalition driven by privacy groups floated draft proposals that would have disfavored most journalists’ uses of drones. The early drafts condemned drone photography in all public places; would have required prior notice to everyone on the ground for most drone use; and would have permitted people to demand that newsrooms remove their drone-captured images from news archives.



The news media coalition, in meetings, letters to the NTIA, and offline discussions with other stakeholders, pushed hard on a series of fundamental First Amendment principles that they insisted must be reflected in any set of UAS privacy best practices. These included:

- Government-endorsed best practices cannot restrict the First Amendment or require journalists to defend use of images collected by UAS on a case-by-case basis;
- Existing technology-agnostic state laws, rather UAS specific-laws at either the federal or state level, are the appropriate way to address privacy concerns;
- Images and sounds gathered in public places are not private and should not be entitled to protection;
- Editorial decisions, including decisions about data collection and retention, must be left to journalists;

(Continued on page 29)

(Continued from page 28)

- An industry-specific approach to privacy issues and drone use is preferable to a one-size-fits-all approach.

These principles educated policymakers and privacy advocates, and after various attempts at red-lining their way through compromise on a multi-industry documents, the group agreed to a complete carve-out for journalists. As a result, the document's prefatory language about applicability states that the recommended restrictions do not apply to "*newsgatherers and news reporting organizations*" "*considering that their activity is strongly protected by the First Amendment to the Constitution of the United States.*"

The document then completely carves out journalists:

*BEST PRACTICES FOR NEWSGATHERERS
AND NEWS REPORTING ORGANIZATIONS*

Newsgathering and news reporting are strongly protected by United States law, including the First Amendment to the Constitution. The public relies on an independent press to gather and report the news and ensure an informed public.

For this reason, these Best Practices do not apply to newsgatherers and news reporting organizations. Newsgatherers and news reporting organizations may use UAS in the same manner as any other comparable technology to capture, store, retain and use data or images in public spaces. Newsgatherers and news reporting organizations should operate under the ethics rules and standards of their organization, and according to existing federal and state laws

Especially important in this outcome: privacy groups have now signed onto a document that recognizes drone photography should stand on equal First Amendment footing to other technologies used by journalists.

Charles D. Tobin and Joel E. Roberson are partners and Christine N. Walz is an associate with Holland & Knight LLP in Washington D.C. Holland & Knight represents a coalition of news media entities in the NTIA multistakeholder process.

Legal Frontiers in Digital Media 2016: Beyond the Crypto Conversation

This year's Legal Frontiers in Digital Media conference returned to the Computer History Museum this past May 19th & 20th, once again endeavoring to tackle emerging legal and business issues at the intersection of media and technology. Now in its ninth year, the conference is jointly produced by the Media Law Resource Center and the Berkeley Center for Law & Technology, and this year was sponsored by Axis Pro, Cooley, Covington, Davis Wright Tremaine, Fenwick & West, Kilpatrick Townsend, Levine Sullivan Koch & Schulz, Perkins Coie, Sheppard Mullin, WilmerHale and Munger Tolles & Olson. New this year, longtime conference sponsor Microsoft underwrote the expenses for a gourmet coffee bar featuring specialty iced & hot coffee and tea drinks, which was received with rave reviews! Further, as in past years, Google sponsored the always popular cocktail reception held at the conclusion of the first day's sessions.

If you have checked out this month's column of MLRC Executive Director, George Freeman, you've already heard much about our excellent Crypto-Controversy: Beyond the San Bernardino iPhone panel, but this was not the only outstanding, or even contentious, session at the conference.

The conference had long strived to explore the legal and business implications of so-called disruptive technologies, i.e., technologies that unexpectedly displace existing ones, and at present, it is arguable that ad-blocking apps are the most significant disrupter to current digital media business models. To explore the implications of the increasing use of ad-blockers, James Chadwick, Sheppard Mullin, moderated the first panel of the conference, titled, Around the Block: New Realities in Ad-Blocked Digital Media.

The panel included: Melissa Gallo, IAB Tech Lab, Nick Morgan, Microsoft Corporation and Cooper Quintin, Staff Technologist, Electronic Frontier Foundation. Mr. Quintin, a software coder who worked on the design of the ad-blocking program, Privacy Badger, presented a technical explanation of how ad-blocking software works, and advocated for the right of consumers to avoid annoying, invasive and malicious online ads, and suggested that online media company should deliver ads that don't track people's online behavior.

Ms. Gallo, by contrast, underscored the importance of online advertising revenue for media organizations to deliver content, and noted that the most annoying online advertising, served up by "a few bad apples," has given the practice of data collection a bad rap, as data is also a means of delivering relevant (and better targeted) ads to consumers. She described a number of industry initiatives aimed at delivering a better

user experience with online ads. Among the more controversial ad-blocking business models discussed were ad-blockers, like Adblock Plus, seeking payment by publishers to “whitelist” ads, and one by start-up, Brave Software, that has designed an ad-blocker that will replace an online publisher’s ads with its own ads.

Mr. Morgan foreshadowed a variety of causes of action – albeit legal theories in need of “creative lawyering” -- that might be brought against ad-blockers, and referred to possible copyright, unfair competition, anti-trust, violations of terms of use, and interference with contract claims that could potentially be brought by publishers. Indeed, just a few days after the conference, the Newspaper Association of America filed a complaint with the FTC, requesting that the agency investigate certain ad-block software companies using particularly aggressive business strategies.

Next up at the conference was a panel that discussed the ever complex web of international content regulations, titled: Digital Media Meets Data Nationalism: Global Strategies to Cope, which focused on how American online companies should approach various requests from foreign jurisdictions to take down content under color of foreign law. The panel was moderated by Jeff Rabkin, Jones Day, who was joined by Aaron Altschuler, ZwillGen PLLC, Ed Britan, Microsoft, Bertrand De La Chapelle, Internet & Jurisdiction Project, and Shantal Rands Poovala, Google Inc. The panel tackled a number of issues that come up whenever a takedown request is made: Can you authenticate that the requester is who he or she says they are? Is the take-down request from law enforcement acting alone or was it issued pursuant to some judicial process? Does the country at issue actually have a law prohibiting the content in question? And should the human rights record of the country involved and the motive of the request be taken into account?

The panel seemed to agree that there were often no easy answers to these questions. Given the lack of clarity in this area, Mr. De La Chapelle, whose organization, the Internet & Jurisdiction Project, was created to establish a cross-border dialogue among nations connected by the Internet, underscored the importance of countries coming together to develop uniform standards for addressing the various legal questions that arise with respect to cross-border content regulation.

First up on the second day of the conference was panel covering important updates not otherwise addressed at the conference: Lightning Round: Roundup of Key Legal



Left to right: Tim Alger, Greenberg Traurig; Simon Frankel, Covington & Burling; Jonathan Blavin, Munger, Tolles & Olson; and Roger Myers, Bryan Cave.

Developments, moderated by Tim Alger, Greenberg Traurig, with an update on recent copyright cases from Simon Frankel, Covington & Burling, a status report on a circuit split in the interpretation of the Computer Fraud & Abuse Act by Jonathan Blavin, Munger Tolles & Olson, the latest on Section 230 from Makesha Patterson, Google Inc., and finally, a report on trends in Lanham Act and False Advertising litigation from Roger Myers, Bryan Cave.

Next up was: Copyrights and Wrongs: Reforming Copyright Overreach, which explored the misuse of copyright law to suppress speech, through meritless lawsuits, threatened litigation, and improper DMCA take-down requests. As articulated by one of the panelists, Professor John Tehranian, Southwestern Law School, unlike other content-based laws such as libel, and other branches of intellectual property law such as trademark, copyright law is unique in its power to suppress content without strong First Amendment protections. One of several examples he cited was *Monge v. Maya Magazines, Inc.*, where a secretly married Latin-American celebrity couple obtained an assignment of the copyright in their wedding photos in order to enjoin publications from using them to prove they were married.

Another panelist, Brad Young, indicated that his company, travel review site, TripAdvisor, often receives requests by users to take down their own negative reviews – clearly prompted by threats from the companies who were reviewed. Professor Tehranian noted that copyright defenses, like fair use, which might be used in such cases, generally cannot be disposed of on a motion to dismiss and require expensive discovery to adjudicate. For this reason, he called for a “New York Times v. Sullivan” of Copyright Law. Kelly Klaus, Munger Tolles & Olson, agreed that the cases cited were clear abuses of copyright law, but was more skeptical that so-called copyright overreach was as pervasive a problem as the other panelists suggested.

Laura Prather, Haynes & Boone, discussed a new Federal Anti-SLAPP statute making its way through Congress, which would be the first such statute which could address abusive copyright claims. Yet, the bill remains controversial because the Motion Picture Association of American has concerns that such a law might slow down their anti-piracy efforts. The panel was moderated by Joe Petersen, Kilpatrick Townsend & Stockton, a co-chair of this year’s conference.



Left to right: Jim Rosenfeld, Davis Wright Tremaine; Matthew Moore, BuzzFeed; Lauren Fisher, Vox Media; Dylan Budd, Ultimate Fighting Championship; Dennis Wilson, Kilpatrick Townsend & Stockton.

Co-chair Jim Rosenfeld, Davis Wright Tremaine, moderated the final panel of the conference: Live and Everywhere: Digital Video in the Age of Vine, Snapchat & Periscope – with panelists Lauren Fisher, Vox Media, Inc., Matthew Moore, BuzzFeed, Dylan Budd, Ultimate Fighting Championship and Dennis Wilson, Kilpatrick Townsend & Stockton. With the ubiquity of live video and easy access to high quality video recording on mobile devices, they looked at the myriad practical day-to-day considerations and approaches that must be made in publishing and protecting video content. Of particular note was a case Mr. Wilson handled in which he obtained a pre-emptive TRO against pirate sites in conjunction with the much anticipated “Fight of the Century” between boxing legends Manny Pacquiao and Floyd Mayweather.

Now Available in Print and E-book Formats!

EMPLOYMENT LIBEL & PRIVACY LAW 2016

50-STATE SURVEY

REPORTS FROM ALL FIFTY STATES,
THE DISTRICT OF COLUMBIA & PUERTO RICO

MLRC | LexisNexis®

Employment Libel and Privacy Law examines defamation and privacy claims in an employment context, an increasing concern to labor and employment practitioners.

MLRC Member Price

\$195 - print

\$195 - e-book

Best Deal

\$335 - print/e-book combo

Company States Claim Against Google for De-Indexing Its Websites

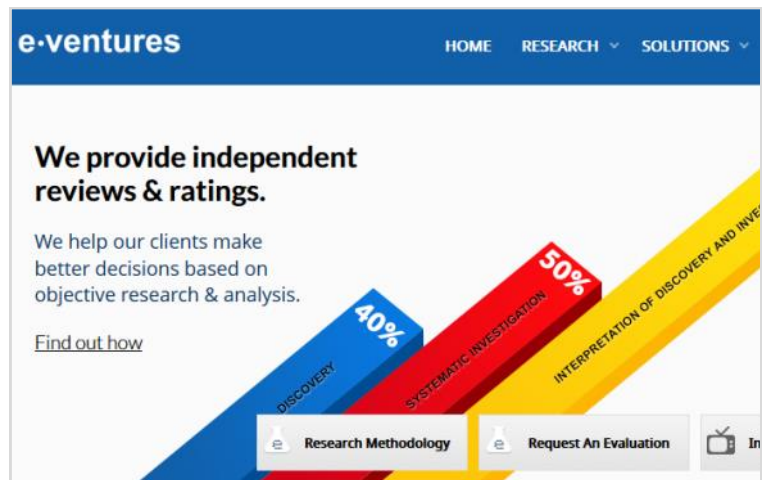
Court Rejects Section 230 and First Amendment Defenses

In May, a Florida federal district court allowed a company's unfair competition and tortious interference claims to go forward against Google for de-indexing the company's websites. [*E-Ventures Worldwide LLC v. Google*](#), No. 2:14-cv-00646 (M.D. Fla. May 12, 2016) (Steele, J.). The court rejected Google's Section 230 and First Amendment defenses, holding that plaintiff sufficiently alleged the de-indexing was done in bad faith and that the case involved Google's anti-competitive conduct — not protected opinion about its search rankings. Moreover, the court held that de-indexing could create the false and defamatory implication that plaintiff was in violation of Google's spam guidelines.

Background

The plaintiff e-ventures.com describes itself as a research company providing professional reviews and ratings across dozens of verticals – as well as search optimization advice. Google removed 365 of plaintiff's websites from its search directory for appearing “to use aggressive spam techniques such as automatically generated gibberish, cloaking, scraping content from other websites, and/or other repeated or egregious violations of Google's quality guidelines.”

Plaintiff [sued](#) Google for violating federal and state unfair competition laws, defaming it; and interfering with its business relationships.



Motion to Dismiss

The court first held that Section 230 did not bar the complaint as plaintiff sufficiently alleged that Google failed to act in good faith when removing the websites from its search results. “The plain language of the CDA only provides immunity for actions ‘voluntarily taken in good faith.’ 47 U.S.C. § 230(c)(2)(A).... Here, plaintiff has included allegations ... that

(Continued on page 35)

(Continued from page 34)

Google failed to act in good faith when removing its websites from Google’s search results.”

The court next held that de-indexing was not constitutionally protected opinion. The court recognized that search rankings are generally matters of protected opinion, but found that plaintiff’s claim was that de-indexing was tantamount to Google falsely stating that e-ventures’ websites failed to comply with Google’s policies. “The Court finds that this speech is capable of being proven true or false since one can determine whether e-ventures did in fact violate Google’s policies. “ Thus while publishers are entitled to discretion for editorial judgments “plaintiff has alleged that Google’s reason for banning its websites was not based upon ‘editorial judgments,’ but instead based upon anti-competitive motives.”

Under this rationale, plaintiff stated Lanham Act and state claims for unfair competition based on the alleged removal of its websites from Google’s search results for anticompetitive and punitive reasons.

On the defamation claim, the Court held that de-indexing could create the defamatory impression that e-ventures’ websites met Google’s criteria for removal as spam when that was not true. The court, however, dismissed the claim without prejudice for failure to allege any fault.

Finally, plaintiff stated a claim for tortious interference with business relations by alleging that Google was aware of and harmed plaintiff’s contractual relationships with third parties by de-indexing its websites.

Plaintiff is represented by Zung Clough PLLC, Naples, FL; and Flaster Greenberg PC, Philadelphia, PA. Google is represented by David Kramer, Wilson Sonsini, Palo Alto, CA; and Nathan Berman, Zuckerman Spaeder, Tampa, FL.

Recent MLRC Bulletins

Legal Frontiers in Digital Media

The Test of Time: Section 230 of the Communications Decency Act Turns 20; The Good, the Bad & the Ugly of Recent CDA Decisions; The Potentially Serious Implications of Federal Court Injunctions that Purport to Bind Non-Party Internet Service Providers in Trademark and Copyright Infringement Actions; Preparing for the EU General Data Protection Regulation; An Overlooked First Amendment Milestone: The Copyright Fight Over the Rodney King Beating Video

Report on Trials and Damages

MLRC's 2016 Report on Trials and Damages updates our study to include 9 new cases from 2014 and 2015. Our trial database now includes trial and appellate results in 641 cases from 1980-2015.



WEDNESDAY, SEPTEMBER 21, 2016

9:00 Registration Opens

Noon-2:15 Optional Meeting Time for Breakout Chairs and Facilitators

2:15-3:30 Program

Rodney King, 25 Years Later; Fair Use and Police/Press Issues

An analysis of the copyright case brought by the plumber who shot the beating video footage against the networks and others. Was a taking of the video a fair use? Did the First Amendment give an extra layer of defense to the copyright claims? And how to improve Police-Press relations in the context of the urban riots which ensued and continue to Ferguson and beyond: Access to Demonstrations and documents, Citizen Journalism, Body Cams and more.

Panelists:

William Dunnegan, Dunnegan & Scileppi
Chief Cathy Lanier, District of Columbia Police Department
Mickey Osterreicher, National Press Photographers Association
Steven Perry, Munger Tolles & Olson
Lizanne Vaughn, Getty Images
Moderator:
Daniel Waggoner, Davis Wright Tremaine

3:30-3:55 Program

(Continued on page 37)

(Continued from page 36)

Chris Bliss, Comedian and First Amendment Proselytizer

Comedian Chris Bliss will entertain with a riff on the First Amendment, but will also talk about his plan, completed in Arizona and pending in other states, to establish a Bill of Rights Memorial on the grounds of each the 50 state capitols.

3:55-4:15 Coffee Break

**4:15-5:30 Boutique Sessions A
Data Privacy 101**

In response to audience demand, this is a beginner's workshop on data privacy law. Ask all the questions you elsewhere might be afraid to admit you have. Among the fundamental issues to be covered are: What laws govern the cyber-security area and does the jurisdiction you are in matter? What role do self-regulatory guidelines play in data protection and do data protection requirements vary by industry? What happens if your company violates data protection law?

Chairs: Yaron Dori, Covington & Burling; Mary Ellen Callahan, Jenner & Block

Employment and Labor Law

Attendees will choose among these topics: How should media companies respond to violent attacks on their journalists? Can media companies still have unpaid interns? What is the potential impact of the Dept. of Labor's new test for independent contractors? What's the effect on media companies if the Dept. of Labor implements its salary base increase for FLSA exemptions? How to defend discrimination claims, and are there First Amendment and anti-SLAPP defenses? How best to execute layoffs and buyouts?

Chairs: Tanya Menton ABC; Tom Wilson, Vinson Elkins

FOIA & BodyCams

FOIA at 50: Best practices for submitting FOIA requests, and negotiation tactics; often overlooked access laws and techniques to obtain public records.

Body Cams: Existing statutes and ordinances; pending and upcoming legislation and policies; MLRC's Model Policy.

Chairs: Terry Mutchler, Pepper Hamilton; Steven Zansberg, Levine Sullivan Koch & Schulz

(Continued on page 38)

(Continued from page 37)

Pre-Publication/Pre-Broadcast (repeated on Friday)

Vetting the contents of articles and videos: What are the libel and privacy concerns? What role does risk assessment play? How should lawyers approach the vetting conversation with editors?

Chairs: David McCraw, The New York Times; Andy Siegel, CBS; David Sternlicht, NBCUniversal; Jennifer Klear, The Wendy Williams Show.

Subpoenas, the Reporters' Privilege, and Shield Laws

Could there be an FBI vs. Apple for the press? Does the reporter's privilege apply to tech information and the cloud? Reporter's privilege 2.0: new arguments for its application to U.S. and foreign news media. What are the effects of the Risen case and the revised DOJ guidelines? Chairs: Kristina Findikyan, Hearst; David Greene, Electronic Frontier Foundation

6:00-7:00 Opening Reception

7:00-9:15 Dinner

Program: A Hypothetical Case Panel in the Context of the 2016 Presidential Campaign

A Fred Friendly-style hypothetical with journalists, political insiders and media lawyers raising issues in covering a political campaign, such as neutral reportage, broadcasting hidden camera and audio tapes of a campaign meeting, distribution of sex tapes of candidates, and other timely issues.

Panelists:

Tom Clare, Partner, Clare Locke
Kevin Madden, Partner, Hamilton Place Strategies
Ken Strickland, Washington Bureau Chief, NBC News
Sam Stein, Senior Politics Editor, Huffington Post
Barbara Wall, SVP & Chief Legal Officer, Gannett
Others to be added

Moderators:

Laura Handman, Davis Wright Tremaine; George Freeman, MLRC

(Continued on page 39)

(Continued from page 38)

THURSDAY, SEPTEMBER 22, 2016

8:15-9:30 Breakfast

Program: A View from the Bench Former MLRC Members, Now Federal Judges, Share Their Views on Media Cases

Judge Mark Hornak (W.D. Pa.)

Judge Wendy Beetlestone (E.D. Pa.)

Judge Paul Gardephe (S.D.N.Y.) (invited)

Moderator: Adam Liptak, The New York Times

9:45-11:00 First Breakout Session

Each registrant will be assigned to one breakout group of approximately 50 individuals for purposes of participating in each of the breakout topics, and will move to a different room for each breakout session.

Digital Media: An in-depth discussion of the latest developments in Section 230 law, as well as liability for harmful speech transmitted via online platforms; the status of right to be forgotten laws; encryption and national security; chatbots and more.

Intellectual Property Torts: An in-depth discussion of the latest developments in online copyright; the Slants / Redskins cases and registration of disparaging trademarks; use of music in election campaigns; right of publicity law; best practices in IP clearance and more.

Publication Torts: An in-depth discussion of the latest developments in defamation and privacy law, including determining public interest in privacy cases, libel lawsuits over denials of allegations; pleading actual malice under Iqbal/Twombly; proof of actual malice; developments in opinion law and more.

11:00-11:15 Break

11:15-12:30 Boutique Sessions B

Anti-SLAPP Litigation and Legislation

Update and review of anti-SLAPP laws and legislation; varying scope of anti-SLAPP laws (stay of discovery, attorney's fees, right of interlocutory

(Continued on page 40)

(Continued from page 39)

appeal); strategic concerns in when and what to file, and how to respond to your adversary's actions; judicial distaste for anti-SLAPP laws; application of anti-SLAPP laws in federal court; current state and federal anti-SLAPP initiatives.

Chairs: Laura Prather, Haynes & Boone; James Chadwick, Sheppard Mullin

Cross-Border Vetting

"You're Not in Kansas Anymore": What jurisdictions should you think about when vetting a story with subjects from various countries? Should you use the lowest common denominator or a more practical approach? How to deal with cross border IP and reporter's privilege issues – and do other countries have more protections? How should journalists use social media overseas? Enforcement of foreign judgments.

Chairs: Adam Cannon, Telegraph Media Group; Randy Shapiro, Bloomberg

FCC

Developments on net neutrality; the FCC's broadband privacy proceeding; set-top boxes; priorities for the Enforcement Bureau.

Chairs: Peter Karanjia, Davis Wright Tremaine; Erin Dozier, NAB

Newsgathering

Modern challenges to newsgathering: Public officials' emails on private servers; violence at campaign rallies; ballot selfies; interactive use of social media; ag-gag laws and undercover reporting; drones update - from FAA rules to insurance; expungement and sealing of court records; citizen cameras; FERPA; and cloud-based public records.

Chairs: Cynthia Counts, Duane Morris; Nabiha Syed, BuzzFeed

Trial Tales

A perennial favorite reviewing important and interesting media trials of the last two years. Lawyers from the *Mitre v. HBO* and *Hulk Hogan v. Gawker* trials will share lessons learned from the frontlines.

Chair: Tom Kelley, Levine Sullivan Koch & Schulz

12:30-2:30 Lunch

Program: Journalistic Family Feud

Teams of lawyers from different geographical regions will try to match their answers on legal and journalism questions with those of the audience.

Host: George Freeman, MLRC

(Continued on page 41)

(Continued from page 40)

2:45-4:00 Second Breakout Session

Digital Media, Intellectual Property Torts, Publication Torts

4:15-6:00 Next Generation Happy Hour

Hosts: Matthew Schafer, Levine Sullivan Koch Schulz; Drew Shenkman, CNN; Christine Walz, Holland & Knight

4:45-5:30 London Conference 2017 Open Planning Meeting

6:00-7:00 Outdoor Reception in the Pavilion

7:00-9:00 Outdoor Dinner Buffet

FRIDAY, SEPTEMBER 23, 2016

8:30-9:30 Breakfast

Program: Why the First Amendment Matters?

Speaker: Floyd Abrams, Cahill Gordon & Reindel

A preview of Mr. Abrams' new book of that title, highlighting how the U.S. is an outlier in providing sweeping First Amendment rights – and how different our ongoing political campaign might be if it were governed by the law of other Western democratic states.

9:45-11:00 Third Breakout Session

Digital Media, Intellectual Property Torts, Publication Torts

11:00-11:15 Break

11:15-12:30 Boutique Sessions C

Advertising and Commercial Speech

Developments in advertising and commercial speech cases, including discussion of what is native advertising and what makes it different; whether varying platforms raise different issues; and other advertising and commercial speech issues, including advertising online sports betting.

Chairs: Deirdre Sullivan, New York Times, and Ezgi Kaya, ALM

Encryption and Protecting Reporters' Materials

Mass state surveillance and digital security practices have been

(Continued on page 42)

(Continued from page 41)

increasingly in the news since the Snowden revelations, but the technical and legal implications for journalists and newsroom lawyers remain complex and convoluted. This interactive session by the Reporters Committee for Freedom of the Press will provide an introduction to using (and not using) technology to protect communications and materials both inside and outside the newsroom. Topics will include email encryption, secure computing environments, basic threat modeling, mobile security, and protecting online sources.
Chair: Adam Marshall, Reporters Committee for Freedom of the Press

Entertainment Law

A hypo to cover submissions and oral pitches of ideas for film and TV projects, including best practices, submission agreements and idea theft claims; acquisition of rights “ripped from the headlines” – “based” or “inspired” by true events and the Hurt Locker case; vetting the screenplay (what is required and the risk of claims); advertising and marketing issues; piracy; and recent entertainment litigation.

Chairs: Joel Weiner, Katten Muchin Rosenman; Pat Duncan, HBO

Ethics

Lawyer blogs: lawyering or advertising? The uses or misuses of Facebook; discussing ongoing trials in social media; spoliation issues in social media; the use of information from data breaches; the risks and rewards of lurking on social media.

Chairs: Bruce Johnson, Davis Wright Tremaine; Len Niehoff, University of Michigan School of Law; Nicole Hyland, Frankfurt Kurnit Klein & Selz

Pre-Publication/Pre-Broadcast

Vetting the contents of articles and videos: What are the libel and privacy concerns? What role does risk assessment play? How should lawyers approach the vetting conversation with editors?

Chairs: David McCraw, The New York Times; Andy Siegel, CBS; David Sternlicht, NBCUniversal; Jennifer Klear, The Wendy Williams Show

12:30-2:30 Lunch

Program: The Next Big Thing: The Hottest Trends in Media Law

A look back at the NBT candidates from prior conferences. Were they hits or bloopers? Plus a look ahead for the Next Big Thing.

(Continued on page 43)

Sponsorship opportunities are still available. If you have any questions, please feel free to contact George Freeman gfreeman@medialaw.org or Dave Heller (dheller@medialaw.org).