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MEDIALAWLETTER

Reporting Developments Through March 25, 2017

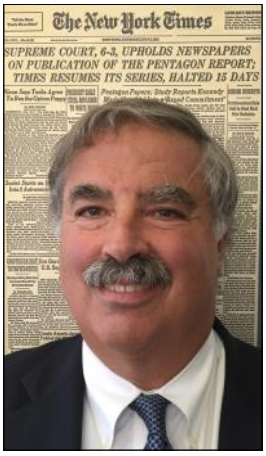
MLRC

LIBEL & PRIVACY

From the Executive Director's Desk

Back to Basics: LA, Miami Conferences Delight; Digital Conference Upcoming

Amidst the day-to-day drama from Washington and our strategizing on how to meet the challenges and offenses posed by the Trump Administration, the MLRC is also continuing to fulfill its fundamental mission. We are holding conferences; running our committees; distributing our Daily Report, our weekly ICYMI, monthly LawLetters and quarterly reports; weighing in on legislative and policy questions; conducting the Institute's legal workshops for journalists who don't have the benefit of a lawyer; answering legal questions from members and from the press; and updating and adding to our website.



George Freeman

In the mix of the more newsworthy and exciting happenings, sometimes the conferences get lost, and all but those who attend are unaware of their goings-on.

But, as an example, the last two conferences we held, in Los Angeles and Miami were really spectacular, with many attendees saying they were the best programs we had put on in those cities in quite a while – so a brief summary may be quite worthwhile.

The panel starred a musicologist who testified at the Stairway trial and who brought with him a mini-piano which he played to illustrate the key passages and copyright issues at the trial.

In Los Angeles in January we held our 14th Annual Entertainment and Media Law Conference in conjunction with Southwestern Law School. Frankly, last year's conference was a hard act to follow: we did a Sony Hack – One Year After. The keynote program featured Aaron Sorkin, screenwriter and producer of such TV and movies hits from The West Wing to The Newsroom, and from A Few Good Men to The Social Network, who very dramatically and eloquently made the case that publishing the materials from the hacking of Sony Corp. was illegal and, even more so, journalistically unethical. First Amendment advocates opposed that position, and it made for a very lively debate.

But this winter's program matched and bettered that one. Our keynote panel was on music copyright, more particularly the recent trials in the Led Zeppelin *Stairway to Heaven* case and the Blurred Lines case. Although contrary to my urgings the program didn't start with the opening bars of *Stairway*, the panel starred a musicologist who testified at the *Stairway* trial and who brought with him a mini-piano which he played to

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MLRC Executive Director George Freeman, center, and conference attendees chat during a break at the Entertainment Law Conference

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illustrate the key passages and copyright issues at the trial. Whether they were themes which had been used by countless musicians before, tricks used by music experts to disguise differences between songs, or how close the plaintiff's work came to Led Zeppelin's, it could all be heard by the audience.

This live musical demonstration combined with arguments from lawyers representing both sides of the case made for a lively, nay, inspired program.

Although this session was on everyone's lips at the reception which followed the day's work, the other three programs were valuable as well. A year ago, a panel on the current business environment in Hollywood noted that soon 25% of eyes watching Hollywood produced movies would come from China, so it seemed only right to have a session this year focusing on movie distribution in China, including the sensitive content and censorship issues.

A lively panel of practitioners working in the field exchanged views on the opportunities and challenges of doing such business in China.

No conference these days feels complete without a Sec. 230 session. But the one we put on at this conference dealt not only with the troublesome recent cases out of California and the Ninth Circuit, but focused on the kinds of sec. 230 issues uniquely applicable to Hollywood lawyers.

It was followed by the concluding session of the day on the copyright and trademark issues inherent in the ever more popular 'fan-created works', and how movie companies were dealing

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Left: Rafael Romo, Latin American Affairs Editor CNN Worldwide; right: Cuban dissident Adolfo Fernandez and Myriam Marquez, editor of el Nuevo Herald.

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with their most adoring fans developing their own content based on copyrighted productions. Much of the discussion dealt with the Star Trek: Axanar case; interestingly, the case was announced as being settled the following day, so we are taking some credit for bringing the parties together.

As in past years, the Conference was held in the LA Times building, a great site for us. Unfortunately, because the newspaper no longer owns the building nor runs its auditorium, it looks like we will have to move to a different venue next year.

Fortunately, we are hopeful we will be able to hold the Conference at USC's Annenberg School of Journalism, which I think will be a great new site.

* * *

In March we held our 5th Annual Latin American Media Law Conference on the campus of the University of Miami (a stone's throw from their Law School where in my first full-time job, I taught Torts the year after my graduation from law school). While this is the smallest of our conferences, it has brought together a hearty and engaged group who have become close friends through our annual meetings.

Again, last year's conference was a hard act to follow, as we had sessions then on the upcoming Rio Olympics and the expected copyright, trademark and coverage issues arising therefrom, and the recent opening of diplomatic relations between the U.S. and Cuba.

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Although it's hard sometimes to herd everyone indoors after breakfast, lunch and breaks outdoors in the balmy Miami weather, this year's program got everyone's attention. We started with a speech by Rafael Romo, a prize-winning CNN correspondent. He showed a number of his clips from volatile Latin American situations and asked the audience to identify both the legal issues and practical physical jeopardies inherent in those scenes. Robust audience participation ensued, as well as the recognition of the physical dangers which come with covering the news in Latin America.

The next panel was most noteworthy for its rather awful ironic twist. Headlined " Press Challenges in Latin America" it was aimed at discussing the obstacles in covering Latin American strongmen ready to throw the book at the press. Typically, in these sessions, U.S. lawyers give advice, not always realistic from our highly protected haven, of what Latin American journalists might do in their vulnerable positions.

However, this year that scenario was turned on its head: South American lawyers and press experts gave the U.S. folks advice about how to deal with a leader who is critical of the media at every turn and who threatens to use the law to keep them in their subservient place or, worse, suggests legal actions – say the opening up of the libel laws and prosecution of leakers - against them.

In a reversal, South American lawyers and press experts gave the U.S. folks advice about how to deal with a leader who is critical of the media at every turn and who threatens to use the law to keep them in their subservient place or, worse, suggests legal actions against them.

After lunch on the terrace, we heard an excellent and certainly timely talk from Cathleen Farrell, of the National Immigration Forum, about the immigration debate, specifically, how it should be covered and how advocacy groups can move the needle to affect its coverage.

That was followed by a panel on "Press Freedom in Cuba after Castro," featuring the editor of el Nuevo Herald, Myriam Marquez, and noted Cuban dissident Adolfo Fernandez who had spent seven years in jail for his activism, and spoke very movingly and eloquently about the situation in Cuba.

The unhappy take-away from that discussion was that not much has changed since Fidel's death, and the improvements in individual freedoms, including those of speech and press, have taken place glacially, if at all. (Mr. Hernandez' prepared remarks, as well as Ms. Farrell's on immigration, are published in this LawLetter, and I very much commend them to you.)

A final session on On-Line Piracy in Latin America closed the day's program. In-house lawyers from NBCUniversal, HBO Latin America, and Univision and IP experts from Brazil and Mexico discussed their legal and practical approaches to combatting the piracy problem.

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The day after both the LA and Miami conferences, the MLRC Institute put on its media law workshops for journalists, in LA at the Southwestern Law School, just a few miles from downtown, and in Miami at the very modern and snazzy offices of Fusion. As with our past workshops, we had very engaged audiences who asked a lot of questions on all the media law topics we covered. But mainly, they were thankful for the presentation as a whole, as most attendees felt it was very much needed since individually they don't have access to or support from lawyers.

The audience in both cities ran the gamut from beginning journalists looking for their first job to freelancers and bloggers pretty much working on their own to reporters and editors at small publications. The faculty in both places were MLRC member media lawyers from those regions, and they did a terrific job in making media law come to life with cogent analyses and many practical examples.

* * *

Looking forward, our next conference will be our Tenth Annual Digital Law Conference, to be held May 18-19 at the Computer History Museum in Mountain View, CA. Our keynote speaker will be Robert Post of the Yale Law School. His talk will introduce a program on "Europe's War on U.S. Platforms", which will take up the issue of European regulators' attacks on American digital companies with respect to data protection, the right to be forgotten, and other issues. This session is paired with a panel on cross-border copyright law issues, with a focus on takedown notices and the practical question of how global players can sensibly navigate the oceanic gulf between the U.S. and EU regimes.

Other sessions will plumb the recent decisions eroding some of the protections of sec. 230; the interfacing with law enforcement and intelligence agencies in instances of threatened or actual data hacking from individuals, terrorist organizations or extremist groups or even foreign governments; and how digital companies approach their social role in balancing the free speech rights of their users and their First Amendment principles with hate speech, cyberbulling and harassment. It also will take up the topical question of fake news, and what steps social media platforms are taking to combat this trend – including how to handle disinformation from official sources.

The Digital Conference starts Thursday, May 18th, after lunch, includes a networking reception Thursday late afternoon, and then resumes Friday morning through lunchtime. It's a great opportunity to focus on and learn about all things digital, as well as to meet many of the players in the field. I hope to see you there.

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

California Jury Awards $1.1 Million in Libel Damages Against Cal Coast News

On March 16, 2017, a jury in San Luis Obispo County, California, awarded $1.1 million dollars to a private figure hazardous waste disposal contractor, finding that he was defamed by the San Luis Obispo-based online news site *Cal Coast News*.

Background

In a 2012 article titled, "Hazardous waste chief skirts law," *Cal Coast News* reporters Karen Velie and Daniel Blackburn claimed that a contractor, Charles Tenborg, illegally transported hazardous waste that "exposed tax payers to huge fines" and that he encouraged public agencies to "ignore state law." Tenborg was the president of the waste management company Eco Solutions. The article, which relied on unnamed sources, also alleged that Tenborg had received an illegal no-bid contract and had been "fired" from an earlier job with a San Luis Obispo County agency.

Tenborg sought a retraction from *Cal Coast News*, but the news site did not respond. He sued for libel in 2013. A motion to strike the complaint under California's anti-SLAPP law was denied and that denial was upheld on appeal.

Pre-Trial Rulings

In pre-trial proceedings, the trial judge Barry LaBarbara concluded that Tenborg was a private figure based on his testimony that his public activities were limited to appearing at waste management conferences in which he promoted his business.

Trial

Opening statements in the trial commenced on March 8, 2017. In the plaintiff's case, Tenborg testified that he had not been previously fired by the County, introducing into evidence a letter of resignation. This was confirmed by testimony from his former employer at the County, who attested to Tenborg's good reputation. Plaintiff's lawyers further presented evidence that Tenborg was in compliance with relevant law applicable to waste disposal and contract bidding in the county. Tenborg testified that Ms. Velie had never asked him about his past employment or illegally transporting waste. Plaintiff also testified that as a result of the article, which was republished in an industry newsletter, he was contacted by colleagues from across California inquiring about the allegations, and that he ultimately had to close his

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business due to the loss of his reputation. Additional evidence was presented showing that the article was the first result that came up in a Google search on Tenborg's name.

A key problem for the defense was their inability to produce evidence supporting their allegations or testimony from their unnamed sources. Ms. Velie testified that she had worked on the story for 10 months, but that she had thrown out her original notes once she had transcribed them to a computer. The computer subsequently malfunctioned, according to Velie, destroying the notes. This was her explanation for failing, during her trial testimony, to be able to identify what sources she relied on for various allegations contained in the article. She also testified that two of her sources had died. Another source was reportedly outside the jurisdiction and unable to testify, according to one of the defense lawyers.

Throughout the trial, plaintiff's counsel's theme was that the reporters didn't perform basic fact-checking and had extensively relied on second-hand information. On cross-examination about her conclusions of illegal conduct by plaintiff, Velie admitted that she "didn't know what the laws were." She testified that she relied on several attorneys to support her legal conclusions, but could not name a single attorney that told her plaintiff had done anything illegal. Plaintiff's expert witness, Venise Wagner, a former reporter and current journalism professor at San Francisco State University, testified that the reporting was based on "hearsay" and "all innuendo."

In closing statements, one of the defendants' lawyers, David Vogel, argued that the amount of damages requested were "outrageous," and that plaintiff had never proven that he lost clients because of the article. He argued, "Who goes reading news articles after they are 4 years old?" He then stated, "He's a big boy; you get over your hurt feelings and you get on with your life."

Plaintiff's lawyer, James Wagstaffe, argued that of the dozen or so witnesses the defendant-reporters said they relied on, none testified. "That tells you everything you need to know about this case," he told the jury.

On March 16, 2017, the jury awarded $300,000 for pain and suffering and another $300,000 in presumed damages as to all three defendants and additionally awarded punitive damages of $500,000 against Cal Coast News and Ms. Velie. The plaintiff did not seek punitive damages against the co-author of the article, Daniel Blackburn. The jury verdict was unanimous on liability, 11-1 on actual damages and 10-2 on punitive damages.

Texas Supreme Court Affirms Denial of Anti-SLAPP Motion to Dismiss in "Welfare Queen" Defamation Case

Court Cautions Against Reliance on Wikipedia in Determining Article's Gist

By Marc Fuller

On March 17, 2017, the Texas Supreme Court decided a closely-watched defamation case brought by a woman who claimed she was libeled when a Dallas magazine referred to her as a "welfare queen." *D Magazine Partners, L.P. v. Rosenthal*, 2017 WL 1041234 (Tex. Mar. 17, 2017).

At issue was whether the term necessarily accused her of criminal conduct and the appropriate role of Wikipedia in making that determination. The Texas Supreme Court held that, while the article as a whole could be understood by a reasonable reader to accuse the plaintiff of welfare fraud, the court of appeals' reliance on Wikipedia's definition of the term "welfare queen" was improper. Because the plaintiff had satisfied her burden under the Texas anti-SLAPP statute to support her defamation claim based on this alleged gist, it affirmed the denial of D Magazine's motion to dismiss.

On an important ancillary issue, however, the Texas Supreme Court agreed with D Magazine that it was entitled to a partial award of fees based on the dismissal of the plaintiff's statutory claims, including claims brought on behalf of her daughter.

The Court's decision adds to a growing jurisprudence regarding the proper role—and, importantly, the limits—of Wikipedia and other open-source online resources in determining the meaning of a word or phrase.

The Court's Decision

Janay Rosenthal sued the publisher of *D Magazine* for defamation based on a March 2013 article by an anonymous contributor, speculating how Rosenthal was able to collect food stamps while living in one of Dallas's most exclusive neighborhoods. The article contained a mug shot of Rosenthal from a prior, unrelated arrest and was published under the heading "Crime." The title of the piece was "The Park Cities Welfare Queen."

D Magazine moved to dismiss the claim under Texas's anti-SLAPP statute. Because the anti-SLAPP statute clearly applied, the parties' argument focused primarily on the "gist" of the article. D Magazine argued that the article merely raised questions about whether Rosenthal

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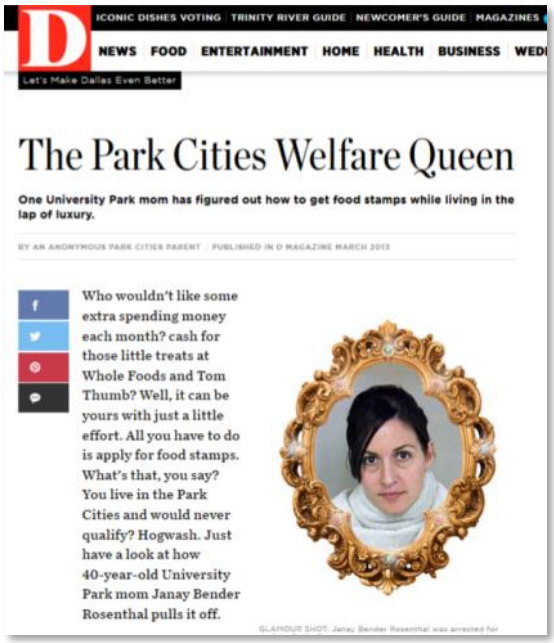
had taken advantage of the welfare system through legal means, while Rosenthal contended that the article accused her of providing false information to the government.

In affirming the trial court's denial of D Magazine's motion to dismiss, the Dallas Court of Appeals began its discussion by noting the article's title, which referred to Rosenthal as a "welfare queen." Citing Wikipedia, the court of appeals held that "welfare queen" had only two possible meanings: (1) a woman who has defrauded the welfare system or (2) a woman who has children out of wedlock while collecting government benefits.

Because the second definition did not apply to Rosenthal, the court of appeals held that the article must have accused her of defrauding the welfare system. Importantly, the "two meanings" noted by the court of appeals did not come from a dictionary. Instead, the court of appeals cited Wikipedia for this definition—even though the parties had not addressed or relied on Wikipedia in their briefing in the trial or appellate courts.


ICONIC DISHES VOTING | TRINITY RIVER GUIDE | NEWCOMER'S GUIDE | MAGAZINES

NEWS FOOD ENTERTAINMENT HOME HEALTH BUSINESS WED

Let's Make Dallas Even Better

The Park Cities Welfare Queen

One University Park mom has figured out how to get food stamps while living in the lap of luxury.

BY AN ANONYMOUS PARK CITIES PARENT | PUBLISHED IN D MAGAZINE MARCH 2013

Who wouldn't like some extra spending money each month? cash for those little treats at Whole Foods and Tom Thumb? Well, it can be yours with just a little effort. All you have to do is apply for food stamps. What's that, you say? You live in the Park Cities and would never qualify? Hogwash. Just have a look at how 40-year-old University Park mom Janay Bender Rosenthal pulls it off.

The Texas Supreme Court rejected the court of appeals' reliance on Wikipedia, but agreed that the article could be understood by a reasonable reader as accusing Rosenthal of criminal conduct. As to Wikipedia, the Court expressed serious concerns about the reliability and accuracy of its crowdsourced content. The Court further stated that reliance on Wikipedia as a source to determine public perception and community norms is dubious because "Wikipedia contributors do not necessarily represent a cross-section of society, as research has shown that they are overwhelmingly male, under forty years old, and living outside the United States." Accordingly, the Court found it "unlikely Wikipedia could suffice as the sole source of authority on an issue of any significance to a case."

Although the Texas Supreme Court criticized the court of appeals' method, it agreed with its interpretation of the gist of the article as accusing Rosenthal of welfare fraud. In doing so, the Court placed considerable emphasis on the article's "Crime" heading. It also stated that the article juxtaposed statements in ways that "strongly imply wrongdoing," by suggesting that Rosenthal had provided incomplete or inaccurate information in connection with her application for benefits. This "gist" interpretation was dispositive of the remaining elements of Rosenthal's claim, as the allegation of criminal conduct is defamatory per se (and thus

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Rosenthal need not show evidence of damages) and Rosenthal presented some evidence that it was not substantially true.

Despite affirming the denial of D Magazine's motion to dismiss Rosenthal's defamation claim, the Texas Supreme Court gave the magazine a significant victory when it further held that the magazine was entitled to attorneys' fees under the anti-SLAPP statute for obtaining the dismissal of the plaintiff's separate statutory claims in the trial court. The Supreme Court held that each claim was a "legal action" within the meaning of the anti-SLAPP statute, and thus, as the prevailing defendant, the magazine was entitled to its fees in connection with the dismissal of those claims. The Supreme Court did not state how the trial court should determine its fees award, in light of the unsuccessful motion to dismiss the defamation claim.

Discussion

The Texas Supreme Court's decision adds to a growing jurisprudence regarding the proper role—and, importantly, the limits—of Wikipedia and other open-source online resources in determining the meaning of a word or phrase. Although the consensus among courts is that Wikipedia should not be the sole source for deciding a critical issue, some courts have been willing to rely on it to determine the popular meaning of slang or jargon. The Texas Supreme Court's criticism of Wikipedia even for this purpose is notable, and it is likely to encourage courts and litigants to conduct a broader and more rigorous analysis of such terms' meaning in deciding defamation and other cases.

Moreover, although the case primarily involved an article in a print publication, the Texas Supreme Court's decision has important implications for defamation and other claims based on internet and social media posts. Like the *D Magazine* article at issue, such posts often feature slang or jargon, combined with a casual, hyperbolic, or satiric tone. Courts have struggled recently to determine the meaning of such statements, with some courts holding that the loose and figurative language in them is not actionable. But *Rosenthal* suggests that Texas courts will scrutinize such statements, in light of the entire post and its attendant features (such as website tags or hashtags), to determine how a reasonable reader or user might interpret them.

Marc Fuller and Tom Leatherbury of Vinson & Elkins LLP filed an amicus brief on behalf of the Texas Press Association, Texas Association of Broadcasters, Reporters Committee for Freedom of the Press, and Freedom of Information Foundation of Texas. Defendants D Magazine Partners, L.P. d/b/a D Magazine, Magazine Limited Partners, L.P., and Allison Media, Inc. were represented by Jason Bloom, Tom Williams, and Ryan Paulsen of Haynes & Boone, LLP. Plaintiff Janay Rosenthal was represented by John DeFeo of Condon Tobin Sladek & Thornton, PLLC.

Reality TV Suit Dismissed Under Anti-SLAPP Statute

By Laura Prather and Christina Crozier

A Texas federal district court has dismissed all claims in a case involving the reality TV show *8 Minutes*. In *Forsterling v. A&E Television Networks*, Cause No. 4:16-cv-02941 (S.D. Tex. March 9, 2017), Judge Lynn Hughes granted the media defendants' motion to dismiss under the Texas anti-SLAPP statute and for failure to state a claim.

Background

The concept of *8 Minutes* was inspired by a group of Christian volunteers who urged women to leave the sex trade. Pastor Kevin Brown, a retired police officer, and his team conducted regular "missions" in which a male volunteer would pose as a "John" seeking the services of a prostitute but then reveal that he was actually hoping to help the woman leave a life of prostitution behind. The creator of 8 Minutes was intrigued by the group's efforts and saw potential for an unscripted "docu-follow"-type television series.

The court found that dismissal was proper under the Texas anti-SLAPP statute because the show covered a topic of public concern, and the plaintiffs did not plead their claims with clear and specific evidence.

8 Minutes was produced by Relativity TV and Long Pond Media. Before women participated in filming of the show, they were asked to sign an appearance release. After filming, the producers put the women in touch with support organizations and victim's advocates.

Five episodes of *8 Minutes* aired on A&E in early 2015. Later that year, three of the women filed suit against Relativity, LongPond, and A&E Television Networks, alleging that the defendants made unfulfilled promises about services they would receive if they appeared on the show, such as housing, employment, and medical care. The plaintiffs brought claims for breach of contract, fraudulent inducement, negligent misrepresentation, intentional infliction of emotional distress, promissory estoppel, vicarious liability, and invasion of privacy.

The defendants filed a combined Rule 12(b)(6) motion to dismiss and anti-SLAPP motion.

Motion to Dismiss Granted

The district court granted the motion on multiple grounds, dismissing all claims against all three defendants.

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The concept of 8 Minutes was inspired by a group of Christian volunteers who urged women to leave the sex trade.

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The court found that dismissal was proper under the Texas anti-SLAPP statute because the show covered a topic of public concern, and the plaintiffs did not plead their claims with clear and specific evidence. The court explained:

> Producing the show was an exercise of free speech on a topic of public concern. This category is not limited to documentaries and newspapers. The show was reality television; the women filmed multiple takes, and the producers dramatized parts of the story. What matters is that the show addressed human trafficking and prostitution, highlighting the potential dangers of the trade. Like other large cities, Houston is a destination for human trafficking, and it has been trying to address the problem.

The district court also found that plaintiffs failed to state claims for several reasons. The court concluded that the plaintiffs waived their fraudulent inducement and invasion of privacy claims in their appearance releases. The court also ruled that the alleged promises to provide services to the plaintiffs were too vague to form a contract.

Laura Prather and Christina Crozier of Haynes and Boone, LLP and Nick Nelson of Bhojani & Nelson, PLLC represented the defendants. Plaintiffs are represented by Damon Mathias of Mathias Civil Justice PLLC.

Court Cuts Off Johnson in His Attempt to Assert Libel Claim

By Jim Rosenfeld and Jaya Kasibhatla

A Delaware Court rejected a Pennsylvania plaintiff's attempt to take advantage of Delaware's generous 2-year statute of limitations for defamation and false light claims, dismissing the plaintiff's lawsuit with prejudice and in its entirety, without leave to amend. *Johnson v. Warner Bros., et. al*., No. 1:16-cv-00185 (D. Del.)

Judge Leonard P. Stark held that libel and false light claims asserted by Marques Andre Johnson, a rapper who sued multiple media defendants for confusing him with another rapper who cut off his own penis, was time-barred. Although Plaintiff was domiciled in Pennsylvania (which has a one year statute of limitations for defamation and false light claims) he sued in Delaware over a year after the reports were published, arguing that he had a substantial fan base and opportunities in Delaware that were diminished as a result of the reports.

Marques Andre Johnson

However, Delaware's borrowing statute requires that where a cause of action arises in another state and that state has a shorter statute of limitations than Delaware's, the law of the state with the shorter limitations period applies. Neither Plaintiff's allegations of economic and reputational harm in Delaware nor the fact that some of the media defendants were Delaware corporations were sufficient to defeat the presumption that, in a multistate defamation case, Plaintiff's cause of action for defamation arises in his state of domicile. Applying Pennsylvania's statute of limitations, the court held the action time-barred and granted the motion to dismiss against all Defendants.

Background

Johnson, who performed under the name "Andre Roxx" and was affiliated with the internationally known Wu-Tang Clan, filed suit over a 2014 article which reported that he

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attempted suicide by cutting off his own penis and jumping out of a window. TMZ's article confused Roxx with another rapper named Andre Johnson, who was also affiliated with the Wu -Tang Clan but performed under the name "Christ Bearer." A number of other media defendants subsequently repeated the error. Plaintiff, who was incarcerated in Pennsylvania at the time, claimed that he learned of the story from television and radio broadcasts while in prison.

District Court Decision

Plaintiff argued that his claims were timely because his cause of action arose in Delaware, and that even if Pennsylvania law applied, the discovery rule would toll the statute of limitations until Plaintiff learned the identities of all of the defendants who re-published the story.

The court rejected all of Plaintiff's arguments, finding first that Plaintiff's multistate defamation and false light claims arose in Delaware. Johnson argued that Delaware had the most significant relationship to his claims because the story caused him the greatest injury in Delaware, where he had a substantial fan base and allegedly lost many opportunities to perform. However, since Johnson could not show that his economic and reputational injuries were "unique" to Delaware, the court held that he could not overcome the presumption that his cause of action arose in the state where he was domiciled. Applying the Delaware Borrowing Statute, the court found that Pennsylvania law governed his claims and rendered them untimely.

Plaintiff's alternative argument, namely that that the discovery rule tolled his claims under Pennsylvania law, fared no better. The court agreed with Defendants that the discovery rule did not apply to mass-media defamation claims, which are easily discernible. Moreover, the plaintiff conceded that he had learned of the allegedly defamatory statements right away, even if he claimed not to know immediately of the full extent of his injury. Finally, under Pennsylvania's single-publication rule, the cause of action accrued when the first article was published, not at the point when Plaintiff learned the identities of all remaining defendants.

Dismissing the claims against all Defendants, the court noted that though Plaintiff had not requested leave to amend, any such request would be denied as futile, since the claims were time-barred when first filed.

Jim Rosenfeld and Jaya Kasibhatla of Davis Wright Tremaine and Thomas E. Hanson, Jr. of Morris James represented defendants Defendants BET Interactive, LLC, CBS Interactive, Inc., Daily News, L.P., Gannett Company, Inc., iHeartMedia, Inc., Interactive One, LLC, Real Times Media, LLC and Viacom International Inc.

Lawsuit Over Ellen DeGeneres Segment Fails as a Matter of Law

Making Fun of Plaintiff's Name Not Actionable

A lawsuit against the producers of the Ellen DeGeneres show over a comedy segment making fun of plaintiff's name failed as a matter of law to state a claim for defamation, privacy or emotional distress. *Pierce v. Warner Bros. Entertainment*, No. 5:16-CV-207 (M.D. Ga. Feb. 15, 2017) (Abrams, J.).

The plaintiff, Titi Pierce, is a Georgia real estate agent. She sued over an *Ellen* segment entitled "What's wrong with these signs?" which pokes fun at typos and malapropisms in public signage. Ellen showed a photograph of plaintiff's Coldwell Banker realty sign, which included her name and cell phone number. Ellen pronounced her name "Titty" – as in breasts, rather than "Tee Tee"— then referred to another funny sign from the segment (the "Nipple Convalescent Home") and observed "Sounds like she might have spent some time in that Nipple home."

Plaintiff's cell phone number was not blurred and she alleged she received numerous ridiculing and harassing phone calls, voice mails and text messages. For example, one voice mail message said her "size DD, 37 bra is ready."

Dismissing the complaint, the court held that given the context the statements poking fun at plaintiff's name were not "false facts" that could support a defamation or false light claim. The misappropriation claim failed because "information that is open to the public cannot be misappropriated." And the TV show was "not directed at a particular individual" and thus was not actionable as intentional infliction of emotional distress under Georgia law.

Finally, the court denied plaintiff's request to amend her complaint, holding the proposed amendments were futile since they lacked sufficient facts to state a claim or overcome the First Amendment hurdles to her claims.

Tom Clyde, Kilpatrick Townsend & Stockton LLP, Atlanta, represented Warner Bros. Entertainment. Plaintiff was represented by Stacey Godfrey Evans, S.G. Evans Law, Atlanta.

Texas Doctor's Libel Suit Pronounced Dead by Appeals Court

By Jim Hemphill

A Houston-area doctor has lost the latest round in a long-running dispute with the parent company of the *Austin American-Statesman* newspaper. *Cox Media Group, LLC v. Joselevitz*, No. 14-16-00333-CV, 2017 WL 1086572, at *10 (Tex. App. – Houston [14th Dist.] Mar. 21, 2017, no pet. h.).

Background

The doctor, Joel Joselevitz, sued Cox Media Group, LLC before the *Statesman* article was even published, unsuccessfully seeking a prior restraint. He voluntarily dismissed that claim, but sued Cox Media again after publication of the article in question, which was "a comprehensive investigation of regulatory action against, and the lack of criminal prosecution of, doctors who allegedly violate laws regarding prescription drugs."

Cox Media's motion to dismiss under Texas' anti-SLAPP statute was denied by operation of law, but the Court of Appeals reversed, ordered the plaintiff's claims dismissed, and remanded to the trial court for assessment of attorneys' fees and sanctions.

A Houston-area doctor has lost the latest round in a long-running dispute with the parent company of the Austin American-Statesman newspaper.

Joselevitz was a pain management doctor who was sanctioned twice by the Texas Medical Board and sued at least three times by the families of patients who died of overdoses while in his care. Among other things, Joselevitz was charged with "non-therapeutically and negligently" prescribing "a dangerous combination" of drugs to his patients. The first sanction involved only continuing education and a $2,000, but the second round of sanctions resulted in the Board suspending Joselevitz's ability to prescribe any medications.

Joselevitz first sued Cox Media and Carol Roane, the mother of one of his patients who died of an overdose, in November 2014, seeking an injunction against Roane to prohibit her from speaking with the *Statesman*, and against Cox Media prohibiting it from publishing anything about Joselevitz. The claim against Roane arose from a confidentiality agreement entered in the settlement of Roane's wrongful death suit against Joselevitz, which the doctor claimed prohibited her from speaking about the matter.

The trial court granted a temporary restraining order against Roane but denied the request to muzzle the newspaper. When Joselevitz continued to pursue injunctive relief, Cox Media filed a motion to dismiss under the Texas Citizens Participation Act (TCPA), the state's anti-SLAPP

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statute. Joselevitz then took a voluntary non-suit against Cox, but maintained his claim against Roane (who had already spoken to the newspaper before the TRO was issued).

The *Statesman* article was published in late December 2014 and discussed the lack of criminal charges against doctors who had been found to prescribe medications illegally. Joselevitz was one of three featured examples. Joselevitz then sought to take the deposition of the *Statesman* reporter, who moved to quash under the Texas shield law. The trial court first granted the motion to quash, then denied a subsequent motion. (Mandamus proceedings on that issue were stayed during the appeal of the TCPA motion.)

Joselevitz amended his lawsuit to add Cox Media as a defendant again in December 2015 as limitations were about to expire. His precise complaints about the article were a moving target. In his initial pleading, he contended that the article falsely characterized him as "a doctor that overprescribed" pain medications, and that it "appears to lay sole blame on Plaintiff for the death of his patients." Cox Media filed a motion to dismiss under the TCPA and set the matter for hearing.

The day before the hearing on the motion to dismiss, he filed a response alleging different purportedly defamatory statements and implications: first, that Roane's daughter died solely from medications prescribed by Joselevitz when in fact she overdosed on "some" medications he prescribed, along with other substances; second, that the article allegedly implied he ran a "pill mill"; and third, that the article states he "overloaded" Roane's daughter with medications until she became addicted, when she purportedly was previously addicted before being treated by Joselevitz.

The relatively lengthy opinion includes a detailed account of the Texas Medical Board's charges and sanctions against Joselevitz.

Although never formally pleaded, Joselevitz submitted an affidavit that identified additional allegedly false and defamatory statements, and he even attempted to add another in his appellate reply brief.

The trial court failed to rule on the motion to dismiss within 30 days of the hearing, which meant the motion was denied by operation of law. Cox Media took an interlocutory appeal, and the Court of Appeals reversed without hearing oral argument.

Court of Appeals Decision

The relatively lengthy opinion includes a detailed account of the Texas Medical Board's charges and sanctions against Joselevitz, and analyzes each challenged statement and implication in light of the Board's actions. The court held that Joselevitz failed to carry his burden under the TCPA to come forward with *prima facie* evidence that the statements were substantially false; that the article does not reasonably imply that he ran a "pill mill"; and that

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the article was not susceptible to the interpretation alleged by Joselevitz – that it painted him as a "vitriolic doctor" who "harmed [his] patients."

The TCPA provides that a successful movant recovers attorneys' fees from the non-movant, along with a sanction sufficient to deter similar conduct. Cox Media argued that because Joselevitz did not contest its fee application in the trial court, the court of appeals could enter judgment for fees in the amount sought. The court disagreed, finding that remand was appropriate for the trial court to specifically consider whether the requested fees were reasonable. On remand, the court will also consider what sanctions may be appropriate.

Joselevitz could move for rehearing or rehearing *en banc*, or could seek review by the Texas Supreme Court.

Jim Hemphill is a shareholder at MLRC member firm Graves Dougherty Hearon & Moody, PC in Austin, Texas, and is co-chair of the MLRC DCS Litigation Committee. He represents Cox Media in the Joselevitz *case.*

MLRC Miami Conference 2017

5th Annual Conference on Legal Issues Concerning Hispanic and Latin American Media

On Monday March 13, over 50 lawyers from North and South America convened at the University of Miami School of Communication for MLRC's 5th annual conference on Legal Issues Concerning Hispanic and Latin American Media.

The genesis of the conference was the growth and importance of the cross-border Spanish language media market and the significant differences in media law between the U.S. and the many nations of Latin America. The conference has provided a unique forum for lawyers from North and South America to learn from each other about these issues and share best practices on defending journalists in the hemisphere. This was amply demonstrated at our 2017 event.

We had two featured speakers. Rafael Romo, Senior Latin American Affairs Editor of CNN Worldwide, started the conference with a colorful discussion of the challenges he has faced gathering and reporting news from Latin America – from covering protests in Mexico to, most recently, the fallout from CNN's investigative report into Venezuela's sale of its passports on the black market.

Our second speaker, Cathleen Farrell, communications director for the National Immigration Forum, discussed press coverage of the immigration debate – and the challenges in reporting on this complex legal and policy issue. A copy of her remarks follows this article.

The conference also included three panel sessions. The first, Press Challenges in Latin America, focused on covering populist leaders in Latin America – from Juan Peron to Hugo Chavez – and the lessons to be drawn in covering the Trump Administration. Dave Heller, MLRC, moderated the panel featuring investigative reporter Michael Smith of Bloomberg News; Carlos Lauria, Director of the Americas programs for Committee to Protect Journalists; and Roxana Kahale, founder of Kahale Abogados, Buenos Aires.

The second panel, Press Freedom in Cuba after Castro, was moderated by Adolfo Jimenez, Holland & Knight, with two expert panelists. Myriam Marquez, editor of el Nuevo Herald, the largest Spanish language paper in the United States, and Adolfo Fernández, a Cuban dissident who spent 7 years in jail for engaging in independent journalism in Cuba. A copy of Mr. Fernandez's remarks follows this article.

Our final panel focused on Online Piracy and IP protection in Latin America, including the scope of the problem and the legal and practical strategies to combat it. The panel was moderated by Allison Lovelady, Thomas & LoCicero, with panelists Ana Salas Siegel, NBCUniversal; Lin Cherry, HBO Latin America; Alvaro Jeanneau, Univision; Federico Perez, Perez Salazar & Echegaray, Mexico; and Paula Mena Barreto, Campos Mello Advogados, Rio de Janeiro, Brazil.

The conference was presented with the support of Davis Wright Tremaine; Holland & Knight; Thomas & LoCicero; and the University of Miami School of Communication.

Cuba After Castro

By Adolfo Fernández

It is a great honor to be here. I hope we can shed some light on Cuba's situation, our national tragedy.

When dealing with Cuba, we need to avoid the usual categories like parliament, administration, checks and balances, the rule of law…

For those in power in Cuba, the Revolution is a God-like entity, a divine source, and the source of everything good. In other words, the Revolution is sacred, and FC is its prophet.

It's an absolute power; and on the basis of that assumption, FC can rule for 50 years, or 60, and nobody can criticize him. He's beyond criticism and beyond reproach. He rules by "divine right".

And how did that happen? He was the triumphant leader of a revolution many saw as the miracle solution to our main problem of the day: Getting rid of the military dictatorship by Fulgencio Batista. Like the ancient Romans said: *Corruptio optimi pessima* (The corruption of the best is the worst of all)

Now FC has passed away, and his younger brother has inherited that "divine power," not without a certain degree of legitimacy, because he was also a part of that conspiracy from the beginning.

Their main aspiration now is that this legitimacy is inherited by the next generation of Castros. Of course, that will be a tough cookie to swallow, particularly for those who have sacrificed enormously for the so-called revolution.

By the way, *mutatis mutandis* the same is true for Venezuela. The Maduro-Cabello- military clique is not going to yield an iota of power. Power is never yielded in that kind of system. Power is passed on to the next leader, or generation of leaders, that in turn will do their best to maintain the status quo.

The difference with Venezuela is that Hugo Chavez came to power through free and fair elections, with all the elements of a liberal democracy –plurality of political parties, free press, regular elections…

In Cuba though, FC got rid of all the elements of what he called a bourgeois democracy, and of a market economy.

Particularly after he defeated the Bay of Pigs invasion, FC was able to say, for the first time in the Americas, (and actually in the whole Western world) all newspapers are mine, all radio stations and TV channels are mine, all hospitals and all schools are mine, all factories are mine, all big farms are mine; you may retain some small plots of land, but the big farms are all mine. All mines are mine; and then, all rivers are mine, all harbors are mine, all roads and railroads

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are mine. There's only one political party –it doesn't matter if it's called Communist, or Fascist, or People's Democratic: there's only one party and it's mine.

And then a Constitution was written to support that *de facto* structure. That Constitution was enacted in 1976. So, during 15 years, FC was ruling from the rostrum. His word was the only law. No other ruler has held that kind of power in our civilization.

And anyone who doesn't agree with that set up or protest against it, even if peacefully, will be judged according to that constitution and its attached penal code, and become a *de jure* enemy of the sacred entity. That offender becomes "an enemy of the people" as in Stalin times, or "a traitor to the homeland" according to Castro.

25 years ago, I made that decision. And of course, I was very afraid. I lived in fear all the time, for what could happen to me, and what could happen to my family; to my wife and to my 14 year-old daughter.

But that is a decision you make regardless; you close your eyes, and you say: "I'm going to do this even if 'the divine ruler' makes me pay dearly for it." I needed to speak about the situation in my country.

When I started as an independent journalist, the usual sentences were 2 or 3 years in prison for "spreading false news", or for *desacato*, meaning "disrespect", or "contempt". They could give you 2 or 3 years for "spreading false news". How did they manage to do that?

Well, you need to use sources for your stories on human rights violations. Then, they manage to "convince" my source that what I had reported was not true. Under duress, my source would declare before court that, for example, her son in prison was well treated; that she had never said to me that her son had been beaten by the police, and that the only thing she had told me was that her son "was not feeling well in prison".

Another trap I was to avoid was using phrases about the Cuban leaders that I could not substantiate; things like "FC is crazy", for example. So, I was very careful to speak only about human rights violations in Cuba, and FC is a bad ruler, and the reasons why I could say that.

If accused, I could defend myself quoting Jose Marti:

> *Un hombre que oculta lo que piensa, o no se atreve a decir lo que piensa, no es un hombre honrado. Un hombre que obedece a un mal gobierno, sin trabajar para que el gobierno sea bueno, no es un hombre honrado.*
>
> A man who hides what he thinks, or dare not say what he thinks, is not an honest man. A man who obeys a bad government, without working to make the government good, is not an honest man.

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But I admit that sometimes I got overenthusiastic. This is one example:

One day FC visited the Chinese Embassy in Havana; it must have been around 1999, for the 50th Anniversary of the People's Republic of China. And he came out speaking wonders about the Chinese culture. Well, nothing is wrong with that. I'm also an admirer of the Chinese culture. But then I thought- and I wrote—wondering when was the last time you heard FC say anything positive about our Western culture. It's true that the Chinese discovered gunpowder and paper. But when did FC celebrate all the scientific achievements: electricity, penicillin, pasteurization and so many others; and all the geographic discoveries? What about Marco Polo, Christopher Columbus? What about Leonardo da Vinci? Those were ambassadors of our culture. It was implicit that FC hated our culture.

And then I went on: when was the last time you heard FC say a word of praise about his school, or his teachers, any of his teachers? Never.

I was given 15 years in prison in a court of law, of which I served 7 and a half.

They created a law to protect Cuba's national sovereignty.

Today the situation remains basically the same, only that independent journalists now have better means of communications: all those technological devices mankind has created, like laptops, and smart phones, and memory sticks…

So, now anyone can produce a cell phone, make pictures, or a video, and upload them to the Internet in seconds. Of course, Cubans on the island don't have internet; what they have is a travesty of internet, but then the ingenuity of Cubans comes into play, and they manage to upload those photos and videos anyway. Yoani Sanchez is an excellent example of that.

Sol is a single mother; she has an only son; he's her only possession. The regime has threatened her with taking away her parental rights if she continues to write critical stories.

A peaceful transition to a more efficient economy and a more democratic exercise of political power.

You aren't threatening them with weapons; so, they're not going to shoot you on sight.

While President Reagan's 1983 "evil empire" speech horrified many critics – and even some of his staff – as a "provocation," dissidents in at least one Soviet prison were "ecstatic."

Israeli cabinet minister Natan Sharansky, who at the time was confined to an eight-by-10-foot prison cell on the border of Siberia, said his jailers gave him the special privilege of reading the communist newspaper Pravda.

Splashed across the party organ's pages after Reagan's March 8, 1983, speech to the National Association of Evangelicals was condemnation of the president for having the gall to label the Soviet Union in such terms.

But a far different take on the speech quickly began to echo among the dissidents, who spread the story by tapping on walls and talking through toilets.

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Sol García Basulto and Henri Constantín, independent journalists in Camagüey

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"We dissidents were ecstatic," Sharansky wrote in a column for the Jerusalem Post.

"Finally, the leader of the free world had spoken the truth – a truth that burned inside the heart of each and every one of us," said Sharansky, a Russian Jew.

Societies cannot remain motionless.

Nothing will come from within the regime

Not making any more unilateral concessions. Those empower only the government, not the people.

Don't expect any serious reform that comes from within the government.

They almost got everything they needed under President Obama. If you think about it, they have missed a wonderful opportunity, to have made some modest reforms, enough to convince the US public opinion, and US business, that their reforms were for real.

Adolfo Fernández was a journalist in Cuba with the Patria news agency; and a contributing journalist to foreign publications, particularly in Sweden, as well as for the Russian human rights news agency Prima. He was arrested and sentenced to 15 years in prison during the Black Spring crackdown on dissidents in 2003. In prison, he went on a hunger strike for demanding food and medicine for seriously ill prisoners. He was released after 7 years and expelled. He know works for the Cuban American National Foundation which provides support and resources for independent civil society, nonviolent activism, and projects that foster civic engagement and community building in Cuba.

Reporting on Immigration in the New Environment

By Cathleen Farrell

Good afternoon and thank you for the opportunity to speak about several topics that are near and dear to my heart: immigration, the media and the changing political and media landscapes. I hope that my observations will be if not helpful to you at least they'll be interesting and I promise to leave plenty of time for questions and discussion.

To say we live in interesting times is putting it mildly.

We are about 50 days in to the Trump administration, an administration that most pundits and pollsters were unable to predict. I would argue that they should have been able to do so. (Did we learn nothing from the results of the "Brexit" and the Colombian peace referenda?)

Cathleen Farrell

This country is deeply, deeply divided, but not necessarily along political lines. The strongest divisions seem to be in terms of how Americans express both their fears and their aspirations for the future of their country. Many want to make America great again. Just what that means and how they will go about it, are still not entirely clear.

It's no longer easy to pigeonhole people by their political views. The monikers "liberal" and "conservative", while not meaningless, are very difficult to define in traditional terms.

Even people's definitions of themselves no longer fit into neat little categories. This country is not only one of the most ethnically, culturally, linguistically, racially diverse countries on the planet; it is arguably one of the most diverse in all of human history.

I sometimes wonder if we realize this. It is pretty extraordinary.

And the backdrop to all of this is that we are still living through one of the biggest revolutions humanity has ever experienced: the tech revolution. Not since humans domesticated animals and then much later the onset of the industrial revolution have we lived in an age that has provided so many challenges and opportunities and disruptions. This latest revolution is happening at warp speed and because of that velocity we can barely keep up with some of the ethical questions technological advances present.

Before we delve into the political landscape and a discussion of the minefield that is immigration reporting, I'd like to give some background here on the media landscape and the changes I've seen just in my professional lifetime alone. Journalists weren't even using computers when I first walked into a newsroom as a journalist – (and I say "as a journalist"

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because my father was a journalist, so I actually had been hanging out in newsrooms since the early 1960s). As recently as about 30 years ago, in some cities there were still evening newspapers and many people subscribed to both a morning and an evening paper. Evening papers eventually died out because they were no competition for the evening newscasts, which often provided real time reporting of the day's events.

The tech revolution hit the news industry full force, in some good and in some very bad ways. The introduction of computers and the world wide web enabled newsrooms not only to produce but to transmit and disseminate the news faster than was ever thought possible. Advances in technology led to greater accessibility to all kinds of information, to our ability to report on that information, to analyze it and to channel it to audiences.

We also saw the rise of new players in the media landscape, such as websites, which initially just mimicked the way print publications were laid out. The rise of cable created the 24-hour news cycle, but not necessarily the demand for substantive reporting.

New tools and platforms, especially social media platforms such as Facebook and Twitter, which allow the consumer to aggregate his or her sources of news, have given the reader the ability to consume what they want, when they want.

This country is deeply, deeply divided, but not necessarily along political lines.

I won't go into the economics of print/traditional vs digital because nobody has really ever figured out how to monetize the news consistently over generations. Suffice it to say that the traditional ***business*** model of many media outlets has suffered greatly with these technological advances and advantages. For quite some time now, probably the last 15 years or so, reporters have been called upon to do more and more for less and less. Newsrooms have suffered steep declines in newsroom personnel. Media outlets have fewer reporters but they are producing more content, although not necessarily more news. Many reporters not only report and write, they also shoot and edit the news, for multiple platforms. There are fewer and fewer beat reporters. So many demands are placed on reporters that they often don't have the bandwidth to be more substantive, to develop sources, to read reports, to delve more deeply into a subject or an area.

The golden age of traditional journalism, which saw its highpoint in the middle to the end of the last century, is now long over and we are well into an age of non-traditional media, which includes new actors.

Some of those new actors are pundits, most of whom aren't journalists but they play them on TV. Not a good trend. But more on that later.

So that was my quick and dirty take from Gutenberg to Zuckerberg.

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As I said earlier, the country is deeply divided, it is polarized. There is no place more evident of that than Washington DC, where the discourse has been ugly and uncooperative for several decades now. This is hardly new.

The new administration in Washington, one could argue, came about as a result of a lot of dissatisfaction with the upheaval caused by globalization and the tech revolution. You could say that we have gone from a zeitgeist of hope to despair. I don't think that's an exaggeration.

For several years now, the country seems to be have been experiencing unprecedented levels of anxiety. There is a feeling of being left behind, a feeling among many that their children will not fare as well as they did economically. People feel unsafe.

Enter Donald Trump.

Trump tapped into the zeitgeist of much of the country in a way that other politicians clearly did not.

Media savvy with very high name recognition. A self-made man. A non-traditional politician. A Washington outsider. A man who appears to speak his mind. No filters.

Trump gave voice to those anxieties and he expressed views that were unpopular with "coastal elites" but resonated with wide swaths of the population: drain the swamp, the unfair media.

Trump used immigration as a proxy for a broad range of issues: national security, crime, the economy (jobs and trade), the culture wars (religious, racial, social). Values.

What was Trump's message? Over and over he cited immigration as the root cause of many of the problems creating the widespread anxiety:

The monikers "liberal" and "conservative", while not meaningless, are very difficult to define in traditional terms.

- We are unsafe because of immigrants from Muslim countries. In December of 2015, Trump expressly proposed a ban on all Muslim immigration. He proposed something called "extreme vetting", a term he used over and over.
- We are unsafe because of the hordes of people coming over the southern border unchecked
- The opioid epidemic is the fault of drugs coming in from Mexico [and not of access to and addiction to prescription drugs, which is what the experts say is largely the root cause of the epidemic]
- Immigrants are taking our jobs
- Immigrants are the main perpetrators of violent crimes

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Trump signaled very early on that he was going to blame immigrants for what ails us. Even when he announced that he was running for president in June of 2015, Trump demonized Mexican immigrants, calling them criminals and rapists. Although some, I suppose, are "good people".

The 24-hour news cycle and the extraordinary accessibility to the correct information still did help us refute erroneous messages with facts. You've all heard it said that we live in a "post -fact" era. That doesn't bode well for the truth. And so this is dire for journalism. Truth is an absolute. There are no alternative facts.

But, thank you anyway, Donald Trump.

Because before this last election cycle, for voters the issue of immigration ranked pretty low in terms of priorities – somewhere between 8th and 12th place, according to many polls in recent years. Donald Trump brought immigration to the forefront and made it the burning issue that many of us believe needs to be resolved.

We need to find a permanent legislative solution to the current immigration situation where many industries (from agriculture to tech and beyond) cannot find and hire the workers they need, where families are divided because of their immigration status, where there are 11 million undocumented immigrants contributing in meaningful ways to our communities and our country and their situations are precarious.

For quite some time now, probably the last 15 years or so, reporters have been called upon to do more and more for less and less.

My organization, the National Immigration Forum, advocates for the value that immigrants and immigration bring to this country. We're a nation of immigrants, as are all the countries in the Americas. We all have our immigrant story. Gosh, even Donald Trump has an immigrant story. His mother was from Scotland and two of his three wives are immigrants.

I can spout all kinds of interesting facts and figures about immigrant contributions:

- Immigrants overall commit fewer crimes and have a lower rate of unemployment compared to the US-born population. [Cato Institute, The Sentencing Project]
- Undocumented immigrants make up approximately 5% of the US workforce. (they are overrepresented in certain industries such as construction and agriculture). [Pew]
- Undocumented immigrants pay an estimated $12 billion a year in federal, state and local taxes. They and documented immigrants pay much more in taxes than they receive in benefits. [Institute on Taxation and Economic Policy]
- (One of my favorite fun facts --Did you know that 83% of the finalists in the 2016 Intel Science Talent Search were the children of immigrants? 75% of that group had one or

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both parents who has an H1-B visa. H1-B visa holders -- that's the high-skilled visa mainly used in the tech industry) –make up less than 1% of the population.)

More than facts and figures, it's really important to hear immigrant stories. They humanize people who have been demonized. Those stories are what is going to win the battle because facts just don't seem to be doing the trick.

And this is where journalists come in.

If I think my job is tough, I think the job of a journalist these days – especially one covering immigration – is tougher still. Besides the day-to-day challenges of limited resources including time to become conversant in a topic, a journalist covering immigration has to be able to ask questions about a very, *very* broad range of topics: economics, culture, public policy. The tax code is complex; immigration law is more complex still.

Couple that with a president who has put the media on notice, to put it mildly.

Among the more egregious examples of this:

Journalists on the campaign trail with Trump were often booed and harassed at rallies. In August of 2015, Trump expelled a prominent journalist from a press conference in Iowa. You all probably remember that incident – the journalist was Univision anchor Jorge Ramos.

In February of last year, Donald Trump said he planned to change libel laws in the United States so that he can have an easier time suing news organizations. He made those comments during a rally in Fort Worth, in a tirade against newspapers such as *The New York Times* and *The Washington Post*, saying they're "losing money" and are "dishonest." And he also said that when he's president they'll "have problems."

The new administration in Washington, one could argue, came about as a result of a lot of dissatisfaction with the upheaval caused by globalization and the tech revolution.

"One of the things I'm going to do if I win, and I hope we do and we're certainly leading. I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected," Trump said. I will leave it to the experts in this room and beyond to decide whether or not the libel laws need to be "opened up" or whether or not public figures are already protected.

As he has cast aspersions on hardworking reporters, Trump has also been able to speak directly to his base via Twitter. Directly and very, very effectively. He is a master ***messager***. Twitter is the new bully pulpit and it is one that Trump uses very effectively, whether or not

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you like what he has to say. He is unscripted and unfiltered, just like social media is supposed to be. Authentic. Reaching out to audiences directly has made him and anyone who uses social media in this way more credible. That's a challenge for journalists who are reporting on him.

Candidate Trump had a pretty solid track record of antagonizing the media and making it difficult for them to challenge, refute, fact-check and even interview him in a substantive way. President Trump is nothing if not consistent.

In his first press conference as president, Donald Trump refused to take a question from a CNN journalist, saying CNN was fake news. Donald Trump later tweeted that journalists were "the enemy of the people".

White House spokesperson Sean Spicer got off to a rocky start with journalists the day after the inauguration when he held his first press briefing and didn't even take questions. He chewed out journalists for their coverage of the inauguration and was generally pretty combative.

The White House has made some changes to long established practices such as credentialing and pool reporting, changes that have rankled the White House press corps. The White House has relaxed the requirements for credentials, allowing in new players, mainly right-wing bloggers who have provided favorable coverage of Candidate Trump and now President Trump.

Trump signaled very early on that he was going to blame immigrants for what ails us.

They've also mixed up the pecking order for asking questions. The long-established practice has been to call on the AP and NYT first and then others. Spicer has introduced a "Skype seat" to allow reporters outside DC to ask questions. (Jackie Nespral of local Miami NBC affiliate was one of the first to do so.)

The well-publicized incident involving a scrum or gaggle in Spicer's office where he chose some reporters over others, raises the issue of fairness and whether journalists are impeded from doing their jobs by being excluded.

When the revised executive order on travel was announced 10 days ago, three high-level cabinet members – Sec of State Rex Tillerson, AG Jeff Sessions and Sec of DHS John Kelly – all read from prepared remarks. They refused to take questions from reporters.

Because we are only about 50 days in to this new administration, it may be too soon to tell how difficult it will be to cover this administration by developing sources and obtaining documents. But as I have just mentioned there are already some troubling trends in the way media has been treated.

I have not heard of people being denied documents or information. During the ICE raids, a few weeks ago, reporters were calling me to ask what I had heard about numbers of arrests, etc… and I referred them to other organizations who do work on the ground. What every

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journalist I spoke to said is, ICE never tells us or confirms anyway, so I am not sure that is a new trend. It is a worrying trend; I am just not sure that it is new.

What can media do?

Media outlets need to devote resources to professional development and to making sure that reporters can actually become beat reporters on complex issues like immigration, healthcare, education, energy, climate change.

Media need to stop covering frivolous stories like Kellyanne Conway kneeling on the couch in the Oval Office, whether or not President Trump is going to get a dog, and whether or not Mrs. Trump is going to move to DC.

Media also have to stop this obsessive coverage of themselves. Nobody beyond the Beltway is interested.

Media outlets also have to stop relying on pundits to fill air time. Far too many of them know far too little, and I find this disturbingly true about immigration. This is as true on MSNBC as it is on Fox. There are real experts out there. It might take time to find them but in interests of accuracy, it is important to do so.

And, if you are covering immigration, call me. I spend a lot of time talking to reporters and getting them access to information on a very complex topic. I am not the expert but I have immediate access to some very smart colleagues.

Before I open this up to your questions, let me plug my organization and its unique role. The National Immigration Forum has been around for about 30 years and it played a key role in convening the conversation around immigrants and immigration. For the last six years we have convened voices that were often left out of the discussion on immigration: the center right.

While we are part of a larger movement, and work across the political spectrum, the Forum has developed a series of close relationships with faith leaders, law enforcement officials, business leaders, business owners, chambers of commerce and industry associations, and veterans' groups. These relationships have helped inform our strategy and have given us an important perspective on Americans' aspirations for the future of our country. No one can be left out of the crucial discussion of where our country is headed and I say (with no false modesty!) that I am very proud of the leadership role the National Immigration Forum plays in bringing in diverse voices and perspectives to help us all decipher the best way forward.

Thanks for your time and interest this afternoon.

Cathleen Farrell is Director of Communications at the National Immigration Forum, Washington, D.C.

Media Law for Journalists Workshop

MLRC Institute Program Provides Legal Guidance to Freelancers

On Tuesday, March 14 the MLRC Institute held its fifth Media Law for Journalists Workshop. This nation-wide program, supported by the MacArthur Foundation and Mutual Insurance Company, is designed to provide practical legal guidance on libel, privacy, newsgathering, copyright and access law for freelancers, bloggers, reporters, editors in print, digital or video spaces, podcasters – essentially any media worker without the benefit of a legal department.

Following successful workshops in New York, Boston, Washington, D.C. and Los Angeles, the program came to Miami, generously hosted by Fusion and its General Counsel Eric Lieberman.

MLRC's Executive Director George Freeman and University of Miami Professor Sam Terilli led off with a session on libel and privacy law. Karen Kammer, Mitrani, Rynor, Adamsky & Toland and Sandy Bohrer, Holland & Knight led a session on newsgathering issues. Richard Ovelman, Carlton Fields Jorden Burt, explained how journalists can use Florida's broad Sunshine Law. Dana McElroy, Thomas & LoCicero, spoke to participants about the reporter source relationship and reporters' privilege. Eric Lieberman of Fusion spoke about copyright and digital media issues. And, in a nod to the location, Dave Heller, MLRC, and Adolfo Jimenez, Holland & Knight spoke about Latin American media law and journalist safety issues.

The Workshops also include an Editorial Roundtable to give freelancers the opportunity to talk to more experienced journalists about career paths and story pitches. The Miami Roundtable included three experienced Fusion journalists, Justine Gubar, Mark Lima, Laura Wides-Munoz, who discussed their careers and answered questions on everything from pitching stories to rates for freelancers.

Recent Cases Challenge Constitutionality of Massachusetts' Wiretap Statute

By Emma Hall and Vanessa Brown

A federal judge in Massachusetts issued two decisions in March 2017 addressing separate constitutional challenges to the state's wiretap statute. *See* *Martin v. Evans*, CV No. 16-11362-PBS, 2017 WL 1015000 (D. Mass. Mar. 13, 2017); *Project Veritas Action Fund v. Conley*, CV No. 16-10462-PBS (D. Mass. March 23, 2017) (Saris, J.).

The statute imposes civil and criminal penalties on the secret recording of oral communications, regardless of whether the speakers have a reasonable expectation of privacy. Persons who secretly recorded police officers in public places have been prosecuted and convicted under the statute.

The recent decisions, which denied in part motions to dismiss challenges to the statute, call into question the constitutionality of the law as applied to secret recordings of police in public places, while reaffirming the law's applicability to secret recordings of private persons made without their consent. Absent legislative action or further judicial guidance, undercover recordings remain a perilous activity in the Commonwealth depending on the identity of the speakers and the circumstances in which the recording is made.

Absent legislative action or further judicial guidance, undercover recordings remain a perilous activity in the Commonwealth depending on the identity of the speakers and the circumstances in which the recording is made.

Massachusetts Wiretap Statute and Existing Precedent

The Massachusetts wiretap statute, G.L. c. 272, § 99 establishes civil and criminal penalties for the "interception of any wire or oral communication." The statute defines "interception" to mean "to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of an intercepting device by any person other than a person given prior authority by all parties to such communication." G.L. c. 272, § 99, B 4. The statutory exceptions are narrow, permitting, for example, the recording of communications transmitted over public air waves and certain interceptions by common carriers, office intercommunication systems, financial institutions and law enforcement officers. G.L. c. 272, §§ 99, B 2, 99 D 1.

Law enforcement officers have successfully used the statute to convict persons who have recorded them in public places. In *Commonwealth v. Hyde*, 434 Mass. 594, 750 N.E. 2d 963 (2001), the Supreme Judicial Court upheld the conviction of a person who secretly recorded his interaction with the police during a confrontational traffic stop. The driver, who was not cited or charged with any crime, later went to the police station to complain about his treatment.

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After providing the recording to substantiate his claims, he was charged and convicted of violating the wiretap statute. *Id.* at 596-97, 750 N.E. 2d at 965. The court affirmed the conviction (over a vigorous dissent). It distinguished cases in which a recording device was in plain sight, *i.e.*, cases in which a recording is not "secretly" made, but rejected the defendant's broader argument that the statute only applied in cases where the speaker has a reasonable expectation of privacy. *Id.* at 598, 750 N.E.2d at 966.

The dissenters disagreed that the statute granted police officers a privacy interest in statements made while effectuating a traffic stop. *Id.* at 610, 750 N.E.2d at 974. Although the case did not address the statute's constitutionality, the dissenters warned that the ruling "threatens the ability of the press — print and electronic — to perform its constitutional role of watchdog." *Id.* at 613, 750 N.E.2d at 977. Citing the significant reforms that resulted from public dissemination of the videorecording of the beating of Rodney King by Los Angeles police officers in 1991, the dissent lamented that "had [the beating] occurred in Massachusetts, under today's ruling [the videographer] would have been exposed to criminal indictment rather than lauded for exposing an injustice." *Id.*

A decade later, the First Circuit addressed the question of whether the First Amendment protects the right to openly record police in public places. *Glick v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011). The plaintiff in *Glick* was arrested for using his cell phone to record police officers who were making an arrest on Boston Common, "the oldest city park in the United States and the apotheosis of a public forum." *Id.* at 84. A state court dismissed the wiretap charges, holding that openly using a cell phone to make a video and audio recording did not meet the statutory requirement of a "secret" recording.

The plaintiff then brought a federal civil rights action, claiming that his arrest violated his rights under the First and Fourth Amendments. The First Circuit rejected the defendants' qualified immunity arguments, holding that the plaintiff had a clearly-established First Amendment rights to film the officers in a public space, subject to reasonable time, place and manner restrictions (a right which applied equally to private citizens and journalists). *Id.* Because the plaintiff's complaint alleged that the police officers admitted knowing they were being publicly and openly recorded, the case did not squarely address the constitutionality of secret recordings of police officers in public places.

Martin v. Evans: Secret Recordings of Police in Public Places

The plaintiffs in *Martin* were civil rights activists who brought an as-applied challenge to the wiretap statute, claiming that the law could not constitutionally be applied to people who secretly record the police in the public performance of their duties. The complaint alleged that the plaintiffs wished to secretly record police officers because they feared that openly recording the officers would provoke a hostile response, as had happened in the past. *Martin*, 2017 WL

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1015000, at *2. The defendants moved to dismiss the complaint on several grounds, including failure to state a First Amendment claim.

Citing *Glick*, the *Martin* court rejected the defendants' claim that the First Amendment does not provide any right to secretly record police officers. The court ruled that, as a content-neutral restriction on speech subject to intermediate scrutiny, the law must be narrowly tailored to serve a significant governmental interest. Because the government "does not have a significant interest in protecting the privacy of law enforcement officials in discharging their duties in a public place," the statute was unconstitutional as applied to the secret recording of police made under those circumstances. *Id*., at *8.

The court recognized that the statute might serve legitimate government interests in certain circumstances, such as when applied to the secret recording and broadcasting of conversations between a crime victim and law enforcement officers, or when recordings might interfere with the performance of law enforcement activities or create safety concerns. But the statute was not narrowly tailored to serve those interests because it "restricts a significant amount of nondisruptive and safe First Amendment activities such as a peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties." *Id.* at *8 (internal quotations and citation omitted). The complaint thus stated a First Amendment claim under the intermediate scrutiny standard.

***Project Veritas*: Secret Recordings of Private Citizens**

Ten days after its *Martin* decision, the court issued its ruling in *Project Veritas*. The plaintiff in *Project Veritas* was a national media organization that regularly recorded and intercepted oral communications of persons without their knowledge or consent. The plaintiff brought both facial and as-applied challenges to the wiretap statute in order to pursue undercover operations in Massachusetts involving (a) the trustworthiness and accountability of government officials, including police officers, in public and non-public settings; and (b) landlords who reportedly took advantage of housing shortages by providing unsafe housing to students.

The court dismissed the plaintiff's claims with respect to investigations of government officials, ruling that the allegations were too vague to establish standing for a pre-enforcement challenge to the statute. While acknowledging the plaintiff's claim that disclosing more specifics would risk tipping its hand to the potential targets of its investigations, the court concluded that the complaint fell short of a "plausible showing of true intent to investigate" that had been chilled by the statute and so dismissed the claim, albeit with leave to replead. *Id.* at 10.

The plaintiff's allegations of a specific intent to investigate scofflaw landlords, in contrast, were held sufficient to establish standing. The court described the "cutting edge" merits issue as whether the wiretap statute violated the First Amendment by categorically prohibiting the

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intentional secret recording of private individuals. *Id.* at 11. Applying intermediate scrutiny, the court ruled that the government has a significant interest in protecting the "conversational privacy" of its citizens. *Id.* at 12.

It rejected the plaintiff's argument of a constitutional right to secretly record private conversations of people speaking in public places where there is no reasonable expectation of privacy. "These types of conversations," the court ruled, "are ones where one might expect to be overheard, but not recorded or broadcast." *Id.* at 14. The court concluded that there was a "significant privacy difference between *overhearing* a conversation in an area with no reasonable expectation of privacy and *recording and replaying* that conversation for all to hear." *Id.* (emphasis added). Acknowledging that the least restrictive means of protecting this interest would be to limit the statute to situations in which the speaker has a reasonable expectation of privacy, the court ruled that that statute nonetheless was narrowly tailored to survive intermediate scrutiny, citing the statute's allowance of open recordings made in plain sight of the speakers, whether by camera or cell phone. *Id.* at 16-17.

The court also dismissed the plaintiff's facial challenge to the statute. The court found most applications of the statute constitutional, including its protection of private conversations in all settings and conversations with government officials in non-public settings or about non-official matters. *Id.* at 19. The court explained that its ruling in *Martin* that the statute was unconstitutional as applied to the secret recording of government officials when discharging their duties in public left a wide range of legitimate applications and compelled the dismissal of plaintiff's facial challenge. *Id.*

As long as Massachusetts requires all parties to consent without regard to whether the speakers have a reasonable expectation of privacy, secret recordings in Massachusetts should be undertaken only after careful deliberation and analysis.

Conclusion

As district court rulings on motions to dismiss, *Martin* and *Project Veritas* are not the final word on the interpretation or application of the Massachusetts wiretap statute. Under the language of the statute itself, which prohibits only "secret" recordings, a recording that is open and notorious would be permissible, as the SJC acknowledged in *Hyde.* In *Glick*, the First Circuit held that there is a constitutional right to record under these circumstances.

The district court's rationale in *Martin* would, for the first time, extend this constitutional right to *secret* recordings. However**,** as long as Massachusetts requires all parties to consent without regard to whether the speakers have a reasonable expectation of privacy, secret recordings in Massachusetts should be undertaken only after careful deliberation and analysis.

Emma Hall and Vanessa Brown are associates at Morgan, Lewis & Bockius LLP in Boston.

Canadian Supreme Court to Address Jurisdiction in Online Defamation Case

Leave Granted in Goldhar v. Haaretz.com

By Chloe Snider

On March 9, 2017, the Supreme Court of Canada (SCC) granted leave in *Goldhar v. Haaretz.com*, 2016 ONCA 515 [*Goldhar*]. This case is important because the SCC will address three key issues relating to the assumption of jurisdiction by Canadian courts, in particular, in the context of online activity.

At issue were jurisdiction and applicable law questions concerning allegedly defamatory material posted by the appellant, *Haaretz.com* (Haaretz), an Israeli newspaper, on its website, which was available in Canada. Both the motion judge and the Court of Appeal (in a two-to-one decision) held that the Ontario courts had jurisdiction; that Ontario was the most convenient forum; and that Canadian law applied.

This case is important because the SCC will address three key issues relating to the assumption of jurisdiction by Canadian courts, in particular, in the context of online activity.

In seeking leave to appeal to the SCC, Haaretz identified three issues of national and international importance: (i) whether the publication of defamatory statements on the internet can give rise to a presumption of jurisdiction in the context of a multi-jurisdiction case (and how such jurisdiction can be rebutted); (ii) what is the appropriate level of scrutiny for the *forum non conveniens* part of the test for assuming jurisdiction; and (iii) whether, in internet defamation cases, the law of the place of "most substantial harm" rather than *lex loci delicti* (the law of the place where the tort was committed) should apply to the case. More broadly, Haaretz raised concerns about the "unlimited, automatic and irrebutable" jurisdiction of the Canadian courts as a result of the Court of Appeal's decision in this case. *Goldhar v Haaretz.com*, 2016 ONCA 515 (Memorandum of Argument of the Applicants on Appeal from the Court of Appeal for Ontario) [Memorandum of Argument of the Applicants].

This case is likely to have broad application going forward in cases involving torts committed through online activity. The SCC will likely communicate the extent to which it thinks that Canadian courts should assume jurisdiction in cases involving online activities that are posted outside of Canada but are viewed within Canada. The SCC's decision to grant leave suggests an interest by that court in addressing jurisdictional issues concerning the international scope of Canadian courts' authority. For example, the Supreme Court also granted leave and recently heard an appeal from the British Columbia Court of Appeal's decision in *Equustek*

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Solutions Inc. v. Google Inc., 2015 BCCA 265, which concerned the competence of the British Columbia courts to issue an injunction with extra-territorial reach.

Background

Haaretz is an Israeli newspaper. It does not have any subscribers or business presence in Canada. It published an article that criticized the management style and business practices of Mitchell Goldhar, the plaintiff and respondent. Mr. Goldhar is a Canadian businessman who owned the Maccabi Tel Aviv Football Club, a Tel Aviv soccer team. He divides his time between residences in Canada and Israel. The article was available in print and on the paper's Hebrew and English websites. The evidence indicated that 200-300 Canadians read the article.

Mr. Goldhar commenced an action in Ontario, alleging defamation. *Haaretz* moved to stay the action on the grounds that the Ontario courts lacked jurisdiction simpliciter; and, in the alternative, that Israel is a more appropriate forum. *Haaretz* also made submissions concerning the law that governs the defamation action. The Ontario Superior Court of Justice dismissed the motion and the Court of Appeal dismissed the appeal (with Justice Pepall dissenting).

Jurisdiction Simpliciter

Importantly, *Haaretz* did not dispute that Ontario readership of the article established that a tort had been committed in Ontario, one of the "presumptive connecting factors" for establishing jurisdiction under the test set out by the SCC in *Club Reports Ltd. v. Van Breda,* 2012 SCC 17 [*Van Breda*]. Rather, *Haaretz* submitted that under the second step of the *Van Breda* test, the presumption had been rebutted because only a minor element of the tort was committed in Ontario, as far more people read the article in Israel. On appeal, *Haaretz* argued that the motion judge erred by failing to recognize the weak link between the action and Ontario, and "by effectively treating the presumptive connecting factor of a tort committee in the province as irrebutable." *Goldhar*, *supra* note 1 at para. 30.

The majority of the Court of Appeal rejected this argument. It held that the subject matter of the action and the article had a significant connection to Ontario. According to the majority, "the article puts Goldhar's Canadian connection front and center by acknowledging that he is a long distance operator and spends most of his time in Canada, and by asserting that, he imported his management model for Maccabi Tel Aviv from his main business interest, his Canadian shopping center partnership." *Ibid* at paras. 37-38. The majority was not satisfied that *Haaretz* had rebutted jurisdiction.

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In dissent, Justice Pepall agreed that the Ontario courts had jurisdiction, but raised concerns regarding "the ease with which jurisdiction *simpliciter* may be established in a defamation case." *Ibid.* at paras. 131-132.

In their application for leave to appeal, *Haaretz* raised the following issue for consideration by the SCC: (i) should the tort of defamation be considered to have been committed in the jurisdiction where a small number of people downloaded material; and (ii) how, if ever, can the presumption of jurisdiction be rebutted in cases of internet defamation. Memorandum of

Argument of the Applicants, *supra* at para. 7. In particular, *Haaretz* has argued that "because the place of publication of internet defamation can, effectively, be everywhere, it does not provide a basis for presuming a 'real and substantial' relationship between the subject matter of the litigation and a particular forum." *Ibid.* at para. 26. It has also argued that any presumption of jurisdiction based solely on online publication should be rebutted where the online publication on its own does not point to a strong relationship with the jurisdiction, and where there is an absence of evidence of reputational harm in the jurisdiction. *Ibid.* at para. 32.

Forum non conveniens

Convenience and Expense to Witnesses

This case is likely to have broad application going forward in cases involving torts committed through online activity.

At the Court of Appeal, *Haaretz* argued that the motion judge's decision not to exercise his discretion to stay the proceedings on the basis of *forum non conveniens* was unreasonable, and that almost every factor identified in *Van Breda* favoured a trial in Israel.

The majority of the Court of Appeal began by reiterating that the party seeking to displace Ontario's jurisdiction bears the burden, in the *forum non conveniens* analysis, to demonstrate that the court of the alternative jurisdiction is a **clearly** more appropriate forum." *Goldhar, supra* note 1 at para. 49, citing *Breeden v. Black*, [2012] 1 S.C.R. 666, 2012 SCC 19 (CanLII), at para. 23. [emphasis original to *Goldhar*]

The majority held that while the motion judge erred in law by suggesting that letters rogatory could be used to compel the attendance of *Haaretz*'s witnesses in Ontario, this error did not make the overall assessment unreasonable. *Ibid.* at para. 67. The majority held that there were available methods for dealing with witnesses outside of the jurisdiction (including videoconferencing) and that *Haaretz* had not demonstrated that these methods were not available in this case. The majority emphasized that the use of technology and interpreters could not be viewed as undermining the fairness of a civil trial. It was therefore not unreasonable to find Israel was **not** the clearly more appropriate forum. *Ibid.* at paras. 68-72.

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In her dissenting reasons, Justice Pepall called for a "robust and carefully scrutinized review of the issue of *forum non conveniens,*" *Ibid.* at para. 132, given the ease with which jurisdiction *simpliciter* can be established, as set out above. Her Honour concluded that the applicable factors supported a trial in Israel.

Haaretz has now asked the SCC to address "how and with what level of rigour, must a *forum non conveniens* analysis (if necessary) be applied, in order to 'temper' the consequences of… rigid jurisdiction rules to ensure a fair and efficient outcome for the parties." Memorandum of Argument of the Applicants, *supra* at para. 8(a).

Applicable law

Finally, the SCC will consider the law applicable in internet defamation cases – namely whether the principle of *lex loci delicti* (the law of the place where the tort was committed) should give way to that of the law of the place of most substantial harm – an issue that was left "for another day" in *Éditions Écosociété Inc. v. Banro,* 2012 SCC 18.

The motion judge held that whether the *lex loci delicti* choice of law rule or a "most substantial harm to reputation" choice of law rule is applied, Ontario law applies to this case, with which the majority found no error. In its leave to appeal factum, *Haaretz*, echoing Justice Pepall's dissent, argued that the "most substantial harm" rule should determine what law governs and that, properly applied, it would result in the application of Israeli law to the case. *Goldhar, supra* note 1 at paras. 180-186 and Memorandum of Argument of the Applicants, *supra* at para. 40-46.

The SCC will consider the law applicable in internet defamation cases – namely whether the principle of lex loci delicti (the law of the place where the tort was committed) should give way to that of the law of the place of most substantial harm.

Conclusion

The SCC will now weigh in on these concerns about the application of traditional grounds for assuming jurisdiction where internet content is involved and when and how jurisdiction can be rebutted in that context. In an age when torts are increasingly occurring through online content, the SCC's decision in this case is likely to provide important guidance to Canadian courts in dealing with future cases involving online activity.

Chloe Snider is a partner at Dentons in Toronto, Canada.

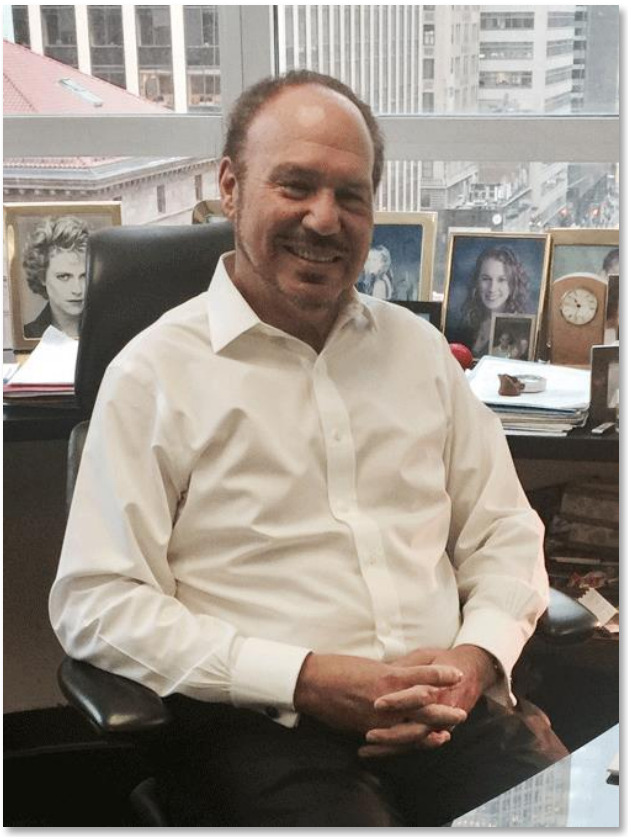
Ten Questions to a Media Lawyer

Rick Kurnit

Rick Kurnit is a partner at Frankfurt Kurnit in New York City. If you'd like to participate in this ongoing series, let us know - medialaw@medialaw.org.

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

My father was a prominent "mad man" in the 60's and owner of an ad agency that was known for its outlandish and creative work. The agency created weekly ads that appeared in the Sunday Times Magazine for Talon Zippers (making a generic product into a brand). One Sunday the ad was a picture of the Statue of Liberty with a talon zipper down her back and the headline: "American women do'nt know what is going on behind their backs". It produced an outraged response from the Daughters of the American Revolution. I learned the glory of the First Amendment (as well as some copyright law) as a nine-year-old, and I resolved to become a First Amendment lawyer.



My first real job (dishwasher at a summer camp does not really count) was as a door-to-door encyclopedia salesman. Following my arrest on the third day on the job, for peddling without a permit, my second job was working in ad agency. Knowing I would someday be a media lawyer, I paid particular attention to the rampant copyright infringement that is standard operating procedure in an ad agency, and I was fascinated by the creative process. Realizing that I had neither the talent nor inclination to compete with my famous father, I concluded that a legal career, helping the creative talents to accomplish their visions, was the way to go.

In law school, I pursued intellectual property and First Amendment courses, Paul Freund's Seminar on the First Amendment, and wrote a Note on "Enforcing the forgotten half of the

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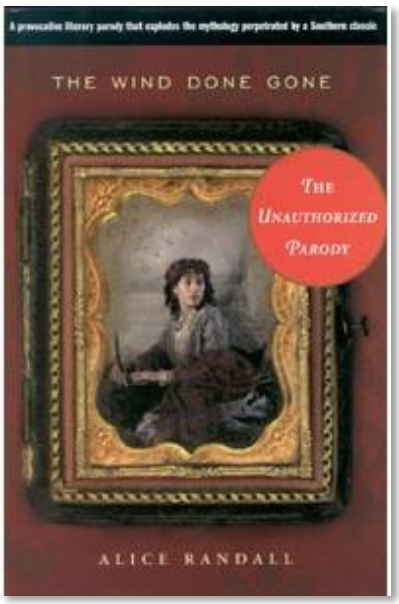
Fairness Doctrine", which I am pretty sure is the last attempt to save the obligation of the media to present accurate information on issues of public importance.

After clerking in the Southern District, it was possible to choose among the best law firms (who were all interested in bringing on former law clerks), so I was able to work a deal with Paul Weiss that I would be assigned to handling litigation for The New York Post. It turned out to be a great deal of defending libel claims by reputed mobsters who would sue every time the paper identified them, but never pursue their claims. I mastered the motion to dismiss for failure to prosecute, but after several months, I lost the client. Paul Weiss did not blame me -- someone from Australia purchased the paper from Paul Weiss' client and changed law firms. After that, I had first call on media litigation. Paul Weiss represented Warner Communications, so there was no shortage, and when Lew Kaplan (now Judge Kaplan) was allowed as an associate to take on the defense of a libel claim, I was offered the opportunity of a lifetime to work with him as the only associate assistance.



Kurnit argued about the scope of the parody defense on behalf of "Gone With the Wind" in the Eleventh Circuit.

In addition, I sought refuge in representing the ad agency client that Paul Weiss represented, to fill out my time and avoid subject matter that was not media related. On my first visit to the agency, to defend the deposition of the agency in a copyright case , I was introduced to the owner. I will never forget his first words to me: "I just want you to know that, as far as I am concerned, if the lawyers are uncomfortable with it, it must be a good ad." I responded: " I am the son of a creative director, so I already know that I don't get to judge the creative. I'll tell you how uncomfortable I am, and you'll tell me how good an ad it is." He shot back: "Who's your father?" When I responded, Shep Kurnit, he smiled. My father was the inspiration for his own claim to fame: turning a generic product into a brand: Perdue chickens. After that, any time he got flak for something outrageous he wanted to do, he would say, "Get me Kurnit's kid," and I became the lead lawyer handling the day-to-day work for the agency.

And so I joined Frankfurt Garbus Klein & Selz, a law firm with a small advertising practice, that needed a publishing lawyer to handle its newly acquired client, Viking Press. (In the karma of all things, Viking Press had just been acquired by a British company which decided to change law firm). The client came with a number of legal issues and a recent setback in a case of libel by fiction, *Springer v. Viking*, which I appealed to the First Department and then to the

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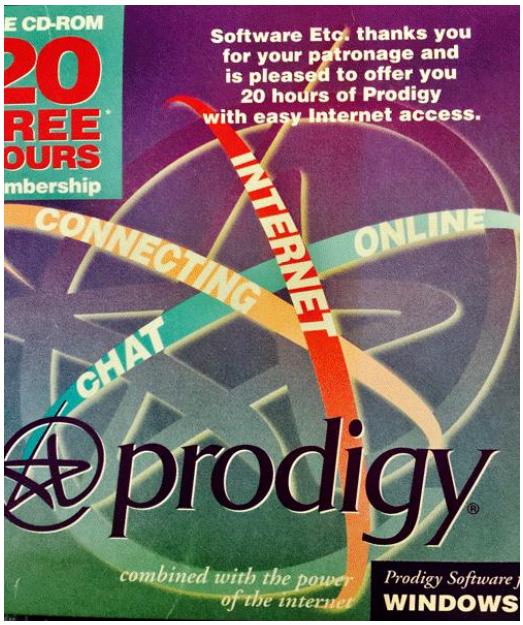
New York Court of Appeals, establishing the law in New York protecting authors of fiction from libel claims and resulting in further success in dismissing subsequent claims against Nelson Demille and Terry Mcmillan, among others. In addition, Viking was the recipient of many libel claims from distinguished plaintiffs, such a Judge Dominic Rinaldi, and Governor William Janklow of South Dakota and the FBI over Peter Matthiessen's book "In the Spirit of Crazy Horse." Through representing Viking I had the opportunity to become involved in the MLRC.

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

The ability to assist authors and creative people to create content and communications that they envision. The constant changes in the media business models and the technology and the problems they pose in applying intellectual property law to new and different media mean that the problems we address are always new and different. The negative is the inefficiency and cost of litigation.



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

When I tried to convince five judges in the Appellate Division that a New York Supreme Court Justice was libel proof. In my defense, I did limit it the circumstance of the republication of the same charge of corruption by the same author who made the charge repeatedly over many years, including in the same book that was now being relitigated as technically not within the single publication rule (*Rinaldi v. Viking Press*).

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

That's hard to define. In addition to Springer v. Viking in the New York Court of Appeals mentioned above, I argued on behalf of John Deere the scope of trademark infringement in comparative advertising in the Second Circuit. I also argued the scope of the parody defense to a copyright claim on behalf of "Gone With the Wind" in the Eleventh Circuit.

But the case of Jackie Onassis against a look alike in an ad, which I argued in the Appellate Division First Department (on behalf of the look alike), may be the most notorious – at least until the movie Wolf of Wall Street brought back memories of Stratton Oakmont (his firm) against Prodigy (the first of the ISP's) where I defended Prodigy…which lead to Section 230 of the CDA. (The Onassis case led to my representation of a Woody Allen look alike at trial in the

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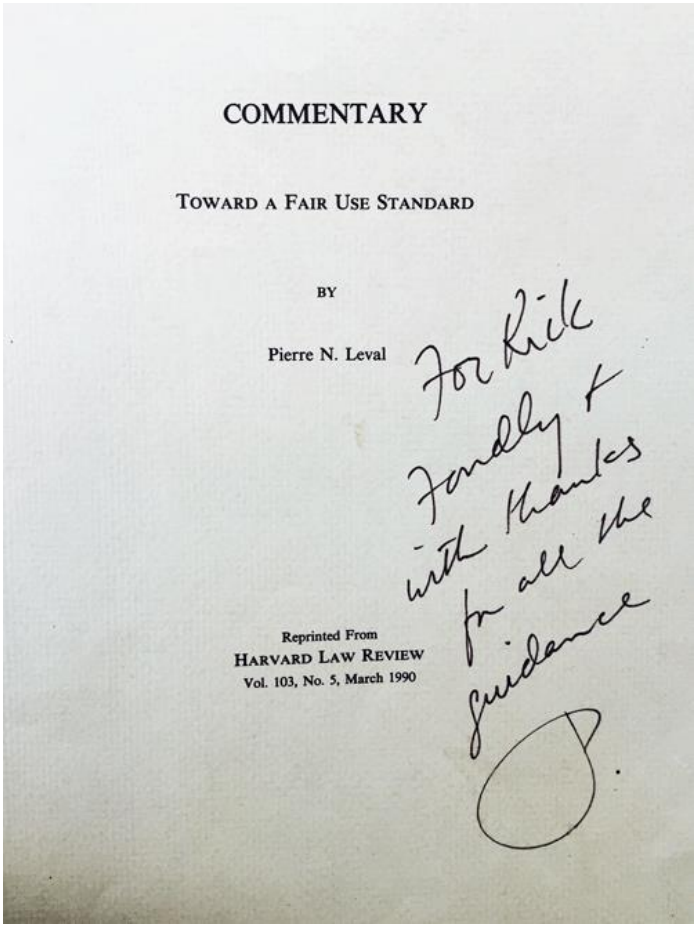


COMMENTARY

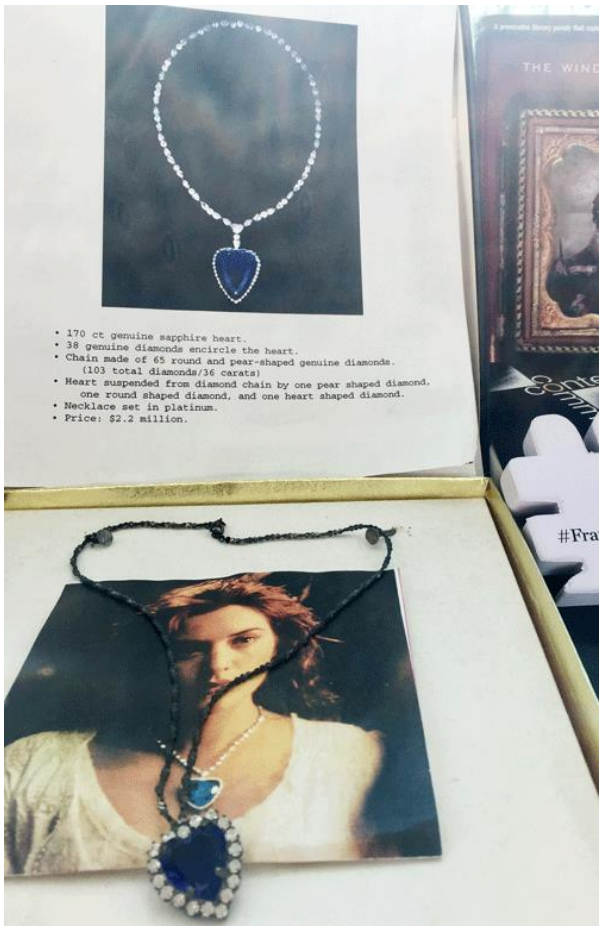
TOWARD A FAIR USE STANDARD

BY

Pierre N. Leval

For Rick
Fondly &
with thanks
for all the
guidance

Reprinted From
HARVARD LAW REVIEW
Vol. 103, No. 5, March 1990



Surprising objects in Kurnit's office. At left, Pierre Leval's law review article enunciating transformative use for fair use inscribed "with thanks for all the guidance." At right, The Blue Heart shaped necklace Kurnit defended in the Second Circuit from the challenge mounted by Twentieth Century Fox to the advertising campaign that offered it for sale as a low cost alternative to a replica of the necklace featured in the movie "Titanic."

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Southern District and the advertising agency at trial in Los Angeles District Court in the Vanna White case…but both of those settled at trial).

What's a surprising object in your office?

The Blue Heart shaped necklace that I defended in the Second Circuit from the challenge mounted by Twentieth Century Fox to the advertising campaign that offered it for sale as a low cost alternative to the replica of the necklace featured in the movie "Titanic." It's the necklace the makers of the movie Titanic do not want you have. But my most treasured is the autographed reprint of Pierre Leval's seminal law review article enunciating transformative use for fair use which was adopted by the Supreme Court.

What's the first website you check in the morning?

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Rebecca Tushnet's 43(B) blog. It is truly amazing how brilliantly she covers so much of the developments in intellectual property…and posts it in the middle of the night

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

Your career is a balance of fortune, fame, fulfillment, and fun. If you are not putting money first on your priorities, and you cannot make it as a rock star, you should take stock of your talents and innate abilities—what are you best suited to doing with your life that will afford you the satisfaction that comes from a job well done and helping people. The satisfaction in being a lawyer is most importantly in helping others to cope with the world (which lawyers have made so difficult and frustrating). If you can do that, and find fulfillment in doing it well, become a lawyer. The most fun you can have as a lawyer, and the best people you will work with, will be found in media law. The ever changing business of media and technology of communications means it will be easy to have fun.

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

Embrace all of the new technologies of communication. The application of existing law and legal principles to new technologies and the new consumers of information and entertainment will be the challenge you will face. Judges and legislators will continue for some time to be trying to fit square precedents, based on square business models into round problems. You will need to be able to see the world of intellectual property and information as differently as it is.

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

A psychotherapist. The greatest satisfaction comes from helping people to cope.

What issue keeps you up at night?

My client's problems. Long ago a wise attorney told me that as lawyers, we are nothing but paid worriers. A client has a problem that is keeping her up at night. (perhaps because the law or lawyers have made the problem more complicated than it has any reason to be). So every client is a person with a problem that they need to have someone take on and worry about better than they can. They need to know that they can stop worrying and rely on me to tell them when they need to think about it again…hopefully in the context of a solution. I assure them that "I will worry about your problem better than you can…" And now the client can sleep at night… and I will be up at night worrying about their problem.