H520 Eighth Avenue, North Tower, 20th Floor, New York, New York 10018 (212) 337-0200

MEDIALAWLETTER

Reporting Developments Through May 25, 2017

MLRC

LIBEL & PRIVACY

INTERNET

FIRST AMENDMENT

REPORTER'S PRIVILEGE

INTELLECTUAL PROPERTY

INTERNATIONAL

ACCESS

From the Executive Director's Desk

MLRC London Conference

Guest Columnist Dave Heller

George is on a well-deserved vacation enjoying the vistas of the Alaska coast and imparting media law wisdom to fellow passengers aboard the ms Amsterdam, when not dog sledding on glaciers! He's graciously turned over his page in the newsletter to allow me to expound on an event close to my heart – the MLRC London Conference.

This year's event is at The Law Society on September 25-26. It should be another terrific event with colleagues from around the world gathering to discuss the latest developments in law and policy.

This year's conference begins with a topic that's roiled both sides of the Atlantic - the rise of populism - from Brexit, to the election of Donald Trump, to anti-establishment political movements throughout Europe. How these events should be covered, and what they mean for press freedom and democracy, will be discussed by John Micklethwait, editor-in-chief of Bloomberg News; James Fallows, new Europe Editor for The Atlantic; and Judge Judith Gibson from NSW Australia. If you are wondering "why a judge from Down Under," well, Judge Gibson is not only keenly interested in the role of the press in democratic society, her Honour is also a fun and engaging speaker.

The conference tends to fill up so we encourage you to register promptly. If you need any more inspiration to attend, remember the wise saying of Samuel Johnson: "When a man is tired of London, he's tired of life."

We are pleased to have two other Judges at the conference who also fit that bill. ECHR Judge Ganna Yudkivska will shed light on her Court's approach to the right to privacy. And Mr Justice Mark Warby, who attended the conference during his days as a media law barrister, will share perspectives on his current position as the judge in charge of defamation, privacy, and related claims against the media in the High Court in London.

These themes will be visited in a panel session on Libel Reform, Leveson and Loopholes, with experts debating whether the promise of reform under the Defamation Act is being undermined by post-Leveson regulations and use of Dublin and Belfast as alternative forums to sue the press.

And the impact of populism is a theme picked up in our panel on Press Freedom in Eastern Europe. Journalists and lawyers will discuss how they are coping under often draconian laws and legal systems – and perhaps also shed some light on the fake new farms in Macedonia and other rogue operations.

(Continued on page 4)

(Continued from page 3)

The heart of the conference has always been the moderated discussion sessions, the "in the round" format that allows participants from around the world to share their experiences and expertise. This year's sessions include:

- National Security vs. The Press: Redux – a cross-border look at the threats reporters face for receiving and publishing leaked information.
- Privacy and the Press in the Digital Age – the ongoing development of privacy law, including the new data protection rules that come into force in 2018.
- A Cross-Border Vetting Exercise – examining a hypothetical article and tweet for libel, privacy and related issues; and
- Publicity Rights in Docudramas and Entertainment – a new session examining comparative laws and practices on the use of life stories, celebrity images, and trademarks in expressive works.

The sessions at the Law Society conclude with what should be a rousing and entertaining Oxford-style debate on whether privacy law is out of control.

In-house lawyers, though, have one more event on tap – the special In-House Counsel Breakfast on Wednesday morning September 27. This is the opportunity for in-house lawyers to talk about the unique issues on their plates – hiring outside counsel, keeping reporters out of harm's way, battling subpoenas, or whatever the hot issues are in September. This year's breakfast is hosted at the offices of the Guardian newspaper in Kings Cross.

No less important at the conference are the opportunities to meet with colleagues socially. This year we have Sunday brunch overlooking the River Thames (bagels provided by host law firm Howard Kennedy), Sunday night drinks at Bloomberg News, and a gala reception on Monday evening at the National Gallery, sponsored by Hiscox. The National Gallery, located in Trafalgar Square, is home to one of the finest collections of paintings in the world. Among the many must sees: Titian's Bacchus and Ariadne, Bronzino's Venus, Cupid, Folly and Time, and Seurat's Bathers at Asnières.

Finally, we're hopefully continuing an event started in 2015 – Soccer Saturday – an outing for hard core fans, as well as the curious, to see a match - schedule permitting - with one of London's five Premier League Football clubs: reigning champion Chelsea, runner up Tottenham Hotspur, perennial contender Arsenal, West Ham United, or Crystal Palace. In 2015, an excited group of 25 conference goers navigated the tube, commuter rails, and the narrow streets of North London to find White Hart Lane, the 100-year old home of Tottenham Hotspur. After a

(Continued on page 5)

(Continued from page 4)

close start, Spurs lead by star striker Harry Kane defeated powerful Manchester City 4-1. We will email a reminder about Soccer Saturday but feel free to email me now to get on the list.

The program, registration information, hotel information, and list of our conference supporters, are all available online at www.medialaw.org/london. And, of course, if you would like to include your firm to our list of sponsors just email me or George.

The conference tends to fill up so we encourage you to register promptly. If you need any more inspiration to attend, remember the wise saying of Samuel Johnson: "When a man is tired of London, he's tired of life." Or in the more modern parlance of Austin Powers: "Yeah, baby, yeah!"

License to Chill: Massachusetts High Court Weakens State's Anti-SLAPP Law

By Jeffrey Pyle

In a surprise ruling, the Massachusetts Supreme Judicial Court ("SJC") has fundamentally changed the legal framework for determining whether a claim is a "Strategic Lawsuit Against Public Participation" (SLAPP) and thus subject to dismissal under the state's "anti-SLAPP law," G.L. c. 231, Â§ 59H.

That statute, passed in 1991, provides that if a plaintiff brings a lawsuit "based on" the defendant's exercise of its First Amendment right to petition governmental bodies, a court must dismiss the case--and award reasonable attorneys' fees--unless the plaintiff proves that the defendant's petitioning was devoid of legal or factual merit and that the plaintiff suffered damages.

In *Blanchard v. Steward Carney Hospital, Inc.*, SJC-12141 (May 23, 2017), however, the SJC held that a plaintiff can avoid dismissal by showing that its claim was not "brought primarily to chill" the defendant's legitimate exercise of its right to petition. This new "motive" test adds significant uncertainty to the anti-SLAPP law and will likely encourage more defamation claims against citizens groups, bloggers, and opinion writers in Massachusetts.

The Massachusetts Supreme Judicial Court has fundamentally changed the legal framework for determining whether a claim is a "Strategic Lawsuit Against Public Participation."

Background

The case arose in 2011, when the Steward Carney Hospital in Boston received reports of abuse at its adolescent psychiatric unit. The hospital responded by dismissing all the registered nurses and mental health counsellors in the unit and issuing statements to its employees and the press that arguably suggested the nurses bore responsibility for the incidents. The nurses sued the hospital for defamation.

The hospital and other defendants in the case filed a "special motion to dismiss" the defamation claims under the anti-SLAPP law. Under a legal framework established in 1998, the hospital's burden was to show that "the claims against it are 'based on' [its] petitioning activities alone and have no substantial basis other than or in addition to . . . petitioning activities." *Duracraft Corp. v. Holmes Prod. Corp.,* 427 Mass. 156, 167-68 (1998).

"Petitioning" is defined to include statements "in connection with an issue under consideration by a[n] . . . executive . . . body." At the time the hospital made its statements

(Continued on page 7)

(Continued from page 6)

about the nurses, the Department of Mental Health was deciding whether to revoke the hospital's license to operate the adolescent mental health unit. The hospital claimed that its statements were made "in connection" with that review and in an attempt to influence the government to preserve the license. If the hospital succeeded in showing the libel claims were based on such "petitioning," the burden would shift to the nurses to show that the hospital's petitioning was a sham, failing which their claims would be dismissed.

On appeal, the Supreme Judicial Court held that some of the hospital's statements amounted to protected petitioning. However, instead of shifting the burden to the nurses as required by prior cases, the court established a new way for plaintiffs to escape anti-SLAPP dismissal. It held that even where a defendant is sued only for First Amendment--protected petitioning activity--and even where that petitioning has factual and legal merit--a court can deny an anti-SLAPP motion if the plaintiff shows that its primary motivating goal in bringing the claim was "not to interfere with and burden defendants' petition rights."

A court can deny an anti-SLAPP motion if the plaintiff shows that its primary motivating goal in bringing the claim was "not to interfere with and burden defendants' petition rights."

The motion judge "is to assess the totality of the circumstances" relating to the plaintiff's "asserted primary purpose in bringing its claim," including whether the plaintiff's claims have minimal merit. If this non-chilling "primary" motive is found, the plaintiff need not demonstrate that the petitioning lacked a basis in fact or law.

The new standard weakens the anti-SLAPP law and will likely result in more defamation claims against citizens groups, bloggers, opinion writers, and the press. In practice, a defamation plaintiff will always insist that its "primary" motivation in bringing suit was to recover damages, not to suppress petitioning.

Defendants seeking to rebut such claims will now have the unenviable task of trying to show their opponents' bad motive--without the benefit of discovery. If a defendant needs to take discovery to show the plaintiff's motive under the "totality of the circumstances," anti-SLAPP motions are likely to become increasingly burdensome and expensive-the very outcome the statute was intended to avoid in the first place.

By placing so much emphasis on the plaintiff's subjective motivation, the ruling threatens to vest more discretion in the hands of trial judges to deny anti-SLAPP motions. Before, the test examined strictly objective factors--what allegedly wrongful actions underlie the claims, and if they amount to petitioning activity, did the petitioning have some merit?

(Continued on page 8)

(Continued from page 7)

To be sure, the *Blanchard* inquiry places the burden of proof on the motive question on the plaintiff. Consistent with that standard, lower courts should presume that any lawsuit with no substantial basis other than petitioning activity is primarily motivated by the desire to suppress the right to petition.

However, judges who simply don't like the anti-SLAPP law, or who don't think the plaintiff should have to pay the defendant's attorneys' fees, will now have greater leeway to deny a special motion to dismiss simply by finding a proper subjective motive.

The court's reluctance to dismiss the claims of the nurses in Blanchard was understandable. The legislature passed the statute to provide for quick resolution of suits brought "to intimidate opponents' exercise of rights of petitioning and speech," Duracraft, 427 Mass. at 161, and there is no indication the nurses brought suit to discourage the hospital from continuing to speak out in support of its license. In resolving this difficult case, however, the Court has made the path to dismissal under the anti-SLAPP law more circuitous and doubtful, to the detriment of the First Amendment values it seeks to protect.

Jeffrey Pyle is a partner at Prince Lobel in Boston. Plaintiffs were represented by Dahlia C. Rudavsky and Ellen J. Messing. Defendants were represented by Jeffrey A. Dretler and Joseph W. Ambash.

Minnesota Anti-SLAAP Law Ruled Unconstitutional

Violates Right to Jury Trial

In a divided opinion, the Minnesota Supreme Court held that the state anti-SLAPP law, Minn. Stat. § 554.02 (2016), violates the right to a jury trial by requiring judges to resolve disputed issues of fact on anti-SLAPP motions. *Leiendecker v. Asian Women United of Minnesota*, (May 24, 2017). At issue was a malicious prosecution claim arising out of an employment dispute.

The Minnesota anti-SLAPP statute is narrow in scope and was not generally useful in media cases. It provides immunity for lawful conduct or speech genuinely aimed at procuring government action.

Under the law, the responding party has the burden of proof, of going forward with the evidence, and of persuasion on the motion; and the court must grant the motion unless the responding party produced clear and convincing evidence that the acts of the moving party are not immunized from liability.

According to the majority, this invades the jury's essential role of deciding debatable questions of fact.

The Court followed the reasoning of the Washington Supreme Court in *Davis v. Cox, 351 P.3d 862, 871, 874 (Wash. 2015* which declared Washington's anti-SLAPP law unconstitutional on identical grounds.

According to the majority, "The Legislature can immunize a category of people from lawsuits, but it cannot interpose the district court as the fact-finder in actions at law."

Chief Justice Gildea dissented, expressing concern that "the majority's resolution of this case may undermine the summary judgment remedy."

Bad Ass Lawyer Better Call Saul for Next Defamation Lawsuit

By Robin Luce Herrmann and Joseph E. Richotte

Todd Levitt is an attorney and a former adjunct professor at Central Michigan University (CMU), with university students as his primary clientele. Levitt was actively involved in marketing his law firm on various social media platforms, including Twitter. As a legal marketing strategy, Levitt maintained a Twitter account by the name of Bad Ass Lawyer.

According to *The Huffington Post*, Levitt also emulates Saul Goodman of Breaking Bad fame - short of Goodman's willingness to engage in criminal activity. In addition to promoting his law practice on Twitter, Levitt admittedly made several posts which referenced marijuana and alcohol use. For instance, he posted a tweet about serving alcohol in a class he taught at CMU, and in another, stated that "Mr. Jimmy Beam just confirmed a guest appearance in class next week." He also referenced marijuana in several tweets; in one tweet he posted an ode to "mommy marijuana," who "always put me at ease."

Although Levitt admittedly tweeted: "I don't mind criticism. I believe in freedom of speech and welcome it.," the First Amendment is apparently a one-way street as far as Levitt is concerned.

Levitt also emulates Saul Goodman of Breaking Bad fame - short of Goodman's willingness to engage in criminal activity.

Levitt I

In April 2014, Levitt, who identified himself on Twitter as "Todd Levitt@levittlaw," noticed an unidentified individual had created an account, "Todd Levitt 2.0 @levittlawyer" that included a photograph of Levitt and a logo used by his law firm. Levitt later discovered that a CMU student was responsible for the imposter Twitter account. Levitt sued, alleging that the student attempted to confuse Levitt's Twitter followers by using his likeness and logo. He also alleged that the student attacked his credibility as an attorney and as a professor by posting the following tweets to the imposter account:

1. "What's the difference between the internet and my tweeted legal advice? A: none. They're both 100% accurate!"
2. "Buying me a drink at Cabin Karaoke will get you extra [credit], but it's not like that matters because you are guaranteed an A in syllabus."
3. "Partying = Defense Clients[.] Defense Clients = Income[.] If I endorse partying, will my income grow? It's like a Ponzi scheme for lawyers!"

(Continued on page 11)

(Continued from page 10)

4. "@twebbsays should either meet me at 4/20 in my satellite office or take a hiatus from the medical card" and "#inToddWeToke" and "4/20 = Pot smoking holiday[.] Possession of marijuana = Client[.] Client = Income[.] In the words of Snoop Dogg: smoke weed every day. #inToddWeToke[.]

In his original complaint, Levitt sought injunctive relief. In response, among other things, the CMU student asserted the common-law equitable defense of unclean hands, and alleged that Levitt violated the rules of professional conduct by creating for himself a fake award entitled "College Lawyer of the Year" and using the award to promote himself. As proof, the student submitted exhibits, including a page containing HTML coding information for "topcollegelawyers.com" showing that Levitt created the website. Throughout the litigation, the primary focus was Levitt's tweets on his Twitter accounts, the tweets on the parody account, and the "College Lawyer of the Year" award.

Not surprisingly, *Levitt I* garnered national attention. The local newspaper – *The Morning Sun* – ran several stories on the lawsuit in *Levitt I*, just as it routinely covered other lawsuits of public interest.

At the conclusion of discovery, the student filed a motion for summary judgment. The trial court held that Felton's Twitter account was protected under the First Amendment as parody. The trial court's ruling was upheld on appeal in May 2016.

In the meantime…

Levitt II

On April 23, 2015, two months after the trial court opinion in *Levitt I*, Levitt sued *The Morning Sun*, its parent – Digital First Media, and its reporter, asserting claims for defamation, false light, intentional infliction of emotional distress, and civil conspiracy. Levitt also sued the attorney for the CMU student in *Levitt I*, the CMU student's father, and another CMU professor. (He later moved to add the student's mother as a defendant). In his allegations against the media defendants, Levitt cited four parts of the story:

- The portion of the headline reading "Attorney suing student admits to fake award";
- The lede, which states in relevant part that Levitt "admitted in court documents filed Friday that he created a 'top college lawyer' recognition and awarded it to himself";
- The fourth paragraph after the lede, which states that "one of those claims [by the CMU student], supported by HTML coding information entered as an exhibit in the case, is that Levitt himself created the website topcollegelawyers.com, and then proclaimed himself

(Continued on page 12)

(Continued from page 11)

'College Lawyer of the Year,' and used the manufactured award to promote himself"; and

- The fifth paragraph after the lede which states that "[t]he website in part said that Levitt was, 'Chosen by an independent search committee measuring social media influence together with campus involvement to assist students academically in persuing [sic] their futures."

Levitt also claimed that the media defendants conspired with the other defendants to defame and harm Levitt.

The media defendants moved to dismiss the complaint on three grounds: (1) that Levitt failed to sufficiently plead fault; (2) that the statements were covered by Michigan's Fair Report Privilege; and (3) that the statements were substantially true.

In response, Levitt argued that while he had alleged actual malice in the complaint as the applicable standard of fault, he didn't actually have to prove it and therefore dismissal was inappropriate on this basis. Notably, Levitt did not plead negligence as an alternative standard of fault; obviously, if he hadn't plead actual malice, he hadn't plead any standard of fault with supporting facts. Levitt never addressed this issue.

"Although the article contained slight inaccuracies, we conclude that the sting of the article's headline would not have a different effect on a reader than the literal truth."

Levitt argued that dismissal was inappropriate under the substantial truth doctrine and the fair report privilege because Levitt literally never "admitted" that the award was fake.

The trial court denied dismissal, holding that Levitt didn't have to plead actual malice; the court never addressed the related point that if actual malice was not the standard, Levitt had failed to plead fault at all. The trial court also denied dismissal under the substantial truth doctrine and the fair report privilege and imposed a literal truth standard, stating that since Levitt literally never "admitted" that the award was fake, falsity was established.

The media defendants filed an application for interlocutory appeal, which was granted. The Michigan Court of Appeals reversed the trial court on substantial truth grounds. *Levitt v. Digital First Media,* (May 16, 2017) (unpublishe). It ruled that "although it is technically true that plaintiff did not 'admit' that the College Lawyer of the Year award was 'fake' or admit in a court document that he 'awarded' the 'top college lawyer' recognition . . . to himself,' we conclude that these inaccuracies do not alter the complexion of the affair and would have no different effect on the mind of the reader than would the literal truth."

The Court of Appeals agreed with the media defendants that the facts demonstrate that Levitt commissioned the topcollegelawyers.com website and created the College Lawyer of the Year award to generate profits. It also found that Levitt established the criteria for the award, chose

(Continued on page 13)

(Continued from page 12)

the persons who comprised the committee that selected the award recipient, won the award, and then broadcast this as an accomplishment on a marketing website. As a result, "[a]lthough the article contained slight inaccuracies, we conclude that the sting of the article's headline would not have a different effect on a reader than the literal truth."

The court denied Levitt leave to amend his complaint on the basis of futility. It also held that because Levitt could not overcome the First Amendment limitations regarding the statements, the trial court should have dismissed all of Levitt's claims.

Robin Luce Herrmann and Joseph E. Richotte of Butzel Long represented The Morning Sun, Digital First Media, and reporter Lisa Yanick-Jonaitis.

Maine Protects Anonymous Speech in Parody Newsletter

Plaintiff Estopped from Re-Litigating Issues Decided Against Her in California

By Sigmund D. Schutz

In what may be the first decision of its kind, the Maine Supreme Judicial Court issued an opinion on May 4, 2017 concluding that an order quashing a subpoena for information about anonymous speakers in one jurisdiction (California) barred further subpoenas – and additional litigation – in another jurisdiction (Maine). *Gunning v. John Doe*, 2017 ME 78, (May 4, 2017).

The net result is that the Court protected the anonymity of the publisher and author of a Freeport, Maine parody newsletter, News As Viewed from a Crow's Nest (the "Crow's Nest") without deciding whether Maine should adopt a heightened standard to protect anonymous speech.

An order quashing a subpoena for information about anonymous speakers in one jurisdiction (California) barred further subpoenas – and additional litigation – in another jurisdiction (Maine).

Background

In 2011, Gunning ran for the Freeport Town Council and was defeated. One week later, the Crow's Nest, which declares under its masthead that it is "a parody look at the news," published an "Election Special" issue, which included a photograph of the "Wicked Witch of the West" character from the classic movie *The Wizard of Oz* next to Gunning's name, along with the caption "Aka: 'Gunner Gunning' 'Miss Prozac 2003,'" and several purported quotes from Gunning. Gunning's complaint against Doe alleged three counts of libel and one count each of false light and intentional infliction of emotional distress based on the statements concerning her in the "Election Special" issue, as well as those appearing in fifteen subsequent issues of the Crow's Nest.

Maine Lawsuit, California Subpoena

In August 2013, Marie Gunning brought suit in the Maine Superior Court against the anonymous publisher and writers (collectively John Doe) of the Crow's Nest, a publication distributed locally in Freeport, Maine, and accessible on the Internet, which Gunning claimed had published defamatory statements about her in several of its issues. Gunning served a

(Continued on page 15)

(Continued from page 14)

California subpoena on the Crow's Nest's website host, seeking the names, email addresses, and IP addresses of anyone associated with the publication's website. Doe moved to quash.

In a decision issued on January 24, 2014, the court granted the motion to quash, ruling that

> [Gunning] must make a prima facie showing of libel.... [She] failed to make this prima facie showing. The Court finds that while the content of the Crow's Nest could be seen as rude and distasteful, taking into consideration the context and contents of the statements at issue, it is a parody. The speech at issue in the Crow's Nest is protected under the First Amendment of the U.S. Constitution. The statements are not actionable speech such that the identities of the website owner and persons who comment or otherwise publish material printed in or posted online at the Crow's Nest must be revealed pursuant to the subpoena.

Doe v. Gunning, No. CPF-13-513271 (Cal. Super. Ct. S.F. County Jan. 24, 2014). Gunning did not appeal.

With the iron will and force of a bulldozer, Gunning served additional subpoenas in Maine attempting to obtain the same information denied to her in California. Doe filed a motion to quash. Reasoning that she could not re-litigate whether the Crow's Nest is non-actionable speech in Maine, the Superior Court dismissed her complaint. Gunning appealed to the Maine Supreme Judicial Court. Die filed a cross-appeal, agreeing with the trial court that Gunning is estopped by the California judgment from continuing to seek the Does' identities, and arguing in addition – should Maine examine the merits afresh – that Gunning cannot force the Does to reveal their identities because the Crow's Nest is both nonactionable constitutionally protected parody and protected anonymous speech.

Cal. Order Given Collateral Estoppel Effect

In a 6-1 decision, the Maine Supreme Court affirmed, concluding that Gunning is precluded from relitigating in Maine the California court's determination that the statements in the Crow's Nest are parody protected by the First Amendment.

Addressing choice of law rules first, the Court determined that the law of the forum state (Maine), not California law where the judgment quashing Gunning's subpoena had been rendered, governed. The Court then analyzed whether to apply collateral estoppel a/k/a issue preclusion.

(Continued on page 16)

(Continued from page 15)

First, the Court concluded that the issue in Maine was identical to the issue decided by the California Court (whether the statements in the Crow's Nest were shielded by the First Amendment). Second, the Court found that the California decision was a final judgment, relying on the Restatement (Second) of Judgments § 28 to reject Gunning's argument that because review of the order quashing the subpoena was available only by extraordinary writ the judgment should not be considered final. Finally, the Court found that Gunning had a fair opportunity and incentive to litigate in California, notwithstanding the fact that her California subpoena was not the only conceivable avenue available to out the authors of the Crow's Nest.

In support of its decision, the Court pointed to Gunning's own tactical decisions with regard to the sequence and nature of her discovery initiatives.

> Had Gunning chosen to prosecute this Maine action by pursuing discovery in Maine's courts – for example if she had sought to depose the Freeport employee before serving a subpoena in California, or if she had withdrawn the subpoena when the Does' California motion to quash raised a potentially dispositive issue – then the Superior Court would have decided the Freeport employee's motion to quash based on Maine law, and either party could have appealed an adverse ruling to this Court. Instead, Gunning opted, of her own volition, to litigate a substantive issue in the California courts, presumably hoping for a favorable result. After receiving an unfavorable ruling, and choosing not to pursue an appeal of that ruling, she cannot simply elect to relitigate the very same issue involving the same parties in another jurisdiction, hopeful of obtaining a more favorable result.

Anonymous speakers with an internet presence should consider an internet service provider in a jurisdiction that has recognized strong protection for speech.

Because the Court was not "writing on a clean slate" on the issue of whether the Crow's Nest was non-actionable parody and protected anonymous speech, it did not reach argument that Maine should adopt the standard articulated in *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001).

A lone dissenting Justice argued that a California court's order concerning "a discovery dispute" should not have been given preclusive effect in Maine, and seemed inclined against imposing any heightened burden on plaintiffs pursuing defamation claims against anonymous speakers.

(Continued on page 17)

(Continued from page 16)

Conclusion

From a client counseling perspective, anonymous speakers with an internet presence should consider an internet service provider in a jurisdiction that has recognized strong protection for speech – not a novel proposition, but one that proved dispositive in this instance. From Doe's perspective, "It's too bad that we won't get an answer on the anonymous speech questions in Maine; I think we had a solid case from that perspective and validation would have been nice. That said, I'm glad it's all over."

Sigmund D. Schutz at Preti Flaherty LLP in Portland, ME, represented John Doe. Zachary L. Heiden, American Civil Liberties Union of Maine Foundation, Portland, ME and Paul Alan Levy, Public Citizen Litigation Group, Washington DC filed an amici curiae brief. Marie Gunning was represented in the appeal by Gene R. Libby, Tara A. Rich, and Tyler Smith of Libby O'Brien Kingsley & Champion LLC of Kennebunk, ME.

Legal Frontiers in Digital Media 2017

EU Regulation a Centerpiece of Conference

On May 18-19, 2017, MLRC held its tenth annual Legal Frontiers in Digital Media conference in Silicon Valley. The event was held at the Computer History Museum in Mountain View, California, and co-presented with the Berkeley Center for Law & Technology for the fourth consecutive year.

This year's conference was co-chaired by **Pat Carome**, WilmerHale, **Jordan Gimbel**, Twitch, and **Makesha Patterson**, Google. The event was co-sponsored by **Axis**, **Cooley**, **Covington**, **Davis Wright Tremaine**, **Fenwick & West**, **Kilpatrick Townsend**, **Leopold Petrich & Smith**, **SheppardMullin**, **WilmerHale**, **ZwillGen**, and **Munger Tolles & Olsen**; **Google** sponsored the cocktail reception following Thursday afternoon's sessions, and **Microsoft** sponsored the gourmet coffee bar which served up free specialty coffee & tea drinks throughout the conference.

Over the years, the conference has increasingly included more coverage of international digital law topics, driven in significant part by more aggressive European privacy and content regulation. And while this conference features a copyright session almost every year, this year's conference – recognizing that copyrights are granted globally and digital content on platforms is distributed globally – was the first to focus on both U.S. and EU copyright law in one session.

That session, titled "Cracks in the Safe Harbor," organized and moderated by **Ben Glatstein**, Microsoft, featured two U.S. lawyers, **Joe Gratz**, Durie Tangri and **Caleb Donaldson**, Google, who brought attendees up to speed on significant recent cases like *BMG v. Cox*, *MP3tunes* and *Mavrix Photographs* that have recognized various circumstances under which the conditions for the DMCA's safe harbor are not met. **Lisa Peets**, a Covington lawyer based in London and Brussels, covered the even

Left to right: Ben Glatstein, Caleb Donaldson, Lisa Peets, and Joe Gratz

Jake Goldstein, Robert Post, Jens van den Brink, Daphne Keller, and Jonathan Kanter

(Continued from page 18)

greater challenges of complying with copyright law in Europe; she brought attention to recent CJEU decisions that could create, in certain circumstances, copyright liability for mere linking to infringing materials.

Immediately following the copyright panel was a keynote address by Yale Law School Dean, **Robert Post**, criticizing the controversial Google Spain decision that has forced Google to set up a process for removing search results on a person's name where the information "appear[s] to be inadequate, irrelevant or no longer relevant or excessive."

According to Dean Post, the decision is at odds with freedom of the press because, he argues, Google should have been treated by the CJEU like a newspaper – analogous to a journalistic enterprise and not a mere profit-making data processor. After the Dean concluded his remarks, the stage was set for a broader discussion of Europe's impact on digital companies, provocatively dubbed "Europe's War on U.S. Platforms."

This session was moderated by **Jake Goldstein**, Dow Jones & Company Inc., and included (in addition to Dean Post), **Jens van den Brink**, Kennedy Van der Laan, **Jonathan Kanter**, Paul Weiss and **Daphne Keller**, Stanford Center for Internet & Society. The panel discussed the burdens that have been placed on digital media under rulings since Google Spain and those that may be in the offing under the soon-to-be-in-effect GDPR and a variety of other regulations being considered by various EU states, including laws regulating hate speech and fake news.

The first day of the conference concluded with a panel discussing the recent actions of the new FCC Chairman, Ajit Pai, to roll back the FCC's 2015 Open Internet Order promulgated to protect Net Neutrality. That session, "Transfer of Title: The Future of Net Neutrality in the Wake of Internet Deregulation," discussed the implications of the

(Continued on page 20)

Tyler Newby, Evan Engstrom, Marc Lawrence-Apfelbaum, Corynne McSherry and Tejas Narechania

(Continued from page 19)

FCC "re-re-classifying" broadband internet service from Title II common carrier status back to a Title I information service. That discussion was moderated by **Tyler Newby**, Fenwick & West, and included **Evan Engstrom**, Engine, **Marc Lawrence-Apfelbaum**, Former EVP, Time Warner Cable, **Corynne McSherry**, Electronic Frontier Foundation and **Prof. Tejas Narechania**, UC Berkeley, School of Law.

Friday morning's sessions were kicked off with an update on a variety of recent Section 230 decisions, many troubling to internet platforms, such as *Doe v. Internet Brands*, where a "duty to warn" claim was deemed outside S. 230 immunity and *Airbnb v. San Francisco*, where the immunity did not apply to an online marketplace site that takes a share of an unlawful transaction. The session was moderated by conference co-chair, **Makesha Patterson**, Google, and was co-organized with fellow co-chair **Pat Carome**, WilmerHale; they were joined by **Ambika Doran**, Davis Wright Tremaine, **Brian Willen**, Wilson Sonsini, and **Aaron Schur**, Yelp, Inc. As the panel's moderator noted, many viewed a California appellate court decision, *Hassell v. Bird* – a

(Continued on page 21)

Makesha Patterson, Pat Carome, Ambika Doran, Aaron Schur, and Brian Willen

Samir Jain, Shawn M. Bradstreet, Catherine Crump, , Nicole Jones, and M.K. Palmore

(Continued from page 20)

decision which held that Yelp could be forced to remove content based on a default judgment against a third party -- as the "worst case of 2016." With the case now before the California Supreme Court, Aaron Schur gave a first-hand account of the myriad problems with this decision, not just under Section 230, but also with respect to due process and First Amendment concerns.

Next up was a panel called "Bridging Divides: Interfacing with Law Enforcement and Intelligence Agencies," in which the conference was very fortunate to have two U.S. Government agents join a discussion on how industry and government can better understand one another when working on criminal and national security investigations. The session was moderated by the former Senior Director for Cybersecurity Policy in the Obama White House, **Samir Jain**, who was joined by **M.K. Palmore**, FBI San Francisco - Cyber Branch, and **Shawn M. Bradstreet**, U.S. Secret Service. Also joining the panel were **Nicole Jones**, Associate General Counsel - Global Law Enforcement and Safety, Google, and **Catherine Crump**, UC Berkeley School of Law. While the U.S. agents and Ms. Jones explored the various points of tension between government and digital companies that often require negotiation, Prof. Crump very effectively noted that the users who are subjects of investigations (but only sometimes prosecuted) often have no notice or safeguards to protect their privacy.

The final session of the conference addressed the content moderation decisions that social media companies like Facebook and Twitter must make to balance the interests and safety of their users. The session, "Online Community Values: Free Speech and Social Responsibility in Privately Owned Forums," was moderated by **Nabiha Syed**, Buzzfeed, and featured: **Elizabeth Banker**, Associate General Counsel - Global Law Enforcement and Safety, Twitter, **Monika Bickert**, Head of Product Policy and Counter-terrorism, Facebook, and **Brittan Heller**, Director of Technology and Society, Anti-

(Continued on page 22)

Nabiha Syed, Elizabeth Banker, Brittan Heller, and Monika Bickert

(Continued from page 21)

Defamation League, Center for Technology and Society. The panel discussed such topics as hate speech, terrorist propaganda, fake news, and the limits of automating the filtering of such content. One of the more challenging issues discussed by the panel is how to handle live video and – in particular – dealing with users who are threatening self-harm. Ms. Bickert expressed the difficulty in assessing whether keeping such a person connected with their friends or taking them offline is the best way to mitigate the situation.

Share Office Space with MLRC

We have two private, windowed offices available for sublet on our floor at 520 8th Avenue. The building is just minutes away from Times Square, Penn Station and the Port Authority. The offices include shared conference room and kitchen, and high speed internet access is available. The building itself has a convenient lobby and 24/7 access and security.

And you'll be sharing space with MLRC's media law gurus and collegial staff. The rent is $1,500 per office/month for the first year. To contact us about the space email or call 212-337-0200 x205 for more information.

SCOTUS Determines New York Credit Card Surcharge Ban Regulates Speech

By Chris Daniel, Heena Merchant & Kelsey Sullivan

On March 29, 2017, the United States Supreme Court unanimously held that a New York law prohibiting merchants from imposing surcharges for credit card purchases was a matter of free speech subject to First Amendment scrutiny. The Court's decision in *Expressions Hair Design v. Schneiderman*, turned on whether New York's law banning credit card surcharges (N.Y. Gen. Bus. Law § 518) (the "New York Surcharge Ban Law" or the "Law") was a regulation on pricing (as held by Court of Appeals for the Second Circuit Court), or whether the Law regulated merchant communications regarding price. Finding the latter, the Court vacated the judgment issued by the Court of Appeals for the Second Circuit and remanded the case.

Surcharges and Discounts

When a customer uses a debit or credit card to make a payment, the merchant selling the item ultimately receives less than the amount charged to the consumer. The delta between the amount charged to the consumers and the amount received by the merchant is the merchant discount. The merchant discount, typically 2.5% for credit cards and approximately 24 cents for debit cards issued by banks with greater than $10 billion in assets, is shared by the Issuing Bank, the card network, and various processors.

The Court held that the New York Surcharge Ban Law prohibited merchants wishing to offer differential pricing from communicating their price in the manner they wish to.

In an attempt to offset the merchant discount, merchants frequently pass such costs on to customers using differential pricing for customers that pay via credit or debit card versus those who pay using cash or other means. In practice, merchants achieve such differential pricing in one of two ways: (i) imposing a surcharge for customers wishing to pay via credit or debit card; or (ii) offering a discount for customers that use cash to pay for the transaction.

The Court explained the distinction between a surcharge and a discount as one that stemmed from the 1976 amendment to the federal Truth in Lending Act ("TILA") which barred merchants from imposing surcharges on customers who pay using credit cards. See Act of Feb. 27, 1976, § 3(c)(1), 90 Stat. 197 (1976). The amendment defined "*surcharge*" *as "any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check or similar means*, whereas a "*discount*" was defined as "*a reduction made from the regular price.*"

(Continued on page 24)

(Continued from page 23)

This delineation was further clarified in the Cash Discount Act of 1981 which, according to the Court, provided that "[1]f no price was tagged or posted, or if a merchant employed a two-tag approach—posting one price for credit and another for cash—the "regular price" was whatever was charged to the credit card user . . . [t]he effect of all this was that a merchant could violate the surcharge ban only by posting a single price and charging credit card users more than that posted price." *Expressions Hair Design at* *3.

While the federal laws banning surcharges expired in 1984 and were not renewed thereafter, several states, including New York, enacted their own surcharge ban laws in that same year. The New York Surcharge Ban Law states that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." See N.Y. Gen. Bus. Law Ann. § 518.

Regulation of Conduct or Communication

The Petitioners in *Expressions Hair Design*, which were comprised of five New York businesses and their owners, sought to employ a "single-sticker regime" whereby the merchants post a cash price and an additional credit card surcharge. The Petitioners challenged the New York Surcharge Ban Law on First Amendment grounds, arguing that its prohibition on their ability to employ the single-sticker regime was an unconstitutional restriction on their ability to communicate their prices to customers. The merchants also alleged that the law was unconstitutionally vague because it did not properly define or otherwise differentiate between surcharges and discounts.

The question presented to the Court turned on whether the New York Surcharge Ban Law was a regulation on a merchant's First Amendment right to free speech with respect to displaying of prices, or whether it regulated a merchant's conduct with respect to pricing, the latter of which would not have First Amendment implications. The Court of Appeals for the Second Circuit interpreted the New York Surcharge Ban Law as a regulation on the merchant's conduct because, according to the court, its prohibition required that the merchant's sticker price be the same as the price that the merchant charged to a customer paying with a credit card. See 808 F.3d 118, 131 (2nd Cir. 2015). The court held that a merchant, therefore, may communicate the price however it chooses to, and the fact that the merchant cannot communicate two different prices is merely incidental to the restriction on a merchant's conduct with respect to such pricing restriction.

The Supreme Court disagreed with the Second Circuit ruling and ultimately concluded that the New York Surcharge Ban Law does not primarily regulate a merchant's conduct, but rather, regulates the merchant's right to free speech. *Expressions Hair Design* at *6. Specifically, the Court held that the Law did not impose restrictions upon merchants with respect to the prices

(Continued on page 25)

(Continued from page 24)

they may or may not charge; given that discounts are permitted, merchants are, in effect, permitted to set any prices they wish for customers using various forms of payment, even if such prices are different.

Rather, the Court held that the New York Surcharge Ban Law prohibited merchants wishing to offer differential pricing from *communicating* their price in the manner they wish to—the Law effectively required merchants to post as their sticker price, the higher price they wish to charge for customers paying with credit or debit cards, and offer a discount for customers paying with cash or other payment methods. As a result, the New York Surcharge Ban Law, the Court held, restricted the merchants' right to freely display their pricing, and accordingly, the Law regulated free speech, and was subject to First Amendment scrutiny.

The Court also quickly swept away the Petitioners' challenge that the Law is unconstitutionally vague. The Law prohibits single-sticker pricing, according to the Court, and "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim." *Id.* at *10.

The decision in *Expressions Hair Design* is determinedly narrow. First, the Court decided the case as an as-applied challenge only for an application in which a merchant posts a single-sticker price with an additional credit card surcharge either as a percentage or specific amount. Further**,** the Court declined to consider whether the Law would survive First Amendment scrutiny as a valid commercial speech regulation or a valid disclosure requirement. The Court in doing so asserted that it is a "court of review, not of first review" and remanded the case to the Court of Appeals to analyze the Law as a form of speech regulation. *Id.* at *10. The Court also noted that the Court of Appeals may need to consider whether the Law allows a two-sticker pricing scheme, which, if allowed, would support the conclusion that the Law is a valid disclosure requirement.

The Court declined to consider whether the Law would survive First Amendment scrutiny as a valid commercial speech regulation or a valid disclosure requirement.

Other State Surcharge Bans

New York is not the only state with limitations on surcharges. Nine additional states restrict merchants from charging different fees to customers using credit cards for payment compared to other means of payment, such as cash, checks, or ACH transfers. States that prohibit differential pricing in connection with credit cards include: California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma, and Texas.

Like the New York Surcharge Ban Law, surcharge ban laws have also been challenged in California, Texas, and Florida. The legality of California's prohibition on surcharges was

(Continued on page 26)

(Continued from page 25)

disputed in *Italian Colors, et al. v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015). In *Italian Colors*, the Eastern District of California determined that a California law banning surcharges violated the First Amendment as an unlawful restriction on commercial speech because it dictated how merchants can describe the price differential between purchases made using cash and those made using credit or debit cards. The court ultimately found that the regulation was unconstitutionally vague.

The Eleventh Circuit likewise held that a Florida surcharge ban law comprised a regulation on free speech subject to First Amendment scrutiny in *Dana's Railroad Supply v. Attorney General, Florida*, 807 F.3d 1235, 1245 (11th Cir. 2015). There, the court held that a surcharge is the same as a negative discount; and therefore, the law, by permitting discounts, regulates the manner in which the merchant communicates the price rather than regulating the conduct of pricing itself.

Relying on the same arguments set forth by the Second Circuit in *Expressions Hair Design,* the Fifth Circuit previously upheld a Texas surcharge ban law in *Rowell et al. v. Pettijohn*, 816 F.3d 73, 79 (5th Cir. 2016), cert. granted, judgment vacated, No. 15-1455, 2017 WL 1199453 (U.S. Apr. 3, 2017), stating that the law in question did not regulate speech but rather economic conduct; however, the decision in *Rowell* has been vacated following the Supreme Court's decision in *Expressions Hair Design*.

The Court's narrow decision does not provide merchants operating in states with similar laws with guidance as to whether such laws constitute valid commercial speech regulations or valid disclosure requirements.

Conclusion

The Court's decision in *Expressions Hair Design* is helpful in its determination that laws similar to the New York Surcharge Ban Law are, in fact, a regulation on free speech subject to First Amendment scrutiny. Unfortunately, however, the Court's narrow decision does not provide merchants operating in states with similar laws with guidance as to whether such laws constitute valid commercial speech regulations or valid disclosure requirements. While such laws may draw First Amendment scrutiny, it is unclear whether courts may still uphold similar surcharge ban laws as constituting valid regulations on free speech. Accordingly, merchants should continue to adhere to any applicable restrictions set forth in similar surcharge ban laws until a more definite conclusion regarding the unconstitutionality of such laws is reached.

Chris Daniel is a partner and Heena Merchant & Kelsey Sullivan associates at Paul Hastings in Atlanta. Petitioners in the case were represented by Deepak Gupta, Gupta Wessler PLLC, Washington, D. C. Respondents were represented by New York State Deputy Solicitor General Steven C. Wu. Assistant Solicitor General Eric J. Feigin represented the United States as amicus curiae.

Vermont Enacts Shield Law

Protection for Journalists' Sources Effective Immediately

On May 17, Vermont Governor Phil Scott signed into law S.96, an Act relating to a news media privilege, making Vermont the 41st state to enact statutory protection for reporters' sources.

The effort to enact the statute was led by the Vermont Press Association with assistance from newspapers and independent journalists throughout the state, most notably editor Paul Heintz of the Seven Days newspaper in Burlington. Commenting on the enactment of the statute, Heintz stated: "For too long this state has allowed its judicial system to haul journalists up on the stand and compel them to testify with few limitations. For too long, the state has allowed overzealous attorneys to force reporters to disclose unpublished information and reveal the identities of confidential sources. That changes today."

Heintz also noted the chilling climate flowing from Washington: "Just yesterday, The New York Times reported that in an Oval Office meeting in February, the president asked his FBI director to jail reporters who reported classified material. We don't hear such deeply un-American threats in Vermont, but that does not mean Vermont reporters and news organizations don't face grave threats." See "Scott signs shield law for journalists," VTDigger, May 17 for a full report on Heintz's comments.

MLRC provided some assistance to the effort as well. Our Model Shield Law was used to help draft the bill -- and members of MLRC's Model Shield Law Task Force provided comments on the bill.

The law provides absolute protection for confidential sources and information; and qualified protection for non-confidential sources and information. Journalism is broadly defined to encompass persons "investigating issues or events of public interest for the primary purpose of reporting, publishing, or distributing news or information to the public."

The full text is as follows:

> It is hereby enacted by the General Assembly of the State of Vermont:
> Sec. 1. 12 V.S.A. § 1616 is added to read:
> § 1616. JOURNALIST'S PRIVILEGE
> (a) Definitions. As used in this section:
> (1) "Journalist" means:
> (A) an individual or organization engaging in journalism or assisting an individual or organization engaging in journalism at the time the news or information sought to be compelled pursuant to subsection (b) of this section was obtained; or (B) any supervisor, employer, parent company, subsidiary, or affiliate of an individual or

(Continued on page 28)

(Continued from page 27)

organization engaging in journalism at the time the news or information sought to be compelled pursuant to subsection (b) of this section was obtained.

(2) "Journalism" means:

(A) investigating issues or events of public interest for the primary purpose of reporting, publishing, or distributing news or information to the public, whether or not the news or information is ultimately published or distributed; or (B) preparing news or information concerning issues or events of public interest for publishing or distributing to the public, whether or not the news or information is ultimately published or distributed.

(b) Compelled disclosure.

(1) No court or legislative, administrative, or other body with the power to issue a subpoena shall compel:

(A) a journalist to disclose news or information obtained or received in confidence, including: (i) the identity of the source of that news or information; or (ii) news or information that is not published or disseminated, including notes, outtakes, photographs, photographic negatives, video or audio recordings, film, or other data.

(B) a person other than a journalist to disclose news or information obtained or received from a journalist if a journalist could not be compelled to disclose the news or information pursuant to subdivision (A) of this subdivision (1).

(2) No court or legislative, administrative, or other body with the power to issue a subpoena shall compel:

(A) a journalist to disclose news or information that was not obtained or received in confidence unless it finds that the party seeking the news or information establishes by clear and convincing evidence that:

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

(B) a person other than a journalist to disclose news or information obtained or received from a journalist if a journalist could not be compelled to disclose the news or information pursuant to subdivision (A) of this subdivision (2).

(c) No implication of waiver. The publication or dissemination of news or information shall not constitute a waiver of the protection from compelled disclosure as provided in subsection (b) of this section.

Sec. 2. EFFECTIVE DATE

This act shall take effect on passage.

Court Holds Filmmaker Waived Reporter's Privilege By Later Joining Murder Conviction Exoneree's Legal Team

By Steven P. Mandell

A federal Magistrate in Chicago has issued an unprecedented decision involving waiver of the reporter's privilege. *Simon v. Northwestern University*, No. 15-C-1433, Dkt # 287 (N.D. Ill.). The decision emanates from the ever-growing body of litigation involving the Northwestern University Medill School of Journalism's Innocence Project and its controversial former director, David Protess.

Protess and his team were instrumental in gaining the exoneration of Anthony Porter shortly before his scheduled execution for the murder of two people in Chicago's Washington Park. In the wake of that exoneration, another man, Alstory Simon, was convicted for committing the murders after he allegedly confessed to the crime to one of Protess' investigators, Paul Ciolino.

In a bizarre twist to the story, after serving 19 years in prison, Simon, himself, was also exonerated, with the county's chief prosecutor announcing that the "investigation by David Protess and his team involved a series of alarming tactics that were not only coercive and absolutely unacceptable by law enforcement standards, they were potentially in violation of Mr. Simon's constitutionally protected rights."

While Simon was challenging his murder conviction, Chicago attorney, Andrew Hale, and a colleague began filming a documentary about the murders and the subsequent prosecutions entitled "Murder In The Park." The film culminates with video of the prosecutor's press conference about Simon's exoneration and his release from prison.

Thereafter, in 2015, Simon sued Northwestern, Protess and Ciolino in federal court for malicious prosecution. Shortly after the film's public debut but before Simon filed his suit, Hale accepted an invitation to join two other Chicago lawyers who had already worked on the suit. The reporter's privilege issue arose when Ciolino subpoenaed Hale and his film production company for unpublished source materials used to develop the film. The filmmakers objected to

(Continued on page 30)

(Continued from page 29)

production, raising the Illinois Reporter's Privilege Act. Ciolino moved the court to compel production of the subpoenaed materials, arguing that the filmmakers did not qualify for protection under the Act because the film was developed for the sole purpose of augmenting Simon's malicious prosecution claim rather than true journalistic endeavors.

The Magistrate held an evidentiary hearing, ostensibly to determine whether the filmmakers qualified as "reporters" under the Act and whether their filmed interviews of witnesses and other materials qualified as protected "source" material. During the hearing, Hale testified that although he continues to have access to source materials, including outtakes from videotaped interviews of individuals who appear in the film, he has shared none of that information with Simon or the other two lawyers on Simon's legal team. At the end of the hearing, the Magistrate raised the prospect that Hale may have waived any reporter's privilege by joining Simon's legal team and asked the parties to brief the issue.

On May 5, 2017, the Magistrate issued his ruling. The Magistrate found that the filmmakers fell comfortably within the definition of "reporter" under the Act and the fact that Hale was also a practicing attorney at the time he created the documentary did not preclude him from falling within the definition. The Magistrate also found that the filmmakers had engaged in a true journalistic effort to explain the story behind the convictions of Porter and Simon and rejected Ciolino's assertion that the film was merely a promotional piece for Simon.

By transforming himself from reporter to attorney Hale brought with him all of the information he learned from producing the documentary and thereby waived his reporter's privilege.

However, the Magistrate also ruled that Hale had waived his reporter's privilege simply by joining Simon's legal team. He rejected the filmmakers' argument that there could not be a waiver in the absence of Hale's express disclosure of source materials. He found inapposite decisions from jurisdictions across the country which unanimously rely on a reporter's express disclosure of source materials to support a finding of waiver.

Instead, he determined that by transforming himself from reporter to attorney Hale brought with him all of the information he learned from producing the documentary and thereby waived his reporter's privilege. Finally, he noted that his ruling was based on a "unique set of facts" that "we suspect unlikely to reoccur" and "thus we caution that the precedential value of this opinion to resolve waiver under Illinois' reporter privilege should be considered cautiously."

The filmmakers have appealed this decision to the District Judge.

Steven P. Mandell, a partner at Mandell Menkes LLC, Chicago, represents Whole Truth Films and Andrew Hale in this case.

No Joke: Copyright Case Against Conan O'Brien Headed to Trial

In an unusual copyright case over the alleged theft of jokes, a Los Angeles federal district court ruled this month that a comedy writer's suit against Conan O'Brien can go forward to trial. *Kaseberg v. Conaco, LLC*, 2017 U.S. Dist. LEXIS 72921 (S.D. Cal. May 9, 2017) (Sammartino, J.).

Parsing in detail the form and gist of jokes about Tom Brady, the Washington Monument and Caitlyn Jenner, the court found that while Conan's similarly themed jokes were not exactly identical, under a "thin copyright" standard a jury could nevertheless find that they were "virtually identical within the context of the entire joke."

Background

The plaintiff, Robert Alexander Kaseberg, is an experienced freelance comedy writer who, though a fan of late-night television talk shows, has never been a staff writer. He posts "monologue" style jokes to his blog and twitter account. And more than 1,000 of his jokes have been used by Jay Leno. Kaseberg claimed that five of his online jokes, dating from December 2, 2014 to June 9, 2015, were used in opening monologues of the *Conan* show soon after they were posted online. Kaseberg sued Conan O'Brien, his producer and writing staff, Turner Broadcasting and Time Warner for copyright infringement.

The Jokes Compared

University of Alabama Birmingham - Oakland Raiders

Kaseberg: "The University of Alabama-Birmingham is shutting down its football program. To which the Oakland Raiders said; Wait, so you can do that?"

Conan: "Big news in sports. University of Alabama-Birmingham has decided to discontinue its football team. Yeah. When they heard the news, New York Jets fans said, Wait can you do that? It's something you can do?"

(Continued on page 32)

(Continued from page 31)

Delta

Kaseberg: "A Delta flight this week took off from Cleveland to New York with just two passengers. And they fought over control of the armrest the entire flight."

Conan: "Yesterday, a Delta flight from Cleveland to New York took off with just 2 passengers. Yet somehow, they spent the whole flight fighting over the armrest."

Tom Brady

Kaseberg: "Tom Brady said he wants to give his MVP truck to the man who won the game for the Patriots. So enjoy that truck, Pete Carroll."

Conan: "Tom Brady said he wants to give the truck that he was given as Super Bowl MVP . . . to the guy who won the Super Bowl for the Patriots. Which is very nice. I think that's nice. I do. Yes. So Brady's giving his truck to Seahawks coach Pete Carroll."

Washington Monument

Kaseberg: "The Washington Monument is ten inches shorter than previously thought. You know the winter has been cold when a monument suffers from shrinkage."

Conan: "Yesterday surveyors announced that the Washington Monument is ten inches shorter than what's been previously recorded. Yeah. Of course, the monument is blaming the shrinkage on the cold weather. Penis joke."

Caitlyn Jenner

Kaseberg: "Three towns, two in Texas, one in Tennessee, have streets named after Bruce Jenner and now they have to consider changing them to Caitlyn. And one will have to change from a Cul-De-Sac to a Cul-De-Sackless."

Conan: "Some cities that have streets named after Bruce Jenner are trying to change the streets' names to Caitlyn Jenner. If you live on Bruce Jenner cul-de-sac it will now be cul-de-no-sack."

Analysis

The defendants moved for summary judgment on five grounds: 1) failure to register; 2) prior creation; 3) no evidence of direct copying, and access cannot be established; 4) at best the jokes are entitled to "thin" copyright protection, and plaintiff cannot establish that they are "virtually identical;" and 5) independent creation.

(Continued on page 33)

(Continued from page 32)

Registration

The court first addressed the issue of registration. Kaseberg failed to provide copyright applications for the Tom Brady or UAB jokes until four months after the close of discovery. The court, applying FCRP Rule 37(c) looked to whether the failure to provide the information was "substantially justified or [was] harmless." Kaseberg conceded that there was no substantial justification, but the court found the failure to be harmless. It further held that discovery should be reopened with respect to the applications, associated documents, and copyright office communications for those two jokes. Summary judgment was thus denied on this ground.

Prior Creation

Next, the court turned to the defendant's claims that Conan's Delta and Washington Monument jokes were created prior to Kaseberg's publications. First, the defendants presented strong evidence of prior creation with an email showing a *Conan* staff writer's submission of the joke about five hours before Kaseberg posted his version online. The plaintiff argued that a triable issue of fact remained, but the court disagreed and granted summary judgment as to the Delta joke.

Prior creation of the Washington Monument joke was addressed separately, and summary judgment was denied on this point. Rather than the same day, *Conan* argued their joke was based on a similar joke with "the same concept and punchline as [Plaintiff's] joke," with a video referencing a DC cold front. That segment aired on *Conan* a year previously. The "common threads [of all three jokes were] the ideas that (1) the Washington Monument looks like a phallus and (2) the Monument may therefore respond to cold weather by shrinking." However, the court found that a triable issue remained for multiple reasons- ideas are not themselves copyrightable, the year-old joke was in video rather than written, and the allegedly infringed and infringing jokes are expressed with reference to a then-recent study about the Monument.

Access and the Relevant Similarity Standard

The court held that access may be established with striking similarity, or with a reasonable possibility of access by a showing of a chain of events or wide dissemination. Here, the court found a genuine issue of material fact as to a chain of events, thus denying summary judgment, and did not reach wide dissemination or striking similarity.

The court found persuasive plaintiff's expert witness report finding there was only a .003-.0075% chance that the jokes were independently created in the specific time period. Moreover, plaintiff had tweeted to and called a staff writer after he saw Conan perform the second

(Continued on page 34)

(Continued from page 33)

allegedly infringing joke. This was sufficient to create an issue of fact that defendants had access to plaintiff's jokes.

Similarity

While the court noted that jokes are entitled to copyright protection, given the subject matter and format of plaintiff's jokes and their "two-line set up and delivery paradigm," only "thin" copyright protection applied. With thin protection, the standard for infringement is "virtual identity." Parsing the jokes, defendants' joke about the University of Alabama Birmingham discontinuing its football program was sufficiently different to be non-infringing. Not only did they use a different team for the punch line (the Jets versus the Raiders), but the punchline invoked a fan perspective, rather than a team's perspective. The remaining gags about Tom Brady, the Washington Monument, and Caitlyn Jenner, however, all created a triable issue of infringement.

Independent Creation

While the Delta joke was clearly established to be created independently, the independent creation of the other jokes was supported only by the testimony of the defense and its writers. This necessarily raised credibility determinations inappropriate for resolution on summary judgment.

Willful Infringement

Finally, the court denied defendants' motion for summary adjudication to find no willful infringement. Willfulness requires knowledge of the infringing activity, combined with willful blindness or reckless disregard. Here plaintiff tweeted to and spoke with a member of the writing staff, so *Conan* was at minimum aware of the plaintiff after the second joke at issue. Additionally, after that staff member spoke with plaintiff, he discussed the plaintiff with other staff, but confusion remains over whether the staff was made aware before or after the jokes were published. As it remains a triable issue whether or not three of the jokes were copied, it similarly remains an issue whether this was done so willfully.

Plaintiff is represented by Jayson Michael Lorenzo, Law Offices of Jayson M Lorenzo, Carlsbad, CA. Defendants are represented by Erica J. Van Loon, Brittany Elias, Nick Huskins, and Rex Hwang, Glaser Weil Fink Howard Avchen & Shapiro, LLP, Los Angeles, CA.

How Europe Is Tackling Fake News and What This Means for Online Platforms

Developments in UK, Germany, France, Italy and The Netherlands.

By Bryony Hurst, Sonja van Harten, Andrea Giussani, Niels Lutzhoeft & Marion Barbier

For hundreds of years here in Europe we have looked to and received our news from traditional press organisations, regulated, to a greater or lesser extent, by independent bodies who set standards with respect to the quality of news content we receive, how we receive it and even, to a degree, how much of a particular story we receive. Whilst, culturally, we adopt a slightly different approach to the definition of a free press than our American brethren, we nevertheless seek to uphold that concept and believe, on the whole, that in order to succeed it is crucial that news organisations maintain their credibility by living up to the trust placed in them as a key pillar in an open and democratic society.

As proponents of freedom of expression, we of course also sign up to the view, when it comes to news outlets, of "the more, the better." What becomes potentially more challenging, however, is the emergence of a flood of news sources who increasingly control (or don't control, as the case may be) the stories we read online but who do not accept that they should be regulated for doing so – indeed, some of these companies do not even consider themselves to be news organisations. Arguably, they are not. The classification of intermediary platforms who do not create news content, do not employ or engage professional journalists, and merely provide a window for others to share thought and express opinion (as well as a great deal of other content besides) should be considered carefully before placing burdensome regulatory obligations upon them unnecessarily.

Should we consider imposing some limits upon the currently rather laissez-faire approach taken to regulation of news content online?

And yet: over the past two years we have heard more and more people referring to and complaining about the phenomenon of "fake news" whose origins appear to be rooted in the growth and spread of the public's reliance on online news sources. When large swathes of people around the world are turning to the internet to find out about world events, politics and opinion, and the reports they find there turn out to be wholly or partially inaccurate, can we justifiably continue to deny that such stories should be treated as "news" and should we consider imposing some limits upon the currently rather laissez-faire approach taken to regulation of news content online?

(Continued on page 36)

(Continued from page 35)

In this context, Europe's unique history with regard to the promulgation of misinformation by mainstream media should not be forgotten. In the last century, European citizens have witnessed, and suffered, first-hand the dangerous consequences of press manipulation by individuals and political parties; one need only consider the role played by propaganda in the rise of the Nazi party during the 1930s and 40s, and in prolonging Communist power throughout Eastern Europe, to understand how the phrase "fake news" may be understood to have additional connotations by many Europeans who lived through those devastating times.

But are we really talking about a threat to free press whose consequences could be as serious as those experienced in the past? Whilst there is no doubt that a huge number of stories have appeared on the internet over the past few years which would not withstand scrutiny by even the most light-touch of fact-checking, are we really suggesting that these have had undue and negative influences on public opinion such as to pose a real and ongoing danger to our democratic systems? During the US election last year, some stand-out fake headlines included "*ISIS leader calls for American Muslim voters to support Hillary Clinton*", "*Pope Francis shocks world, endorses Donald Trump for president*" and, my personal favourite, "*Ireland is now officially accepting Trump refugees from America.*"

Europe's unique history with regard to the promulgation of misinformation by mainstream media should not be forgotten.

According to data released by Buzzfeed in November 2016, from August 2016 until Election Day, engagement with the top 20 fake election stories rose to 8.1 million; by contrast, engagement with the top 20 real election stories declined to 7.3 million. There is therefore little question that these stories were reaching potential voters. However, a study conducted by Stanford University in January 2017 concluded that fake news stories did not impact the outcome of the election; this conclusion was based on a range of data, most importantly that only 34% of those surveyed stated that they trust information received via social media. It also noted that the two fake news stories that had been most widely believed during the election were in fact pro-Clinton.

Perhaps this can be explained by the simple fact that this is not the twentieth century; we live in a different time; we receive news content in myriad ways, fast-pace and ever-changing; the average reader of an online news portal, especially one without the credentials of an centuries-old national newspaper, surely knows to be circumspect as to the accuracy and reliability of the content he reads therein? Moreover, satirical sites which deliberately parody "real" news outlets are now commonplace; through them online users have learned more than ever that the phrase "don't believe everything you read in the press" should be front and centre when digesting online content.

(Continued on page 37)

(Continued from page 36)

Of course, satirical sites are clearly labelled as such. Stories reported in real-time, as an event is unfolding, are usually demarcated as "live" and therefore more prone to error and the need for correction too. What, though, when apparently well-considered and fully-edited stories appear on bona fide, mainstream, social media sites? How is the average reader to apply his judgment as to reliability and accuracy in such circumstances, particularly when the story in question has been liked by 1 million of his closest friends and attracted 400,000 seemingly intelligent comments?

This is where we are forced to concede that the emergence of popular social media portals poses additional risks to a reader's ability to objectively assess online content posted on such sites; the phrase "echo chamber" is increasingly used in connection with sites like Facebook. I, a Facebook user, hold certain opinions and values, which my friends, fellow Facebook users, are also more likely to hold; my friends share or like articles, which then appear in my news feed, and which I also like or share – so that my other friends receive notification of the same in their news feeds. Pretty soon, my and 1 million of my closest friends' news feeds are being flooded with articles which all reinforce the same or similar viewpoints. Because I am seeing the same or similar stories more often, and because my friends are liking these articles, I give them more credence than I would a story which I had come across independently from a traditional news source.

The capability of online news stories to "go viral" also explains a new motivation behind the creation of fake news, unique to the context of news shared via social media.

The capability of online news stories to "go viral" also explains a new motivation behind the creation of fake news, unique to the context of news shared via social media. As an online news story is read and shared, so its audience grows, often exponentially in contrast with stories emanating from more traditional news sources. Consequently, internet sites can guarantee higher numbers of "eyeballs" (and, depending upon the story content, even the right type of eyeballs) on their stories, which enables them to sell advertising space attached to such stories at a higher value. This drives advertising revenue both for the website, and for the content creators, through the roof and provides a huge incentive to create/host content which will be shared repeatedly. It was precisely this which emerged as a key driver behind the volume of fake news promulgated during the US election last year; investigations carried out by The Guardian and Buzzfeed uncovered that more than 100 fake news domain names were registered to a small Macedonian town, Veles, where a number of the locals have seized upon the opportunity to make money by writing fake news – an opportunity which peaked during the US election as it became clear that Trump supporters were keen users of social media so that anti-Clinton stories went viral with very little effort required from their Macedonian authors. A criticism often

(Continued on page 38)

(Continued from page 37)

levelled at the social media sites who play a part in this economic food-chain is that, they have little financial incentive(at least short-term) to remove and/or scrutinise popular stories.

The issues relating to fake news are by no means challenges facing the US alone. Over the past year, in particular, a number of European countries have also begun to question the need for closer scrutiny of the impact of fake news and debates concerning potential regulation of online news sources are underway. During the Brexit referendum in June 2016, the "Vote Leave" campaign focussed on headlines designed to grab the lion's share of digital airtime; few will forget quickly the Brexiteers' claim that leaving the EU would free up £350 million for investment in the NHS, or the "Breaking Point" poster on immigration, depicting queues of migrants at the Croatian-Slovenian border (and not the British border as it appears may have been the intended implication).

In January 2017, the campaign's director admitted "*Would we have won without immigration? No. Would we have won without….the NHS? All our research and the close result strongly suggests no*." Equally, during a referendum in Italy in December 2016, called to determine its Prime Minister's proposals to reform the Italian political system, claims were made that half of all online news stories relating to the vote the day before it took place were in fact fake. Other European countries with government elections in 2017 include the Netherlands (which held general elections in March) , France (whose nail-biting election just concluded), Germany, Hungary, Slovenia and Norway. Measures are being considered in all of these countries in an attempt to ensure that no suggestion can be made that fake news stories have played any significant part in the election outcomes.

These political drivers are only half the story, however, as to why Europe's governing minds are increasingly turning to the question of whether regulation of online news outlets should be introduced. In March 2015 the European Commission unveiled its plans to create a Digital Single Market in Europe, which has behind it the goal of contributing €415billion to the European economy. There are 16 key actions being undertaken by the Commission to deliver the DSM, one of which is a "comprehensive analysis of the role of online platforms in the market," including "how best to tackle illegal content on the Internet."

Against this backdrop, European governments and regulatory authorities are more closely scrutinising the impact of internet companies generally and, in particular, US-based businesses who are expanding their services and operations into Europe (with one eye, presumably, on ensuring that such businesses do not distort the market opportunities for home-grown and smaller businesses). In the context of online news distribution, such scrutiny is being encouraged by the traditional media players, who have long considered the internet intermediaries as competitors, and many of whom have as an agenda the goal of securing a level playing field in terms of regulation of media content, whatever its medium of delivery.

(Continued on page 39)

(Continued from page 38)

This threat of increased regulation in Europe should be, and is being, taken very seriously by US-based digital/social media companies. Its consequences are likely to present significant financial, logistical and legal burdens:

First, to implement the sort of monitoring of content that is currently being proposed in some European countries, a huge investment of both time and money may be required to put the requisite technology, people and processes in place within the necessary timeframes.

Some of the regulatory requirements being debated would involve internet companies needing to implement technology which enables them to monitor and verify a wide range of news stories prior to distribution. Whether such machinery exists and how it could be implemented without disrupting user experience are questions all service providers will need to grapple with quickly in order to comply.

The debate around regulation of fake news is simply the latest dilemma in the wider and older debate as to who should accept ultimate responsibility for content hosted online. Sites such as Facebook have, for many years, faced repeated attempts by European courts and regulators to erode the historical limitations on liability afforded to internet intermediaries under the E-Commerce Directive and related legislation (which pre-dates even Facebook's incorporation date, never mind the phenomenon of fake news). Key in their line of defence has been an ability to demonstrate that they play no active role in monitoring the content hosted on their sites; some of the proposed regulation could render this argument unavailable to them in the future.

Finally, on the subject of legal challenges, despite the European Commission's vision of a unified digital single market, with one set of regulations, it is already becoming apparent that each Member State in Europe is tackling the issue of fake news in its own way. This could present a challenge to internet companies who would need to comply with different regulations in each European country – and as the draft regulatory proposals that are emerging appear relatively prescriptive in their approach, it may be hard to adopt a "lowest common denominator" approach to compliance.

Clearly, then, for a variety of reasons, the ground is shifting in Europe in terms of digital/ social media companies' ability to distribute content considered to be newsworthy completely unchecked. To explain the varying perspectives on this issue from around the EU and to describe some of the regulatory measures currently under consideration, we have brought together five digital media law experts from key jurisdictions whose analyses form the remainder of this article. In addition to guiding you through the drivers for change in their jurisdiction and the steps being taken or considered to tackle fake news, they will also provide thoughts on the legal and commercial impact of this upon both large online media platforms and also upon smaller digital businesses.

(Continued on page 40)

(Continued from page 39)

United Kingdom

First things first, let's address the elephant in the room – for the purposes of this article, the UK is very much still to be considered as part of the EU. Until it Brexits some time in 2019, it remains part and parcel of the Digital Single Market initiative and is incentivised by the same drivers as the rest of Europe to create an environment in which digital businesses can grow and flourish.

It also, however, has its own unique perspective to bring to the issue of fake news, having undergone the somewhat harrowing experience of the Brexit referendum and received, for the first time in recent years, a truly polarised political narrative and accompanying press coverage. In addition, the UK remains a bastion for, on the one hand, an influential traditional press industry which lobbies for greater regulation of tech companies which it views as its new competition and, on the other hand, a strong advertising industry which has to balance its desire to increase ad revenue at all costs against protecting the brands of its clients against advertising fraud.

In the past two years, examples of fake news in the UK have ranged from the sublime to ridiculous. Without wading any further into the trail of colourful news reports that provided the soundtrack to the Brexit vote last June, other examples of fake news stories that have gone viral in the last twelve months include doctored photos first published by a freelance photographer on Twitter which appeared to show Jeremy Corbyn, the leader of the UK Labour Party, dancing a "jig" at a ceremony in commemoration of those who were killed in World War I and II and, even more distressing than that, a hoax report in December that Buckingham Palace was attempting to cover up the fact that Queen Elizabeth II had died (started from a fake BBC News Twitter account, with suspected pro-Kremlin associations).

Inquiries into what is driving fake news and what can be done to better address it were already underway but, following the recent announcement by prime minister Theresa May that a snap election is to be held in the UK on 8 June, the need to ensure that its impact on national affairs is minimised in coming months has become even more pressing. Damian Collins, a Member of Parliament and Chairman of a parliamentary select committee looking into the issue, recently told the Guardian newspaper that he feared misleading news stories threatened "the integrity of democracy in Britain."

Mr Collins chairs the UK government's Culture, Media & Sport Committee which announced in January of this year that it was launching an inquiry into "widespread dissemination, through social media and the internet, and acceptance as fact, of stories of

(Continued on page 41)

(Continued from page 40)

uncertain provenance or accuracy." The inquiry is aimed at answering a range of questions relating to fake news, including how to define it, its effect on public understanding of the world, differences in effect related to age/social background/gender, how online advertising practices contribute to this, responsibilities of search engines and social media platforms and use of algorithms to identify fake news, how to educate the public on differentiating between real and fake news and approaches taken by other countries to the issue.

In response to a call for evidence by the Committee, 79 individuals and organisations have made written submissions, including Facebook, Google, the Press Association, the BBC, Guardian News & Media and the News Media Association (the "NMA"). In their evidence, both Facebook and Google set out in some detail the various measures being taken by them to support and promote quality journalism and ensure accuracy of information. In Facebook's case, this includes the launch of a programme to work with third party fact-checking organisations and new tools for users to report hoax stories. Google highlighted its Digital News Initiative, whose main focus is on assisting companies in the fact-checking community, and its founding partner status in the First Draft Coalition which is dedicated to addressing challenges relating to trust and truth in the digital age.

In the past two years, examples of fake news in the UK have ranged from the sublime to ridiculous.

Despite this, perhaps predictably the traditional press organisations' submissions contain some hefty criticism of the impact of what the NMA describes as the "Google-Facebook duopoly" and call for a review of these organisations' status as "mere intermediaries." The NMA goes as far as to suggest that Ofcom (the UK's communications regulator) and the UK's competition authority should "examine the impacts of Google, Facebook and other platforms on the media landscape and to evaluate the importance of news media content to their business models, underlying issues of the digital advertising supply chain and the sustainability of real news."

As yet, no actions have been recommended by the Committee; the inquiry has been suspended until after the general election in June and we anticipate it recommencing shortly thereafter. It is difficult to predict precisely what conclusions will be drawn in due course, although Mr Collins has made a number of comments to the press to date which suggest his personal view is that the solution should focus on social media companies taking greater responsibility for content on their sites, providing consumers with tools to assess the veracity of stories and flagging suspicious content with appropriate warnings. In light of the measures being put in place voluntarily already by Facebook and Google, any conclusions drawn by the inquiry later this year may well be overtaken by actual events as far as these trailblazing companies are concerned.

(Continued on page 42)

(Continued from page 41)

For smaller and emerging digital businesses, however, the consequences could be felt more keenly. Whilst the harshest of the criticism contained in some of the submissions was reserved for the major digital players and so regulatory investigations at an identified-company level seem unlikely for all but the biggest companies, any industry-level reform proposed as a result has the potential to increase the operating burden on smaller organisations; the need to implement additional technical measures or employ internal or external fact-checkers, for example, will require significant financial investment and failure to come up with the goods could result in fines or other penalties being imposed or even exclusion from the market.

A final thought in relation to the UK's unique impending "Brexit." Whilst our European counterparts may push on with strict and enforced regulation of digital businesses which may essentially demolish the long-standing intermediary defences currently available under the E-Commerce Directive, depending upon the direction in which the UK's Brexit negotiations develop, an opportunity could present itself for the UK to take a lighter touch approach to regulation in this and other areas. Whilst the current atmosphere appears weighted against this approach (in particular the ongoing boycott of Google and YouTube advertising after reports that advertisements placed by major brands were appearing next to inappropriate content, including fake news), it is possible a time will come when considerations as to the UK's future economic prosperity play a greater role in setting the regulatory agenda and the tide may shift. In the meantime, however, the extent to which companies operating in the UK address the challenge of fake news remains a question of social responsibility weighed against commercial pragmatism.

Germany

Fake news has been a recurrent issue in Germany in recent months with politicians and refugees appearing as the most frequent targets. As Phil Howard, Director of the Oxford Internet Institute, has recently estimated, 20 per cent of news in social networks is fake in Germany (as opposed to more than 50 per cent in the United States). Prominent German examples include Green Party MP and former consumer protection minister Renate Künast who was quoted as expressing sympathy for the immigrant suspect of a brutal murder in Freiburg. Ms. Künast had been reported as saying that "*the traumatized young refugee has committed homicide, yet we still need to help him*." Falsely attributed to *Süddeutsche Zeitung,* this quote had actually never been published in any

(Continued on page 43)

(Continued from page 42)

newspaper, and turned out to be entirely fabricated. Likewise, after the widely-reported series of sexual harassment cases by new immigrants on New Year's Eve 2015, similar stories were spread during early 2016, most of which were invented, or massively exaggerated. In the city of Frankfurt, a story involving a pub owner who reported a group of "50 Arabs" had entered her premises and harassed ladies went viral– a story that triggered intense police investigations, yet turned out to be an entirely false report.

The increasing incidence of fake news has prompted vigorous policy reactions. Volker Kauder, head of the Conservative Party's parliamentary group, has remarked that platforms such as Facebook or Twitter "*must react to complaints much more rapidly and delete entries if these are unlawful*." According to Mr. Kauder, even fake news stories that are simply false, without infringing upon any defamation laws, should carry a warning label. The head of the Green Party's parliamentary group, Katrin Göring-Eckardt, went yet further, suggesting that social media companies should be subjected to the same liability rules that apply to the press in general, and called for penalties that ought to be "painful" and amount to a "portion of the company group turnover".

In the wake of stricter legislation, social networks have sought to implement fake news reporting systems. In January this year, Facebook created an option for its users to mark news as fake by clicking a designated button which was made available in Germany; news exceeding a certain number of "fake" markings will be reviewed by Correctiv, a German-based not-for-profit centre for journalistic research. News failing the fact check by Correctiv will be assigned a red warning label. Whilst obviously invented news can be identified relatively easily and marked in this way, many cases will require time-intensive investigations, including witness testimony, as the research centre's managing director has admitted recently.

Facebook created an option for its users to mark news as fake by clicking a designated button which was made available in Germany.

These initiatives did not prevent the Federal Government from adopting a bill on the "improvement of rights enforcement in social networks" in April. The bill was drawn up under the auspices of Heiko Mass, Federal Minister of Justice, who claims that social network operators have so far proved too reluctant to remove infringing content in a timely manner. Research commissioned by the Federal Ministry of Family and Youth and published by the website www.jugendschutz.net established that unlawful hate speech or the use of prohibited signs – such as the swastika – were deleted in 90 % of cases by YouTube, 49 % by Facebook and 1 % on Twitter. Deletion quota are substantially higher where registered users reached out to YouTube or contacted Facebook by e-mail – yet too low for the Federal Government.

The recently proposed bill seeks to subject platform operators to additional requirements. It imposes detailed reporting obligations on operators as a first step towards public accountability.

(Continued on page 44)

(Continued from page 43)

The core of the legislative project is an obligation for social network operators to implement an "*effective and transparent procedure … for ruling on complaints over unlawful content*." This procedure must ensure that "*blatantly unlawful content*" is deleted or made inaccessible within 24 hours of filing of the complaint. Where infringing content is not apparent or evident, social network operators have a more lenient seven day deadline for deletion – a deadline that, according to the authors of the bill, provides sufficient time for them to conduct fact-finding and seek external legal advice. Mere breaches of privacy rights outside the realm of criminal law are not caught by the bill; the review and deletion obligations are limited to a lengthy catalogue of criminal deeds that includes hate speech, distribution of propaganda for anti-constitutional organisations, the use of prohibited signs, participation in a criminal organisation, religious slander and (criminal) libel laws. Finally, the bill obliges social network operators to name an authorized recipient for the service of legal documents established in Germany.

The authors of the bill seemed hesitant to impose heavy fines for each and every failure to delete blatantly unlawful content within one day, or simply illegal posts within one week. Instead, fines of up to 50 Million Euros can be imposed if a social network operator fails to set up an effective complaint system, or if such system is not implemented "appropriately". While single failures to delete posts within 24 hours or seven days are unlikely to trigger any penalty, repeated occurrences could result in substantial fines. Details are left to secondary legislation. The sanction system as set out in the draft remains vague.

Fines will be issued by the Federal Office for Justice, a Government agency under the supervision of the Justice Ministry. If a sanction relies on a network's failure to delete unlawful content, the underlying non-deletion cases will be referred to a court for a preliminary ruling, before the government agency decides on its fines.

It is far from certain that the law as currently proposed will be adopted by Parliament, or – even more importantly – pass muster from the Federal Constitutional Court at a later stage. The draft needs fine-tuning, and would have to be adopted in the current legislature.

In the meantime, the bill has triggered forceful protests among media associations, civil rights activists, scholars and media lawyers. In a "*declaration for free speech*", scholars, organizations and activists have acknowledged the crucial role of social network operators in combatting unlawful content, yet have fiercely rejected the notion that those private entities should be "*entrusted with the state's duty to rule on legal compliance of content*." As the authors of the declaration claim, the bill's approach would prompt operators towards a "when in doubt, delete" attitude, and put free speech principles under threat.

In fact, defamation claims in Germany essentially rely on a balancing exercise between countervailing rights and interests, namely free speech versus privacy rights that protect individuals from reputational damage. Whilst no such balancing exercise will be required in self-evident cases of outright insult - cases that might qualify for 24-hour-deletion under the bill –

(Continued on page 45)

(Continued from page 44)

German Constitutional caselaw teaches us that most cases are not so clear-cut. As the Court ruled a few weeks ago, the expression "Gauleiter of SA troops" used by a right-wing protestor against a Green-Party-MP did not qualify as an outright insult, and therefore required balancing – a subtle exercise that is better placed with upper courts than with social network employees.

Discerning and deleting false factual information might appear much easier at first sight, as the German Constitution's article on free speech does not protect purposively false information. In most cases, however, the decision as to whether information is 'true' or 'false' – or 'knowingly false' – is covered by a veil of uncertainty. As if the Constitutional Court had anticipated later legislation on fake news, it prominently stated in its press review judgment in 2010: "The truth of a fact is often uncertain from the outset … If a statement later recognized as untrue were sanctioned, … the communication process would suffer damage, as only facts with waterproof evidence could be voiced without risk." Facts related to opinions in some way are thus at least prima facie caught by free speech protection, even if they later turn out to be inaccurate.

Finally, the notion of 'fact' has been interpreted in a restrictive fashion to give full effect to free speech protection. Allegations of 'corruption' have been qualified as opinions rather than as (legal) facts, as has a report describing a chemical agent found in yoghurt cups as "poisonous" and "carcinogenic." In such cases, should the question of whether such statements are defamatory fact-based allegations which should be deleted, or lawful personal opinions, really be placed in the hands of social media companies?

In answer to this question, constitutional scholar Karl-Heinz Ladeur has remarked: "We will see that there are not so many cases where unequivocally false factual allegations are at play in a genuinely legal sense." And the liberal political commentator Heribert Prantl adds: "In the future, Facebook should not rule on whether a post qualifies as libel, as hate speech, or as fake news. This has been the province of courts so far. It would make sense to leave this as it is."

Italy

The Italian political debate concerning fake news on the internet heated up when suggestions emerged that the result of the country's referendum on 4 December 2016, concerning a proposed reform of the Constitution, may have been influenced by inaccurate and misleading political reports circulating in the run-up to the vote.

Following the surprising rejection of the proposed constitutional reforms, the head of Italy's competition authority, Giovanni Pitruzella, (among others) released

(Continued on page 46)

(Continued from page 45)

statements to the press calling for rules to be imposed (and state bodies to regulate compliance with those rules) to prevent what he described as a "driver of populism" and a "threat to our democracies". His suggestion is that a new public independent body should be created, tasked with identifying and removing fake news, and imposing fines as appropriate on the publishers in question.

The main offspring of the debate that has raged since then, however, is bill no. S.2688, filed on 7 February 2017 and currently pending in the Senate, entrusting the Italian courts of law with determining liability for fake news publication. Adele Gambaro, a member of the Liberal Popular Alliance who initiated the legislation, in a statement dealing with the bill remarked "There have always been 'fake news' or hoaxes, but they have never been spread at the rate we see today. Because of this, it is no longer possible to put off the debate." She went on to state "The internet has certainly expanded the boundaries of our freedom by giving us the opportunity to express ourselves on a global scale…. But freedom of expression cannot turn into a synonym for lack of control where control, in the information era, means correct news, for the protection of users."

The Italian political debate concerning fake news on the internet heated up when suggestions emerged that the result of the country's referendum may have been influenced by inaccurate and misleading political reports.

Article 7 of the bill is the most troublesome one for ISPs: the manager of a website is obliged to actively monitor it; and any failure to remove not only fake news, but also merely exaggerated or biased stories ("tendenziose"), is subject to a fine of 5,000 Euros. Further, if the fake story amounts to libel ("diffamazione"), judged according to the criminal standard, then punitive damages are also to be awarded. Article 2 of the same bill also introduces fines for hate speech (of up to 10,000 Euros) and those which would cause alarm to the public or damage the public interest can be punished by a prison sentence of up to 1 year. Traditional press organisations (television and newspapers) are not subject to the bill's provisions.

Implementation of such law would definitively be extremely cumbersome both for the players in the internet service providing market and for the judicial system as a whole, and would probably give rise to hard-fought litigation – implementation of the bill would be on an avoidable collision course with the constitutional protection of freedom of expression and affected persons are strongly encouraged, in the provisions relating to punitive damages, to file suit.

Traditional media support the bill as a protection from the threat of competition from new media. This is despite the fact that these organisations have, for decades, themselves suffered the impact of somewhat spurious legal claims brought against them in relation to "fake news"; such cases are common, very costly for the press outlets, and yet are not effective in the

(Continued on page 47)

(Continued from page 46)

prevention of fake news (especially if the allegation that a story is "fake" really boils down merely to a story being "biased"). As they have argued on many occasions a biased report may of course be considered a legitimate feature of public debate, insofar as it is not specifically prohibited on higher constitutional grounds (racial, or gender bias, is constitutionally prohibited) and large amounts of bias are generally permitted in the context of advertising. The traditional media outlets' position in relation to the bill may therefore be considered somewhat hypocritical.

If the bill were to be approved and become law, it would result in significant costs to ISPs, not only to implement the monitoring activities that would be required, but also for the inevitable subsequent litigation involving compatibility of any implementing measure with constitutional protection of freedom of expression.

A further important consequence for ISPs would be the superseding of the intermediary/ hosting defence currently available pursuant to article 16 of legislative decree no. 70 of 2003, which implements article 15 of the EU E-Commerce Directive (prohibiting imposition on hosting providers of a general duty to monitor).

The chances of the bill ultimately receiving approval currently seem very low, notwithstanding the wide support lent to it by the Italian press. Its proposal is highly controversial for political reasons as well – it runs the risk of appearing as an attack on the main propaganda vehicle of the major political party opposing the current government, namely the "Movimento 5 Stelle." General political elections are due to take place no later than 2018. In light of this, the current political majority is wary of taking any step which might to be an attempt to gag its main adversary: supporters of the "Movimento 5 Stelle" described Mr Pitruzzella's proposals as the "Spanish Inquisition," and are likely to condemn the bill as censorship - its leader, Beppe Grillo, recently wrote that the matters set out in the bill could only rightly be decided in a trial by jury, and not by a judge alone.

It was assigned to the competent legislative commissions (1st commission – Constitutional Affairs, and 2nd commission – Justice) on 28 February 2017, but no debate within the commissions has yet commenced. Ms Gambaro herself appears to acknowledge the challenges associated with obtaining approval; she recently commented (transl) "This text is a first step. We know it's an enormous task, but we want to try, and we are open to debate." Hence, although Italian public opinion may currently be in favour of some sort of curbs on the spread of fake news on the internet, the country remains some way from reaching a consensus as to who should provide this or how.

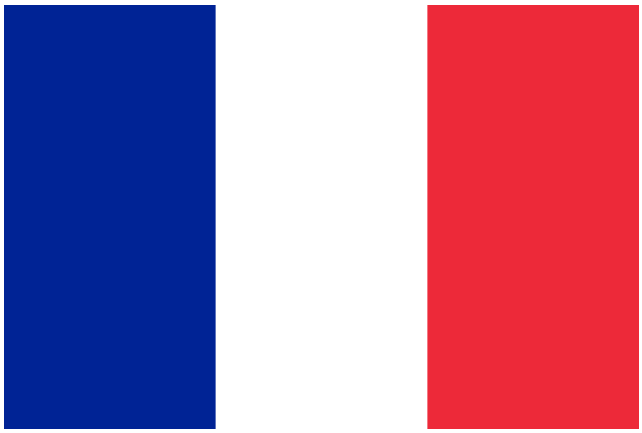
The development of legislation in Italy may, however, be overtaken by other events. The German regulatory proposals described above would not only have their own impact on the Italian market, since major players operate on a transnational level and would therefore most likely comply apply the strict German standard to their operations in other EU countries, but

(Continued on page 48)

(Continued from page 47)

may also revive old proposals and fuel new ones both in Italy, especially after the election in 2018. A s the German proposals appear to be partially fuelling the adoption of voluntary measures by ISPs in any event, the need for highly prescriptive legislation in the future may die away altogether, especially if they are negotiated at the European level.

France



The debate surrounding fake news in France grew in the run-up to the presidential election. It would certainly not be easy to assess what consequences – if any – fake news may have had on the election. Even though he was arguably the most targeted by this phenomenon, centrist candidate Emmanuel Macron emerged on top of his contenders at the end of the first round and went on to win the Presidential election in May.

Over the last few months, a number of unsubstantiated and misleading claims were spread on social network platforms regarding Macron: His campaign team accused Russian media outlets Russia Today France and Sputnik of deliberately spreading misinformation and ill-founded rumors. In a particularly misleading article headlined *Ex-French Economy Minister Macron Could Be 'US Agent' Lobbying Banks' Interests,* Sputnik hinted that Macron could be secretly under American influence, that he may live a "double life" and that he misused public funds for campaign purposes.

Macron was also alleged to have received large amounts of campaign funding from Saudi Arabia. The information was displayed by a forged webpage designed to look exactly like the website of a legitimate newspaper, and gained mainstream coverage when it was retweeted by far-right political figure Marion Maréchal - Le Pen, also the niece of the candidate Marine Le Pen.

Most recently a year-old video resurfaced, in which Macron could be seen carefully washing his hands after having held a living, freshly-caught fish during an encounter with fishermen. Parts of the video were edited in order to support the claim that Macron has a habit of washing his hands after shaking hands with blue-collar workers.

Among the most preposterous allegations spread by fake news was a widely-shared Facebook post which claimed that Eliane Houlette, the head of the National Financial Prosecution office, was secretly the wife of the Minister for Economic Affairs' chief of staff. Given that the presidential candidate from the main opposition party, François Fillon, has

(Continued on page 49)

(Continued from page 48)

suffered a large drop in the polls as a result of his prosecution by Mrs Houlette's office on embezzlement charges, this false allegation implied serious accusations of collusion between the executive and judiciary branches of government.

Such news coverage has ensured that the debate surrounding fake news has raged in the months leading up to the country's crucial voting periods. Earlier this year, France's Ministry of Interior Bruno Le Roux said in Parliament that the threat posed by disseminations of fake news was one of the main concerns of the government with regard to the safety and transparency of the election campaign. Many other reports have also relayed the government's apparent concerns that the election result could be swayed by the dissemination of fake news and that it was working hard to produce solutions to this issue.

Looking back on the course of the presidential campaign, it seems the steps taken by public officials in conjunction with the initiatives of web platforms (described further below) succeeded in avoiding a potential massive upsurge in the amount of fake news being disseminated on social networks in the run-up to the election. In this respect, a significant part of the task of those who work on debunking fake news consists of explaining that blatantly bogus claims made up by satirical websites, traditionally important in France (as exemplified by the *Gorafi* website as well as the well-known satirical cartoons of *Charlie Hebdo*) are indeed hoaxes given their origin and nature, when this kind of pseudo-information is shared on social networks and is then taken at face value by many users.

It has been suggested that the scope and purpose of current French libel laws do not offer adequate protection against the spread of fake news,

It has been suggested that the scope and purpose of current French libel laws do not offer adequate protection against the spread of fake news, given that such information is often anonymously disseminated online and can reach a large audience before any legal proceedings can be initiated.

On 22 March 2017, Nathalie Goulet, a center-right Senator, introduced a bill purporting to define the dissemination of fake news as a prosecutable offence under article 226-12-1 of the Criminal Code. Under these proposed provisions, providing access to "fake news" by any means would be punished by up to one year in prison (with an automatic stay of execution) and a fine of 15,000 Euros, if:

- The information is detailed
- The public has not yet been made aware of such information
- No appropriate reservations are displayed next to the information
- The information is likely to deceive the public

(Continued on page 50)

(Continued from page 49)

- The information is likely to lead the public to act in accordance with it

The access to the information is provided in bad faith (a social network or a search engine will be regarded as providing access "in bad faith" if it maintains the information without appropriate reservations more than three days after the information is reported by a third party)

The detailed list of the conditions to be met in order to prove the offence sufficiently gives rise to a number of further debates. For example, if the public has not yet accessed the information in question so that, in essence, no harm has been done, is it really appropriate to impose such severe penalties? Liability merely on the basis that you provided theoretical access to the information could arguably pose a real and disproportionate threat to freedom of expression.

As yet, the government has not expressed support for this bill and it has not yet been discussed during official parliamentary proceedings. It therefore currently remains a rather isolated legislative proposal.

The proposed bill is arguably not the perfect solution to the problem of fake news. Indeed on one view, it amounts to a systematic criminalization of online services, notably social networks and search engines, generating huge costs for a very limited benefit. More importantly, its current provisions risk seriously undermining the freedom of speech enjoyed by individuals on social networks and other online services. Compliance with the bill may force platforms to pre-emptively and indiscriminately eliminate any debated information to avoid liability, allowing only the most consensual claims made by a few "trusted" sources.

In light of the above, voluntary self-regulation may instead provide the solution. In the run-up to the first round of the presidential election (23 April 2017), a number of informal meetings were planned between French officials in charge of cyber security and representatives from Google, Facebook, YouTube and Dailymotion to discuss appropriate measures to be taken by these companies to tackle the issue of fake news.

Announced on 6 February 2017, the collaborative project Crosscheck was launched in France on 28 February 2017. Thirty-seven well-established media and technology platforms as well as journalism students united their efforts to spot and debunk misinformation disseminated on social media, with a primary focus on the French presidential election.

In an effort to curb the proliferation of suspicious and ill-founded claims on social networks, Facebook partnered with a number of French media organizations to allow its users to report questionable contents to independent journalists. The reported content is fact-checked and – if held not to be supported by sufficient evidence – appropriate warnings are displayed next to the title and a link to the independent assessment is provided.

The self-regulation of platforms in partnership with independent fact-checkers is just getting started but its first results are encouraging: a simple warning flag displayed next to the information deemed doubtful is an efficient way to prevent a story from spreading like wildfire

(Continued on page 51)

(Continued from page 50)

on social networks, whilst in cases where more analysis is required by a user, the detailed explanations on the origin of misleading or forged pictures and videos that can be found on Crosscheck.com assists with evaluating even the more finely-balanced of cases.

This collaborative and non-punitive way seems to strike a good balance between the need to prevent the dissemination of fake news and freedom of speech, while ultimately giving users the power to choose which content they want to share and access.

The Netherlands

In the course of the last months of 2016 the notion of fake news increasingly became a matter of public concern in The Netherlands. This was largely caused by articles in the press about wilful misinformation as an influencer of the American elections and the Brexit referendum. The Council of Advice (Raad van State), an advisory and judiciary body of the Dutch state, emphasized in its yearly report the importance of reliable information as an important resource for economic and social processes. Fake news was identified as a serious threat to the stability of the society. The Council of Advice therefore concluded that specific rules and regulations regarding fake news deserve consideration, as did institutions that assist the public and companies in the verification of information. However the Council of Advice did not propose any concrete measure in this regard. It emphasized that history teaches us that any state should think twice before assuming a dominant role in controlling information. Such state involvement in itself runs the risk of undermining the public's faith in the reliability of information.

Ironically the Council of Advice shortly thereafter was accused of presenting fake news itself in its yearly report by claiming that the proper functioning of the Dutch democracy was at stake by a growing number of municipal politicians stepping down for various reasons. The Council of Advice was forced to admit that it could not support this assertion with concrete numbers.

The rather passive stance of the Dutch government and its advisory bodies should be viewed against the background of a relatively low number of fake news incidents in The Netherlands. This resilience against fake news is according to some explained by the fact that the Dutch language community is fairly small (17 million inhabitants) compared to the English-speaking population, which makes it less attractive to financially-driven fake news generators. In

(Continued on page 52)

(Continued from page 51)

addition, in the months and weeks before the Dutch elections in March, very few attempts to influence the outcome with deliberate misinformation were identified.

One example of fake news that some argue may have influenced the Dutch public opinion was a somewhat satiric article claiming that Sylvana Simons, a black politician with a strong anti-discrimination agenda, had objected to the black outfit of football referees and that the Dutch Football Association had considered adopting a "rainbow" outfit for them instead. Although the satiric character of the article was evident the story became a hot topic on social media and generated much public opposition against Ms Simons. Another example of fake news was a tweet by Geert Wilders, a right wing populist politician, picturing his political opponent Alexander Pechtold in a pro-Shariah demonstration. Although it was obvious that Pechtold's face was copied and pasted into the picture, Pechtold suffered reputational damage in the midst of the elections.

Just like in other countries Facebook introduced in The Netherlands tools to report fake news by simply clicking a button. This initiative was criticised by various blogs on the basis that it could lead to the removal of articles before sufficient verification has been carried out. Another initiative that attracted attention was Facebook's cooperation with one the largest Dutch news sites, nu.nl, and Leiden University. This cooperation allows Dutch Facebook users to report fake news, following which two fact checkers will independently verify the veracity of the reported news item. If both fact checkers identify the item as "dubious" the news item will be ranked lower. The fact checkers cooperating with Facebook in the Netherland adhere to the code of principles established by the International Fact-Checking Network (IFCN) of the American Poynter Institute.

The voluntary initiatives are often perceived as an attempt by the sector to head off regulatory interference. However, platforms takings such steps are actually risking triggering greater liability. Depending upon the measures they adopt, platforms like Facebook that implement steps to identify and/or block fake news articles could risk losing the intermediary defences available under the European E-Commerce Directive as implemented in Dutch legislation. Interference by platforms with content hosted by them may lead the Dutch courts to consider that the relevant platform is no longer 'hosting' within the meaning of the Directive, which could leave them exposed to assertions that they owe due care obligations to users (depending on the nature of the platform and its role in the creation and/or distribution of the content).

These due care obligations have yet to be further developed in Dutch jurisprudence, but recent decisions seem to impose a high level of duty of care upon platforms in the digital society. For example, in the Skyscanner case the High Court of Amsterdam recently held that a specialized search engine like Skyscanner can be held liable for misleading travel offerings made by third parties included in its automatically generated search results. It should be noted

(Continued on page 53)

(Continued from page 52)

that this decision seems difficult to reconcile with Article 15 of the E-Commerce Directive (which sets the rule that there are no general monitoring obligations upon online intermediaries). Nevertheless the Skyscanner case shows that due care responsibilities of online platforms are not necessarily limited to an effective notice-and-take-down procedure, but may include pro-active action such as, in the case of fake news, verification by fact checkers.

As far traditional content-creating media is concerned, it does not seem likely that fake news will lead to increased responsibilities being imposed on such organisations. Both mainstream news sites and smaller news blogs already have an editorial responsibility when it comes to checking their sources and conducting, if necessary, their own research. Such due care obligations have been codified by the Dutch Council for Journalism, a self-regulatory body, in its Guidance for Journalism. This guidance is also taken into account by Dutch civil courts when it comes to assessing liability for journalistic publications. Obviously Dutch courts will also take into account lessons learned from recent fake news incidents. Adopting sites like Breitbart, or the Dutch equivalent De Dagelijkse Standaard, as a reliable source of information is not without risk.

Concerns caused by fake news could, however, actually provide an opportunity for the traditional media outlets. These organisations are particularly well placed to provide added value by fact-checking digital news stories and putting them into context. It is possible that they could develop this into a driver for different business models, such as pay walls and pay-per-view.

The debate around fake news is just getting started in Europe. The various EU Member States are at different stages in finding a solution to the issue.

Conclusion

It is clear that the debate around fake news is just getting started in Europe. The various EU Member States are at different stages in finding a solution to the issue; some appear committed to prescriptive legislation and regulation, with severe penalties for non-compliance, others appear to welcome collaboration with technology platforms to tackle the problem in other ways; yet others, including the UK, simply have not yet made their minds up. Whilst a careful eye should be kept on the German legislative developments, given Germany's importance within the EU, it may yet be the case that individual countries are prepared to learn from each other and adopt more creative solutions to ensure the accuracy of information accessed by users of social media sites.

The current dilemma this poses for US technology platforms is what approach to adopt with respect to fake news in the meantime. On the one hand, as has been seen in relation to other online content-related issues (such as hate speech), the adoption of voluntary measures can go far to alleviate European concerns and to head off greater regulation. On the other hand, from a

(Continued on page 54)

(Continued from page 53)

legal and commercial perspective, it would not be sensible to offer too much too soon. However, waiting until legislation arrives at your door may not be advisable; taking pro-active steps now to demonstrate what can feasibly be done to minimise the impact of fake news (including flagging the role of governments and others to educate the general public of the need to treat news with a reasonable amount of objectivity) may help to influence any formal legislative requirements that are ultimately adopted.

Similarly, engaging with European authorities on this topic may provide opportunities to educate them on the approach taken by other governments around the globe and to steer them accordingly; as and when any proposed legislation is passed, it is understandable that US platforms may want to adopt the "lowest common denominator" approach to compliance and this will be rendered far easier if the legal instruments of various EU Member States bear at least some resemblance to one another.

As this article flags, the digital media industry appears to be taking a collaborative approach to this issue, and is reaching out to third party organisations such as First Draft for support. For smaller companies without the resource of tech giants such as Facebook and Google, take advantage of this open and co-operative environment and the opportunities it presents to obtain effective and cost-efficient assistance in implementing measures early which could help you to withstand scrutiny later down the line. If greater regulation is introduced in this area in Europe, there is no doubt that this will present some operational and financial challenges to all organisations, but fledgling digital businesses in particular; but an opportunity also exists, to achieve brand recognition, from the outset, as a socially responsible news distributor.

Finally, seeking to close on a positive note, we urge readers to remember that all the current regulatory scrutiny should be viewed against the backdrop of the stated overall goal of the EU's Digital Single Market which is to "open up digital opportunities for people and business and enhance Europe's position as a world leader in the digital economy". For US technology platforms, therefore, there remain grounds for optimism; as one European Commissioner put it recently "Fake news is bad, but the ministry of truth is even worse."

Bryony Hurst is a partner at Bird & Bird in the Dispute Resolution Group based in London. Sonja van Harten is an associate at Bird & Bird in the Dispute Resolution and Data Protection Practices and is based in The Hague. Andrea Giussani is of Counsel at Bird & Bird in the Dispute Resolution Practice based in Rome. Niels Lutzhoeft is a partner at Bird & Bird in the International Commercial Group based in Frankfurt. Marion Barbier is a partner in our Dispute Resolution practice based in Paris.

Fighting for Access in the Sunshine State

By Sandy Bohrer

In Florida, like elsewhere, government agencies, with the cooperation of state legislatures, employ multiple strategies to defeat public records requests. The first line of defense when the press (or individuals) ask for documents that may prove embarrassing to the agency is to assert as many exemptions as possible. Some agencies, like Florida's Department of Corrections ("Our Vision: "Inspiring success by transforming one life at a time,") have a form with almost three dozen exemptions listed which is provided to the public records requester along with redacted documents.

The way it works is a clerical person with little familiarity with the public records law checks off as many of the exemptions as possible, redacting as much as possible from the records, and explaining that one or more of the checked exemptions applies to each redaction, without telling the person requesting the documents which exemption applies to which redaction, making it difficult to even evaluate the merits of the exemption claims. A Florida appellate court approved this approach.

So, in a recent public records suit by The Miami Herald against the Department of Corrections, the Department said one of six exemptions applied to each of the 421 redactions from Inspector General reports of investigations of conditions and activities in Florida's prisons. It turns out, for the vast majority of the redactions, only one exemption was asserted: for health and health care "records" under two Florida statutes, although the Inspector General's reports are not health records or health care records, under HIPAA.

HIPAA, the Health Insurance Portability and Accountability Act, is a federal law designed to provide privacy standards to protect patients' medical records and other health information provided to health plans, doctors, hospitals and other health care providers. People at Florida's Department of Corrections, or at least its personnel whose job it is to redact public records, seem to believe that because they have an infirmary and employ doctors and nurses, anything remotely related to the health or physical condition of an inmate is covered by HIPAA, that HIPAA pre-empts Florida's public records law, and it is all exempt.

The problem is HIPAA does not preempt any state's public records law. Appellate courts in four states have so held, and the Florida trial court in the Herald's public records suit recently agreed, holding that as a matter of law some 95% of over 400 claimed exemptions were invalid. As the Court noted, "Courts from across the country have held (and one state's attorney general has opined) that the disclosure of information is "required by law" for the purposes of HIPAA when the information is subject to a state's public records law. *See, e.g., State ex rel Adams County v. Kinyoun*, 765 N.W. 212, 217 (Neb. 2009); *Ore. Health and Sci. Univ. v. Oregonian Pub.*, 373 P.3d 1233, 1241 (Or. App. 2016); *State ex rel. Cincinnati Enquirer v. Daniels*, 844 N.E.2d 1181, 1186, 1188 (Ohio 2006); *Abbott v. Texas Department of Mental Health and*

(Continued on page 56)

(Continued from page 55)

Mental Retardation, 212 SW 3d 648, 657-60 (Ct. App. Tex. 2006); *see also* Attorney General Opinion of AG of Wisconsin, 2007 WL 9364007 (Wis. A.G.)." The judge also rejected the Florida health/health care records exemptions because Inspector General reports are neither.

In a way, the Department of Corrections has won this battle, because what was timely in 2016, when Herald reporter Julie Brown was winning awards for her reports on Florida's prisons, may not be timely in 2018, when the Department of Corrections exhausts its appellate remedies. But at the end of the day, the Herald and the public has won the war, because neither the Department nor any other agency in Florida will be able to assert HIPAA as a basis for an exemption, and none will want to risk the six figure attorneys' fees award the Herald and Ms. Brown are going to recover.

Sandy Bohrer and Scott Ponce of Holland & Knight, Miami, represented the Miami Herald.

Ten Questions to a Media Lawyer

David Keneipp

David Keneipp is Senior Vice President, Legal Affairs, FOX Television Stations in Los Angeles

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

I started as a corporate lawyer at a mid-sized firm in New York. (At least, it was considered mid-sized back then; I was the 39th lawyer in the door.) I had gone to law school with the intention of becoming an entertainment lawyer, but most firms with that specialty in NY were too small to take people right out of law school. Also, corporate law and related classes interested me during law school. Thus, the corporate gig.

After a few years, a lateral partner with a few entertainment clients joined the firm. I was able to do some corporate work for them, and thus I was a known quantity when a TV syndication company decided it needed someone in-house. I worked for them for a couple of years in NY before they moved me to LA. Unfortunately, they went bankrupt a couple of years after I moved to LA. Shortly after that, I came to Fox as a legal and business affairs executive in a unit that produced made-for-TV movies. That's probably the only time when my job was 100% entertainment law. After that unit downsized, I was able to segue (as they say in *Variety*) to the Fox station group. We had six stations at the time.

(Continued on page 58)

(Continued from page 57)

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

Keneipp in 1991, a few months after arriving at Fox

The best part of the job is pre-broadcast review. I like being involved in how the story is researched, reported, and assembled. The newsroom people I work with regularly know I'll do my best to find a way for the story to get on the air or on the website. My job is to guide them in finding the elements that will make the story not only accurate but sufficiently defensible that management will accept whatever risk may remain. The second best part is pre-pre-broadcast review, otherwise known as newsroom training. I know I can't turn the newsroom personnel into lawyers, but that's not the goal. I'm just trying to get them to recognize issues—enough so that, if they don't know the answer, at least they realize there's an issue and give me a call.

Least favorite? Real estate leases. The agreements are long, and the underlying subject matter doesn't interest me that much. I'd much rather do software licenses or equipment purchase agreements if I'm not reviewing stories.

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

On several cases, I think I've held out hope that we could still eke out a victory when all we were really doing was spending more money on a losing case. We wound up settling later—and for more—than we should have.

Unrelated incident: When I was a very junior lawyer at my old firm, I was told to call the president of our client to get some information for a merger we were working on. He wasn't available, so I left word that he should call me about the "Company X takeover." Of course, I used the real name of the other company. Unfortunately, the deal was known to only a few people. If the president's assistant (who took the message) hadn't been one of the people in the know, my career in private practice might have been a lot shorter.

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

I was only a litigator for a very short period at my old firm. The only case I worked on was a hostile takeover; we represented incumbent management. We lost at trial, but we won in the

(Continued on page 59)

(Continued from page 58)

Second Circuit and made a little law in the process. As a media lawyer nowadays, I just kibitz while Fox's in-house litigators and outside counsel do the actual work.

What's a surprising object in your office?

Most people only glance at this metal thing on my desk and assume it's a horseshoe. If they look more closely, they notice that it's smaller than a horseshoe and shaped more like a V than a U. It's a camel shoe. I found it in the sands near the Great Pyramid in Egypt when I was working on a live special for that TV syndication company.

What anyone who knows me would find least surprising are all the baseball artifacts I have—most of them related to the Cubs (a/k/a the 2016 World Champion Cubs). The rally towel was given to me by one of the anchors at the LA station. Her husband is also a Cubs fan and had attended all of last year's World Series games at Wrigley Field.

There's also a taxi poster by Saul Steinberg. It's an homage to the summer job I had all through college and into law school.

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

I'm an amateur photographer, and the first sites I check every morning are blogs by Scott Kelby and Matt Kloskowski. They're both photographers and teachers based in the Tampa area. The first news site I check is nytimes.com.

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

I'm not sure that "don't" is the right advice. Recently, I was speaking to the dean of my alma mater (Rutgers Law School in Newark). He said that hiring is starting to increase; firms that didn't hire much a few years ago are finding that they now need people. One reason I went to law school was to practice entertainment law, but I also went because I thought law school would be good training and experience for any number of careers. I still think that's true, but it may not be worth amassing a mountain of debt in pursuit of a vague goal.

One general piece of advice that applies in almost any field: aim high. Go to the best law school you can get into (and afford). If you get the chance for a summer job with a big-time law firm, take it. It's a lot easier to trade down than it is to trade up.

(Continued on page 60)

(Continued from page 59)

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

Learn the fundamentals. Defamation, invasion of privacy, and copyright infringement are still things you have to guard against. Just because the information is delivered with electrons on screens instead of via papers on doorsteps doesn't mean the possibility of claims has gone away. If anything, it's increased because there is so much more publishing going on.

That said, there are additional important areas to learn now—privacy and data security come to mind, as well as all the ways in which IP affects technology.

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

My goal coming out of college (before I decided to go to law school) was to someday run a regional theater, like the Guthrie in Minneapolis or the Goodman in Chicago.

What issue keeps you up at night?

Copyright infringement. Technology has made it so easy to find and copy material without permission, and the web has also made it easier for the copyright owners to find uses that may have infringed their work. Fair use is really infinite shades of gray, with few clear-cut answers. How much is a broadcaster or publisher willing to spend to defend anything short of a slam-dunk use (if there is such a thing)? Especially in breaking news situations, such as the nightclub shooting in Orlando or the terrorist attack in Paris, you really need confidence that the news managers are enforcing the organization's guidelines despite everyone's inclination to grab the most compelling images they find on Twitter or Instagram, without bothering to ask for permission.

If you'd like to participate in this ongoing series, let us know - medialaw@medialaw.org.