



# MEDIA LAW LETTER

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## **Upcoming Events**

### **MLRC/Southwestern Entertainment and Media Law Conference**

January 14, 2016  
Los Angeles, CA

### **Legal Issues Concerning Hispanic and Latin American Media**

March 7, 2016  
Miami, FL

### **Legal Frontiers in Digital Media**

May 19-20, 2016  
Mountain View, CA

### **MLRC/NAA/NAB Media Law Conference**

September 21-23, 2016  
Reston, VA

*From the Executive Director's Desk***Free Speech in Jeopardy on Campuses**

I went to college in years of great turmoil, 1967-71. We protested the war in Vietnam, demonstrated for civil rights, argued with administrators (and family) about drugs, sex, rock 'n roll, length of hair, and held sit-ins, moratoria, and happenings.

I've often said that one of the luckiest breaks I've gotten was going to college the years I did. There was an excitement of new ideas (and music); a massive change in culture and values, an almost daily debate about the events of the day and a tension and struggle about whether to embrace all the new mores.

Lately, originating with the demonstrators at the University of Missouri, somewhat similar occurrences have taken place at numerous campuses across the country. But they really have not been very similar at all. For instead of debate and a vigorous jousting of ideas, one of the major themes of last month's movement has been the orthodoxy of political correctness, and the main victims – particularly sadly for us – have been free speech and the marketplace of ideas.



**George Freeman**

**The notion that a seemingly liberal ideology would not only fail to carry the banner of free speech but would directly attack it seems preposterous to the revolutionaries of the 60's and 70's and perfidious to us media lawyers.**

The notion that a seemingly liberal ideology would not only fail to carry the banner of free speech but would directly attack it seems preposterous to the revolutionaries of the 60's and 70's and perfidious to us media lawyers. Indeed, the facts are so incredible and strange that they are briefly worth examining, per chance, at a decidedly liberal institution, my own alma matter, Amherst College – but the themes enumerated below have been much the same at Yale, Claremont, Missouri and a host of other campuses.

I'll put aside the "Amherst Uprising's" demand that the school fire Lord Jeffrey Amherst as its mascot for the sin of supporting the strategy (the history is not entirely clear) of giving smallpox-laden blankets to the enemy Indians prior to the Revolutionary War; would killing them with muskets and cannon be better? How can today's standards fairly judge the actions of 250 years age? If the mascot must go, why not the name of the college and town?; and so, goodbye to

Jefferson, Calhoun and apparently Woodrow Wilson at Princeton. As one pundit put it, soon all our cities and buildings will be named Mother Teresa.

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**The times they are a changin': 1964 v. 2015.**

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But moving on from this bit of political correctness run amok, the Amherst protestors also have demanded that “students who posted the ‘All Lives Matter’ posters, and the ‘Free Speech’ posters that stated ‘in memoriam of the true victim of the Missouri Protests: Free Speech’ ... be required to attend extensive training for racial and cultural competency.” How Orwellian is that? Protestors seeking a compulsory re-education program for counter-protestors.

Another Amherst Uprising demand is that its President state a “zero-tolerance policy for racial insensitivity and hate speech.” A private college is not – unlike the University of Missouri – bound to protect all speech but that which would incite imminent lawless action. But for the protestors to demand that the authorities ban speech which, albeit unpleasant and offensive, is non-threatening and – more to the point – opposite to the protestors’ beliefs, seems to turn the First Amendment on its head.

Even more bizarre is the demand in many of the campus protests that the self-identified marginalized students be afforded “safe spaces.” Apparently, based on what transpired at Missouri, they should be free to meet and be safe from the press; as has famously been reported, a faculty member joined the protestors there in trying to ban a press photographer from viewing their otherwise public meeting. But the media is not all they want to be safe from.

Even more shockingly, they want to be safe from ideas they don’t share, ideas they find insensitive. I remember going door-to-door in 1969 debating with conservative and hostile townsmen the impropriety of being at war in Southeast Asia. But an exchange of ideas and debate as to history and policy seems now to be strongly disfavored. In these safe spaces, students would be protected from even having to listen to contrary viewpoints.

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But isn't the academy the last place in need of such a safe space? Other than perhaps after a drunken frat party (too often leading to unspeakable crimes), the typical campus certainly is safer than the neighborhood surrounding it. But more to the point, students come to the university to exchange ideas and to learn about positions different from their own. Why are they so timid and discomfited with such opposing views that they can't vigorously counter them, yes, in the marketplace of ideas. It's hard to see how the schools are helping their students in their upcoming careers and in life itself if they are protecting them from uncomfortable and hostile speakers and ideas.

Even worse, as suggested above, it's not only any ideas which they disagree with, but which deviate from the current politically correct orthodoxy, which is the enemy. That this sort of unthinking and over-sensitive drive to censorship is happening on our campuses would seem to lead to the conclusion that some re-education is needed – perhaps in the values inherent in the First Amendment.

Peter Scheer, himself an Amherst grad and the Executive Director of the First Amendment Coalition, asks: “When did college students become so fearful of competing ideas? When did they become so emotionally frail that even a hint of criticism is seen as a hostile act from which they must be shielded (and for which perpetrators must be re-educated)?”

I have no sympathy for bigoted or distasteful speech. But as our Supreme Court has noted on a number of occasions, there is a difference between fighting words and offensive speech. Students in top colleges, of all people, ought to be able to, or, at the least, ought to be learning how to, meet, contest and trump such nasty speech with better and more valued ideas, not ask their government – school administrators – to protect and punish their opponents. Isn't that what the First Amendment is all about?

**For the protestors to demand that the authorities ban speech which, albeit unpleasant and offensive, is non-threatening and – more to the point – opposite to the protestors' beliefs, seems to turn the First Amendment on its head.**

\* \* \*

This unfortunate situation is not merely anecdotal nor is it limited to the privileged few on ivied campuses. A recent Pew survey shows that skepticism about free speech and the appropriateness of government restricting offensive remarks is shockingly widespread among the younger sector of our population. Thus, when asked whether Government should be able to prevent people from saying things that are offensive to minority groups, 28% of Americans agreed (including 24% of Baby Boomers) – but so did a whopping 40% of Millennials (ages 18-34). (Very interesting in relation to our recent Hate Speech conference in Paris – and

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consistent with the comments by European lawyers there – half of EU respondents agreed, including 70% of Germans and 48% of the French surveyed, quite different than the American 28% total.

At bottom, the fact remains that among the young, this renunciation of free speech principles in favor of the authorities' responsibility to censor and even punish unpopular, politically incorrect and offensive speech (let alone re-educating those who might dare to utter such words) is widespread and not limited to the elite campuses. Those of us in the media bar, in my view, have an obligation not only to our clients, but to proselytize in favor of free speech values as well. Given this sorry state of affairs, we have a lot of work to do.

*We welcome responses to this column at [gfreeman@medialaw.org](mailto:gfreeman@medialaw.org); they may be printed in next month's MediaLawLetter.*

## The 13th Annual Entertainment & Media Law Conference

# One Year After the Sony Hacks: Reverberations in the Industry and the Law

THURSDAY, JANUARY 14, 2016  
LOS ANGELES TIMES BUILDING

The Future of Theaters:  
The Role of Traditional Distribution in the Digital Era

On the Digital Battlements:  
Dealing With Hackers, Enemy States and the U.S. Government

From Your Hard Drive to the Front Page:  
Leaked Information, Journalism and the First Amendment

*Full schedule and registration: [www.medialaw.org](http://www.medialaw.org)*

## 2015 Annual Dinner: A Night at the Movies

### *Lively Panel Discusses Journalism, Law and Film*



**Panelists left to right: Marty Baron, Cynthia McFadden, Erin Lee Carr and Victor Kovner**

After cocktails, appetizers, a rich dinner, and perhaps a few handfuls of popcorn, the more than 600 guests at the MLRC Annual dinner may be forgiven for groaning a bit at the program's opening gambit. Without warning, the lights dimmed and up on three large screens appeared excerpts of a lurid chat between two members of the website Dark Fetish Net detailing the rape, murder, dismemberment and eventual consumption of a fleshy female victim.

So began "A Night at the Movies," an examination of the relationship between journalism, law, and film. The panelists: Erin Lee Carr, director of the documentary "Thought Crimes: The Story of the Cannibal Cop," Victor Kovner, attorney for HBO's "The Jinx: The Life and Deaths of Robert Durst," and Marty Baron, ex-editor of the Boston Globe, portrayed by Liev Schreiber in the recent hit "Spotlight." The spirited moderator was NBC's Cynthia McFadden.

Below are some of the highlights from the discussion. Subjects ranged from reporter's privilege, legal and ethical obligations to film subjects and law enforcement, journalists' varied sense of FOIA, and the moment in "Spotlight" where Globe outside counsel and long-time MLRC member Jon Albano is mentioned by name.

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**McFadden:** Did Valle's lawyers advise against him doing the film?

**Carr:** I think they said, "Be cautious. We just got you off. You could've been in jail for 40 years - why would you jeopardize this?" But I think he wanted to see what was going to happen. He thought he had never committed a crime, so why not let a documentary crew follow him around? ... I really felt it was a fair shake for him.

\* \* \*

**McFadden:** If you had come across material in the course of making the film that would've been useful to prosecutors, would

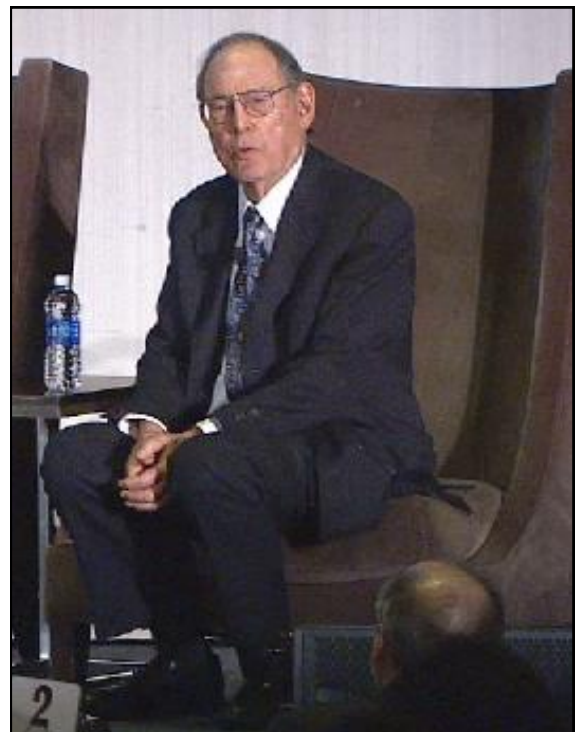
you have gone to them?

**Carr:** I want to defer to my lawyer! I think I'm obligated to – yes. But fortunately for Mr. Valle and fortunately for me, that was not the case.

\* \* \*

**McFadden:** Andrew [Jarecki] and the filmmakers are very open in the film about saying that the second interview with Robert Durst comes about under some degree of duress. Robert Durst needs the outtakes that the filmmakers have, and the filmmakers discuss on camera how this is going to allow them to put pressure on him to sit down a second time.

**Kovner:** They had been urging him for an extended period of time to be interviewed. Bob agreed on a great many occasions that he would be interviewed, but he kept putting it off. Ultimately, he agreed to it. Did he agree to it for this particular



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reason? That's hard to say; I don't know. I don't think he was under coercion. He was consistently advised by his counsel and repeatedly rejected the advice of his counsel.

\* \* \*

**McFadden:** Someone mentioned to me the other day Janet Malcolm's famous book "The Journalist and the Murderer." She makes a really strong argument that journalists are always seducing and betraying their sources. I'd love to get a thought about this lingering notion that journalism is, as she puts it, an immoral act. "Journalism is morally indefensible," she said. "Journalists and their subjects are always in a dance of seduction and betrayal."

**Kovner:** I think Janet Malcolm has it wrong. It's not a question of betraying a source, because the journalist does not owe the duty to the source. The journalist owes the duty to his or her audience – and to the truth.

\* \* \*

**McFadden:** The film says it was the first day on the job you made this assignment. Is that true?

**Baron:** It is true. It was my first news meeting, my first day ... There was a column written by Pulitzer Prize winning columnist Eileen McNamara about a priest

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named John Geoghan who had been accused of abusing as many as 80 kids ... She ended her column saying the truth may never be known, because documents were under seal. My perspective is when someone says the truth may never be known, that should be chum for journalists. Not that I want to compare us to sharks, but our obligation is to go find out what that truth is, not settle for one side saying one thing and another side saying something else, particularly when it involves an instance of grave wrongdoing.

\* \* \*

**McFadden:** Being an outsider in Boston obviously made a difference. It changed the point of view.

**Baron:** People at the Globe have said I was able to offer a fresh perspective. I think there was almost an assumption that because the documents were under seal that they simply weren't going to be able to get them. ... I came with the expectation that any documents that were being hidden from the public could be obtained. Now of course these were not public records by any means. But our practice in Florida would've been to go to court to unseal these documents. I asked in that first meeting whether they'd considered doing that and there was silence.

# Pennsylvania Supreme Court Reinstates Verdict In Favor Of Media Defendants

## *Decision Ends Long-Running Newspaper Libel Case*

By Kevin C. Abbott and Justin H. Werner

The Pennsylvania Supreme Court this month put an end to a long-running defamation action concerning a series of articles discussing the searches and investigation of plaintiffs and their ties to organized crime. Following a new trial that the Supreme Court ordered after it vacated the first trial due to an appearance of impropriety in the assignment of the non-jury case to a former judge who now resides in federal prison, the trial court found in favor of the *Citizens' Voice*. On appeal, the Superior Court reversed in part and ordered a third trial. In an opinion dated November 20, 2015, the Pennsylvania Supreme Court reversed the Superior Court, reinstated the trial court's judgment in favor of the *Citizens' Voice*, and brought final close to a case that has lasted over 13 years. [\*Joseph v. Scranton Times\*](#).

In doing so, the Supreme Court clarified that Pennsylvania defamation law mandates proof of actual injury to reputation as a prerequisite to the recovery of other injuries, such as emotional distress, humiliation, and embarrassment, and reaffirmed the challenging burden imposed by the constitutionally-mandated "actual malice" standard for the recovery of presumed damages in private figure cases.

### Background

In 2002, Thomas Joseph, his printing and call center businesses, two airport limousine businesses, and his son sued the *Citizens' Voice* and its reporters for a series of ten articles that appeared in the *Citizens' Voice* newspaper in Wilkes-Barre, Pennsylvania in 2001. The articles reported on the searches of Joseph's home and business as part of a federal criminal investigation into Joseph's alleged ties to organized crime and to William D'Elia, the reputed head of organized crime in the area. No criminal charges were brought against Joseph.

This case was first tried in 2006. Following a nonjury trial, former judge Mark Ciavarella entered a judgment of \$3.5 million in favor of the plaintiffs. On the *Citizens' Voice's* appeal, the Superior Court deferred to former judge Ciavarella's findings and affirmed. *See Joseph v.*

**The Supreme Court clarified that Pennsylvania defamation law mandates proof of actual injury to reputation as a prerequisite to the recovery of other injuries, such as emotional distress, and reaffirmed the challenging burden imposed by the constitutionally-mandated "actual malice" standard.**

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*Scranton Times, L.P.*, 959 A.2d 322 (Pa. Super. 2008). When evidence was discovered that the nonjury trial had been improperly steered to Ciavarella by former president judge Michael Conahan, that Ciavarella and Conahan were involved in a criminal conspiracy (popularly termed the “Kids for Cash” scandal), and that Conahan frequently met with D’Elia, the Supreme Court vacated the first judgment based on its finding that the first trial “was infected with the appearance of judicial impropriety” and ordered a new trial. *Joseph v. Scranton Times, L.P.*, 987 A.2d 633, 635 (Pa. 2009).

The second nonjury trial was conducted in 2011 before Judge Joseph Van Jura. After hearing two weeks of testimony, Judge Van Jura found that Joseph and his witnesses were not credible, that the plaintiffs did not prove any injury caused by the allegedly false statements in the articles, and thus plaintiffs had not proven one of the essential liability elements of a defamation claim. The trial court entered judgment in favor of the *Citizens’ Voice*. The plaintiffs appealed and the Superior Court affirmed the trial court’s dismissal of the claims by Joseph’s business but reversed the trial court’s judgment against Joseph and his son. *See Joseph v. The Scranton Times, L.P.*, 2014 Pa. Super. 49 (March 11, 2014).

The Superior Court held that the trial court committed legal error by disregarding the plaintiffs’ own testimony of embarrassment and humiliation resulting from the articles. The Superior Court also concluded that the trial court committed a legal error by failing to consider whether the plaintiffs had proved actual malice and could recover presumed damages, even in the absence of proof of injury to his reputation. The Superior Court remanded for a new trial on actual malice and damages.

### **Pennsylvania Supreme Court’s Decision**

The Pennsylvania Supreme Court issued a majority opinion on November 18, 2015 authored by Justice Stevens, reversing the Superior Court’s order granting a new trial on the issues of actual malice and damages, and upon finding that “there are no outstanding appellate issues,” directed reinstatement of the trial court’s verdict and judgment in favor of the *Citizens’ Voice*, bringing this matter to a final conclusion. Slip. Op. at 61.

The Court’s analysis began with a detailed recitation of the constitutional limitations placed on defamation claims, recognizing that “more recent changes to the tort of defamation have been shaped by First Amendment concerns, which have largely conflicted with former common

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law notions of presumed injury to reputation and damages.” Slip Op. at 33. The Court observed that the United States Supreme Court had abolished the recovery of “presumed injury” in private figure cases in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), because it “invites juries to publish unpopular opinion rather than to compensate individuals for injury sustained by a publication of a false.” Slip Op. 35.

The Court noted that *Gertz* broadly stated that “actual injury” includes “impairment to reputation and standing in the community, personal humiliation, mental anguish and suffering,” Slip Op. at 36, and that *Gertz* was later interpreted to not require proof of reputation harm as a constitutional prerequisite for recovery on a defamation claim, and that proof of mental injury, standing alone, was sufficient. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

The Court also noted that this holding was subject to a spirited dissent by Justice Brennan, who argued that allowing defamation plaintiffs to recover for emotional and mental injuries absent proof of reputational injury “subverted whatever protective influence the ‘actual injury’ stricture [in *Gertz*] may possess.” Slip Op. 37.

Turning to Pennsylvania law, the Court started its analysis by noting that case law restricts a private figure plaintiff whose defamation claims is based on negligence to the recovery of compensation for actual injury, rejecting any possibility of recovery of presumed damages consistent with *Gertz*. Slip Op. 39. However, the Court then departed ways with *Firestone*’s constitutional narrowing of *Gertz* to conclude that “for the purposes of a Pennsylvania defamation case, proof of actual injury to a private plaintiff’s reputation is a prerequisite to the recovery of damages for other actual injuries, including mental and emotional injuries.” Slip. Op. 41. Recognizing that this issue was “not specifically considered by this Court previously,” the Court found support for its holding within the “historical framework of defamation” as set forth in the *Restatement (Second) of Torts* and Pennsylvania case law, stating that “our case law makes clear that the protection of an individual’s reputation is the very essence of a claim for defamation.” Slip Op. 42. Consistent with Justice Brennan’s dissent in *Firestone*, the Court concluded that “permitting the recovery of damages for injuries such as mental anguish without a showing of injury to reputation subverts the protective influence of *Gertz*’s actual injury stricture,” and cited high court decisions from New Mexico, Arkansas and Kansas that follow the same holding.

Applying this requirement to the case, the Court concluded that “we initially disagree with the Superior Court’s legal premise that private figure plaintiffs resting their defamation claims upon negligence may recover for mental injuries caused by the publication of defamatory

**The Court concluded that “permitting the recovery of damages for injuries such as mental anguish without a showing of injury to reputation subverts the protective influence of *Gertz*’s actual injury stricture,”**

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articles, absent proof of actual injury to reputation...thus [the trial court], who ... properly found that [plaintiffs] did not prove they suffered actual reputation injury, was not required to consider whether [plaintiffs] suffered mental injuries for the purposes of defamation.” Slip Op. 47.

On the issue of presumed damages, the Court noted that “we continue to find no specific directive from the U.S. Supreme Court to cause us to abandon the long standing practice of allowing punitive, as well as presumed, damages in the appropriate case.” Slip Op. 45. Citing *Gertz and Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374 (Pa. 1985), *reversed on other grounds* 475 U.S. 767 (1986), the Court held that Pennsylvania law allows “private plaintiffs in libel cases involving media defendants to recover presumed and punitive damages upon their satisfaction of the *New York Times* actual malice test.” Slip Op. 45.

Turning to this case, the Court noted that the trial court’s opinion in the case never discussed whether the plaintiffs satisfied the actual malice standard. Slip Op. 52. Nevertheless, the Court rejected the Superior Court’s order remanding this issue for a new trial. Instead, recognizing that whether a defamation plaintiff proved actual malice by clear and convincing evidence is a question of law and the mandate in *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984) that an appellate court must make an independent inquiry of whether the actual malice standard is met, the Court conducted an independent review of the trial record. Slip. Op 54-59. Upon its review of the record, the Court concluded that the evidence presented by the plaintiffs at trial “lacks the convincing clarity which the constitutional standard demands, and hence could not constitutionally sustain a judgment for presumed or punitive damages ... as a matter of law.” Slip Op. 60.

The Court’s rulings on reputational injury and actual malice, together with its other findings that the Superior Court erred in overriding and repeatedly mischaracterizing the credibility determinations by the trial court as legal error, resolved all of the outstanding issues on appeal. The Court reinstated the trial court judgment in favor of the *Citizens’ Voice*, bringing final closure to the case. Chief Justice Saylor and Madam Justice Todd joined the majority opinion.

Justice Eakin wrote a [concurring and dissenting opinion](#) joined by Justice Baer, noting that he agreed in full with the “holdings that proof of reputation harm is a prerequisite for a private plaintiff to recover other injuries, that the Superior Court erred in framing the trial court’s credibility determinations as legal errors, and that a private plaintiff may recover presumed and punitive damages from media defendants upon proof of actual malice,” and dissented for the sole reason that the issue of actual malice should have been remanded to the trial court.

*The Citizens’ Voice is represented by J. Timothy Hinton, Jr. of Haggerty Hinton & Cosgrove LLP in Scranton and Kevin C. Abbott, Kim M. Watterson and Justin H. Werner of Reed Smith LLP in Pittsburgh. The Plaintiffs are represented by George C. Croner of Kohn, Swift & Graf, P.C. in Philadelphia and Timothy P. Polishan of Kelley, Polishan, Walsh & Solfanelli, LLC in Old Forge.*

# Connecticut Court Holds That First Amendment Protects Posting of Missing Person Flyers

By William S. Fish, Jr.

The Connecticut Supreme Court recently discussed the interplay between the First Amendment and the claim of intentional infliction of emotional distress. [\*Gleason v. Smolinski\*](#), 2015 Conn. LEXIS 341 (2015). Relying upon [\*Snyder v. Phelps\*](#), 562 U.S. 443 (2011), the Court held that the defendants' conduct of posting missing person flyers was protected by the First Amendment even though the content and location of the posted flyers were directed at the plaintiff to persuade her to be forthcoming with her knowledge about the missing person.

## Background

The case involved the disappearance of William Smolinski ("Bill") in 2004 under suspicious circumstances. The defendants, Bill's mother and sister, firmly believed that the plaintiff, Bill's former girlfriend, either caused or knew more about Bill's disappearance than she would say. The defendants began to pressure the plaintiff to cooperate with the police by saying disparaging things about her and by posting "copious numbers" of missing person flyers about Bill along the school bus route driven by the plaintiff and near her home. In response to the defendants' conduct, the plaintiff filed a civil action against the defendants, alleging intention infliction of emotional distress and defamation.

**The Court then discussed *Snyder v. Phelps* at length and its holding that a court must examine the "content, form and context" of speech to determine whether it is of public or private concern, which in turn implicates the level of protection the speech enjoys.**

## Proceedings Below

Following a court trial, the trial judge awarded the plaintiff \$32,000 on her claim of intentional infliction of emotional distress and \$7,500 on her defamation claim. The trial court also awarded \$13,166.67 in punitive damages. The trial court found that the defendants hung missing person flyers "throughout [the plaintiff's] bus route, at places where she lived and worked, and even near, if not on, school grounds where she picked up and dropped off children. This went on for months." The trial court also found that the defendants'

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intention was to “hound” the plaintiff until she “broke” with respect to what she knew about Bill’s disappearance.

On appeal, the Appellate Court affirmed the trial court’s judgment, and the defendants appealed to the Connecticut Supreme Court. Relying upon *Snyder*, the defendants argued that the plaintiff’s claim of intentional infliction of emotional distress was barred because it arises from speech protected by the First Amendment, namely, the act of posting missing person flyers on public roadways.

### Connecticut Supreme Court Decision

The Supreme Court began by discussing First Amendment principles. Based on these principles, it held that because there was no challenge to the trial court’s factual findings, the case was subject to de novo review to determine whether the defendant’s conduct was entitled to First Amendment protection.

The Court then discussed *Snyder v. Phelps* at length and its holding that a court must examine the “content, form and context” of speech to determine whether it is of public or private concern, which in turn implicates the level of protection the speech enjoys. With respect to the objective content of the speech at issue, the Court easily determined it was a matter of public concern since it related to a missing person and the possible commission of a crime. With respect to the form and context of the speech at issue, the Court noted that the flyers were content neutral regarding the plaintiff and that the flyers were placed on or adjacent to public roadways, a traditional public forum.

The Court also stated that the “defendants’ preexisting intention to ‘hound’ the plaintiff until she ‘broke’ with respect to what she knew about Bill’s disappearance” did not transform the protected nature of their speech because it still was consistent with the “overarching public concern of gaining information about Bill’s disappearance, in particular by persuading the plaintiff to be forthcoming with her knowledge about the case.” *Gleason*, 2015 LEXIS 341 at \*43.

The Court also noted that speech on a matter of public concern that is “solely a contrived means for malicious harassment on a matter of private concern” would not be constitutionally protected. *Gleason*, 2015 LEXIS 341 at \*58. The Court thus agreed with the Alaska Supreme Court that the First Amendment is not an “all-purpose tort shield.” *Greene v. Tinker*, 332 P.3d 21, 34-35 (Alaska 2014). The Court also found instructive a recent New Hampshire Supreme Court case that relied upon *Snyder* in holding that the First Amendment barred certain tort claims against persons who followed and videotaped parking enforcement officers in the

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performance of their duties in a traditional public forum. *Keene v. Cleaveland*, 118 A.3d 253 (N.H. 2015).

Based on the foregoing, the Court held that the defendants' conduct in posting the flyers was constitutionally protected, but it remanded the case to the trial court to consider whether the record supports a finding of intentional infliction of emotional distress independent of any constitutionally protected conduct.

*William S. Fish, Jr. is a partner at Hinckley Allen in Hartford, CT. Plaintiff was represented by John R. Williams. Defendants were represented by Steven Kelly, Christopher P. DeMarco and Anne T. McKenna.*



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

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

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# Virginia Federal Court Dismisses Libel Complaint Against Forbes Contributor

*Complaint Failed Iqbal/Twombly Test;  
Article Was Substantially True and Opinion*

By Charles J. Glasser, Jr.

Judge Liam O'Grady of the Eastern District of Virginia dismissed a libel complaint against Dolia Estevez, a Forbes contributor, who was sued by Alejandra Sota, who was a spokesperson for former Mexican President Felipe Calderón. [\*Sota v. Estevez\*](#), No. 1:15 civ 610 (E.D. Va. Nov. 30, 2015).

The [article in question](#) – a “listicle” – was headlined the “10 Most Corrupt Mexicans of 2013” but the article further explained that it was a “list of the 10 Mexicans *perceived* to be among the most corrupt in 2013.” (emphasis added).

Sota originally filed a complaint against Forbes, its holding company, and Estevez in the Southern District of New York, where the case was dismissed for lack of diversity. Plaintiff, represented by Jonathan Sherman of Boies Schiller and Flexner, refiled against the reporter individually in the Eastern District of Virginia where she resides. The complaint argued that the Mexican plaintiff was not a public figure or

public official in the United States and that the article implied she was corrupt. The reason Sota made the list was because she had admittedly been investigated twice for corruption in Mexico.

Judge O'Grady, after allowing a first complaint to be refiled to allege more details that might state a claim, dismissed the amended complaint under the Iqbal/Twombly line (failing to allege sufficient factual basis to survive dismissal) because the article was substantially true as the plaintiff could not deny she had been investigated.

In addition, and most useful, the court followed the TripAdvisor case from the 6th Circuit holding that “listicles” or “top ten lists” are inherently the stuff of non-actionable opinion, and given that the basis for Estevez’ opinion was both true and disclosed, the complaint must fail. This is a very useful media law decision.

Sota has since refiled her case solely against Forbes in New York State Court in Manhattan.

*Kayvan Sadeghi and Ron White of Morrison Foerster, and Charles J. Glasser on the briefs as of counsel, represented Estevez pro bono.*





# Florida Appellate Court Reverses Order Compelling Economic Development Commission to Disclose Records

By Robert L. Rogers, III

A Florida appellate court has reversed a trial court's order compelling an economic development commission to publicly disclose its records, on grounds that the trial court applied the wrong test to determine that the commission acted on behalf of a Florida county and was therefore subject to Florida's Public Records Act. [\*Economic Dev. Comm'n v. Ellis\*](#), 40 Fla. L. Weekly D2451a (Fla. 5th DCA Oct. 30, 2015). Advocates of open access to public records may view this with disappointment, to the extent it invites governments to hire private entities to perform their work for them in order to more easily shield related documents from public eyes.

*Economic Development Commission v. Ellis* involves efforts by Scott Ellis, the current Clerk of the Courts for Brevard County, Florida, to obtain records from the Economic Development Commission of Florida's Space Coast, Inc. ("EDC") related to BlueWare, a service provider hired by the prior clerk of court whose CEO, along with the prior clerk of court, has been charged criminally with bribery and bid tampering. After the EDC refused Ellis's request, Ellis filed suit seeking to compel disclosure of the records under Florida's Public Records Act codified at Fla. Stat. § 119.01 *et seq.* EDC opposed the lawsuit by claiming it is a private organization whose documents are not public records. Following a two-day evidentiary hearing at which the court heard detailed testimony about the EDC and its relationship with Brevard County, the trial court ordered the EDC to disclose the disputed records because the EDC is an agent acting on behalf of the County subject to Florida's Public Records Act.

In reversing the trial court's ruling, Florida's Fifth District Court of Appeal focused upon the test applied by the trial court and the specific characteristics of the EDC described during testimony at the two-day hearing.

Under Florida's Public Records Act, "all state, county, and municipal records are open for personal inspection and copying by any person" (Fla. Stat. § 119.01). The Act explicitly applies to "agencies," defined as including any private business entity "acting on behalf of any public agency" (Fla. Stat. § 119.011(2)). In *News & Sun-Sentinel Co. v. Schwab, Twitty &*

**Advocates of open access to public records may view this with disappointment, to the extent it invites governments to hire private entities to perform their work for them in order to more easily shield related documents from public eyes.**

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*Hauser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992), the Supreme Court of Florida recognized that this broad statutory definition of agency “serves to ensure that a public agency cannot avoid disclosure under the Act by contractually delegating to a private entity that which otherwise would be an agency responsibility.” *See*. However, while a private entity acting *on behalf of* a public entity is subject to the Public Records Act, a private entity that is *merely providing goods or services* to a public agency is *not* required to comply with the Act.

When faced with a dispute over whether a private entity assisting a government unit is actually acting on behalf of the entity and is therefore subject to Florida’s Public Records Law, a Florida court generally must conduct a “totality of factors” test (established by the Supreme Court in *Schwab*), under which the court analyzes the question under nine factors that include “the level of public funding,” “whether the activity in question was conducted on publicly owned property,” “the extent of the public agency’s involvement with, regulation of, or control over the private entity,” and “whether the agency has a substantial financial interest in the private entity.”

However, “the factor by factor analysis outlined by *Schwab* is not necessary when the delegation of governmental responsibility is clear and compelling.” Thus, under the “delegation of function” test, if presented with clear and compelling evidence that a private entity has “completely assum[ed] a governmental obligation,” the Florida court may ignore the “totality of factors” test and determine that the private entity is subject to the Public Records Law based on such clear and compelling evidence. In this case, the Fifth DCA disagreed with the trial court’s choice to apply the “delegation of function” test instead of the “totality of factors” test.

Prior Florida appellate courts have affirmed the application of the “delegation of function” test to:

- A private entity that Marion County, Florida hired to perform all of its misdemeanor probationary services (*Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997));
- A private Humane Society that investigated claims of animal abuse and seized animals pursuant to statutory authority (*Putnam County Humane Society, Inc. v. Woodward*, 740 So. 2d 1238 (Fla. 5th DCA 1999));
- A private company hired by Polk County, Florida to provide all health care services to all inmates held in the county’s correctional facilities (*Prison Health Services, Inc. v. Lakeland Ledger Publ’n Co.*, 718 So. 2d 204 (Fla. 2d DCA 1998); and

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- A private engineering firm hired to develop the City of Apalachicola's public water system, where the City had no engineer on staff and relied exclusively on the firm to perform both general and specific engineering services over a 15-year period (*B&S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008)).

In this case, the Fifth DCA held that the trial court erred in applying the “delegation of function” test to hold that the EDC was subject to Florida’s Public Records Law, and instead should have applied the “totality of factors” test, because the EDC was not Brevard County’s only agent that conducted economic development activity on the County’s behalf—the County also hired and paid other entities to perform such tasks, and also paid its own employees to perform such tasks.

“Unlike the Salvation Army in *Stanfield*, here EDC did not take over the county’s role or completely assume the county’s provision of economic development services. EDC provided economic services to, not in place of, the county. Although local governments may engage in a variety of economic development activities, those services in our opinion are not traditional governmental obligations or functions like those involved in *Stanfield*, *Woodward*, *Prison Health Services*, or *B&S Utilities*.” The Fifth DCA therefore held that the trial court’s application of the “delegation of function” test was improper, since “there is not a clear, compelling, complete delegation of a governmental function to EDC,” and it should have instead applied the “totality of factors” test to determine whether the EDC was subject to Florida’s Public Records Act.

**The trial court erred in applying the “delegation of function” test to hold that the EDC was subject to Florida’s Public Records Law, and instead should have applied the “totality of factors” test.**

Notably, the Fifth DCA chose not to conduct this analysis itself, but instead remanded the case to the trial court. “On appeal, each party has emphasized different testimony from which competing conclusions might be reached concerning the *Schwab* factors. The trial court who was present during the two-day evidentiary hearing is in the best position to evaluate the witnesses, their testimony, and any other evidence.”

*Robert L. Rogers, III is a media and business litigation attorney with Holland & Knight LLP and works in the firm’s Orlando office. The Appellant was represented by Edward G. Guedes and Alicia H. Welch of Weiss Serota Helfman Cole & Bierman, P.L. and Kimberly Bonder Rezanka. The Appellee was represented by Curt Jacobus, Alec D. Russell, and Charles T. Wells of GrayRobinson, P.A. and Kevin C. McBride, Staff Counsel to the Clerk of Courts for Brevard County, Fla.*

# Second Circuit Rules in Favor of Author of “Point Break” Parody

## *Unauthorized Parody Protected By Copyright Law*

By Steven Paradise and Laurel S. Fensterstock

On October 30, 2015, the United States Court of Appeals for the Second Circuit, in [\*Keeling v. Hars\*](#), No. 13-694-cv (2d Cir. Oct. 30, 2015), affirmed a judgment on a copyright claim obtained in the United States District Court for the Southern District of New York (*Keeling v. New Rock Theater Prods., LLC*, No. 10 Civ. 9345 (TPG), 2013 WL 918553 (S.D.N.Y. Mar. 11, 2013)).

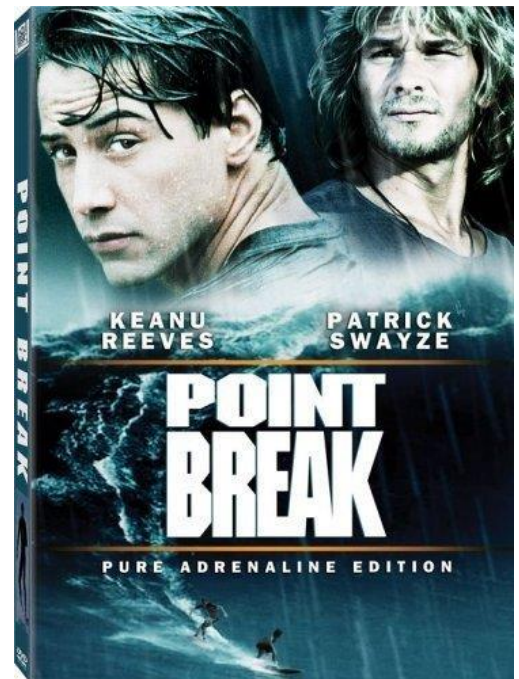
On appeal, the Second Circuit considered whether an unauthorized work that makes “fair use” of its source material may itself be protected by copyright, and held that “if the creator of an unauthorized work stays within the bounds of fair use and adds sufficient originality, she may claim protection under the Copyright Act, 17 U.S.C. § 103, for her original contributions.” Opinion at 3.

The ruling is significant because it involved the invocation of the “fair use” doctrine as a sword in support of a copyright infringement claim, rather than as a shield to defend against a claim of copyright infringement.

### Background

Jaime Keeling is the author of *Point Break LIVE!* (“PBL”), a stage production that is a parody of the 1991 action film *Point Break*, which starred Keanu Reeves and Patrick Swayze. In the film, a rookie FBI agent played by Reeves, goes undercover to infiltrate a gang of bank-robbing surfers, led by Swayze’s character. Although Keeling’s parody parallels the characters and plot elements of the movie, relying mostly on selected dialogue from the film, Keeling added jokes, props, exaggerated staging, and humorous theatrical devices to “transform the dramatic plot and dialogue of the film into an irreverent, interactive theatrical experience.” *Id.*

For example, Reeves’s character is selected at random from the audience through a contest in which the various contestants “audition” for the part, and the winner is the performer who receives the audience’s loudest applause. During the show, Reeves’s character reads his lines



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**Actors in Point Break LIVE!, a stage production parodying the 1991 action film.**

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from cue cards thereby exaggerating Reeves's reputedly stilted performance in the movie. Additionally, massive waves in the film are replaced with squirt guns and blue sheets blown by household fans, and one of the pivotal scenes in the movie in which Reeves's character must pick up bricks, blindfolded in a deep swimming pool, takes place instead in a kiddie pool. Keeling possesses no copyright or license with regard to the film.

In 2007, Keeling entered into a production agreement with Defendant Eve Hars, pursuant to which Hars and her production company, New Rock Theater Productions, LLC ("New Rock"), could stage a two-month production of *PBL!* from October 2007 through December 2007. During that time, Hars received legal advice leading her to believe that Keeling did not lawfully own any rights in the script for *PBL!*. As a result, once the production agreement expired, Hars sought to renegotiate its terms to allow her to continue staging productions of *PBL!* with no obligation to pay Keeling. Keeling refused to renegotiate and registered for a copyright in *PBL!*, without permission from the copyright holders of the film. The U.S. Copyright Office issued Keeling's registered copyright for *PBL!* on January 4, 2008. Subsequently, Hars and New Rock continued staging *PBL!* in many cities for the following four years without Keeling's permission and without compensating her.

### **The Lawsuit**

In December 2010, Keeling brought suit against Hars, New Rock, and an investor in *PBL!* for copyright infringement, breach of contract and tortious interference of contract. Defendants'

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motion to dismiss the suit was denied as was their motion for summary judgment.

In December 2012, after a week-long jury trial, the jury returned a verdict in Keeling's favor in the amount of \$250,000, finding that Keeling's use of material from *Point Break* was "fair use in the way of a parody," Keeling was the sole owner of the copyright in *PBL!*, and defendants infringed Keeling's copyright.

### The Appeal

Defendant Hars appealed the jury verdict arguing, among other things, that an unauthorized derivative work like *PBL!* categorically may not receive independent copyright protection regardless of whether it makes fair use of its source material, and that an author's original contributions to a derivative work that consist solely of non-copyrightable individual elements cannot satisfy the originality element necessary to support a copyright. The Second Circuit disagreed with both of these arguments as well as Hars's challenges to the District Court's jury charge.

The Second Circuit made clear that Hars's argument that an unauthorized derivative work like *PBL!* categorically may not receive independent copyright protection regardless of whether it makes fair use of its source material, is inconsistent with the operative statutory language. Specifically, the Copyright Act provides:

that derivative works are entitled to 'independent' copyright protection, separate from any copyright in the preexisting material. 17 U.S.C. §103(b). Though copyright protection expressly may extend to derivative works 'employing preexisting material in which copyright subsists,' the statute cautions that protection 'does *not* extend to any part of the work in which such material has been used *unlawfully*,' 17 U.S.C. §103(a). (emphases supplied). If, however, a work employs preexisting copyrighted material lawfully—as in the case of a 'fair use' – nothing in the statutes prohibits the extension of the 'independent' copyright protection promised by Section 103.

**The ruling is significant because it involved the invocation of the "fair use" doctrine as a sword in support of a copyright infringement claim, rather than as a shield to defend against a claim of copyright infringement.**

*Id.* at 13. Accordingly, the Second Circuit affirmed the District Court's holding that

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when a derivative work's unauthorized use of preexisting material is fair use and the work contains sufficient originality, its author may claim copyright protection under § 103 for her original creative contributions.

*Id.* at 15.

Similarly, the Second Circuit found Hars's argument that an author's original contributions to a derivative work that consists of solely non-copyrightable individual elements cannot support a copyright, inconsistent with a long line of case law that confirms that

copyright covers compilations of raw data or facts, elements which are not themselves protectable, so long as the compilation itself (including the arrangement of those elements) possesses some 'minimal degree' of creativity, 'no matter how crude, humble, or obvious.' (internal citations omitted).

*Id.* at 16. The Court distinguished Keeling's original compilation, for which she sought copyright protection, from individual devices for which she would not be able to obtain protection, such as the concept of drafting an audience member to play Reeves's character, the reliance on cue cards, or the use of squirt guns. The Court cited the District Court in holding that

'Keeling's creative contribution, and thus her copyright, is in the original way in which [she] has selected, coordinated, and arranged the elements of... her work' to create new parodic meaning.

*Id.* at 18.

### **Conclusion**

Overall, the Second Circuit's 24-page decision made clear that an unauthorized parody of a copyrighted work, like *PBL!*, is entitled to the copyright laws' full protection so long as it is sufficiently original. As the Second Circuit held, "without any possibility of copyright protection against infringement for her original fair-use parody, playwrights like [Ms.] Keeling might be dissuaded from creating at all." *Id.* at 15.

*Steven Paradise is a partner, and Laurel S. Fensterstock an associate, at Vinson & Elkins LLP, New York, NY and they represented plaintiff in this case. Defendant acted pro se.*

# Court Upholds Advertising Proposal Use of Photos as Fair Use

By Mark Sableman

A long-standing practice of the advertising industry of using low-resolution photos in proposals for clients is fair use and hence not copyright infringement, according to a recent decision, [\*Kennedy v. Gish Sherwood & Friends, Inc.\*](#), 2015 WL 6750814 (E.D. Mo. Nov. 5, 2015).

The case focused on “comp use,” the advertising industry’s term for its use of photos in advertising proposals and mock-ups. The term “comp use” derives from the “comprehensives” that agencies would put together at the proposal stage in the pre-Internet age, often involving cutting and pasting of pre-existing photos with original headlines, copy, and art.

While many stock photo companies expressly recognize and permit comp use of their photos, the plaintiff, Stephen Kennedy, claimed in his lawsuit that comp use of his photos by defendant Gish Sherwood & Friends, Inc., a Nashville advertising agency also known as GS&F, constituted copyright infringement. He also asserted claims under section 1202 of the Digital Millennium Copyright Act, claiming that GS&F, in the course of its comp use, altered and removed copyright management information.

The case arose when Kennedy found several of his photos used without authorization by GS&F’s former client, First Acceptance Insurance Company (“FAIC”). GS&F handled FAIC’s advertising from 2010 through 2012, but in 2012 FAIC terminated the relationship, and asked for all files, including non-licensed files.

GS&F produced the files, and specified which photos were licensed and the terms of the licenses. In 2013, however, FAIC’s marketing director sorted through all of the files, found five photos she liked among the comp files, and directed that those photos (all taken by Stephen Kennedy) be posted on FAIC websites.

Using a reverse image search, Kennedy found that FAIC was using unlicensed copies of his photographs in Internet advertisements. He then sued FAIC for infringement, and, in the course of that case, he learned that the photos had originally been copied for comp use by GS&F in the course of its work for FAIC. He brought GS&F into the suit, and in discovery learned that GS&F had copied 169 of his photos, from his website, in the course of preparing proposals for FAIC. (GS&F had proposed that FAIC use certain of Kennedy’s photos, but the company chose other approaches.)

**The case focused on “comp use,” the advertising industry’s term for its use of photos in advertising proposals and mock-ups.**

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Kennedy settled with FAIC and then pursued his infringement and DMCA claims against GS&F. He sought statutory damages from GS&F under sections 504 (infringement) and 1203 (DMCA violations) of the Copyright Act. He claimed he was entitled to up to \$27 million for copyright infringement and another \$10 million for the alleged DMCA violations.

In discovery, an email exchange between Kennedy and GS&F's art director came out, in which Kennedy expressed awareness of comp use, and a willingness to permit it. However, Kennedy claimed that his willingness to allow free comp use was dependent upon the agency obtaining the photos directly from him, not from his website.

Discovery also revealed a history of dealings between Kennedy and GS&F in which Kennedy knew of, and acquiesced in, comp use of his low-resolution photos, taken from his website. In two instances several years before the copying at issue in the suit, Kennedy knew of GS&F pulling his photos from his website, showing them to clients, and getting client approval for the photos, all before it ever approached him to obtain licensed, high-resolution copies of the photos. In both of those cases, where Kennedy's photos were ultimately licensed for publication, Kennedy made no objection to GS&F's comp use of his photos.

GS&F ultimately moved for summary judgment on Kennedy's claims, on multiple grounds. The Court granted the motions in part, most notably finding that GS&F's comp use was justified on two independent grounds: implied license, and fair use.

The court denied GS&F's express license defense, which was based on Kennedy's email to its art director in which Kennedy stated that he offered free comp use of his low resolution photos to his prior clients. Although GS&F qualified as a prior client and used only low resolution photos in its comps, the Court interpreted the email to require GS&F to request and obtain the photos from Kennedy, which it had not done. It had copied the photos from Kennedy's website, which displays about 100,000 photos.

However, the Court granted summary judgment on GS&F's alternative consent defense – implied license. The Court noted that implied license may be found where the copyright holder engages in conduct from which the defendant may infer consent. Silence or acquiescence can also give rise to an implied license, where the copyright owner knew of the practice, encouraged it, and never protested it. The Court relied on several Internet implied consent cases, including *Field v. Google Inc.*, 412 F.Supp.2d 1106 (D. Nev. 2006) and *Parker v. Yahoo! Inc.*, 2008 WL 4410095 (E.D. Pa. 2008).

The Court based its finding of implied license on Kennedy's prior dealings with GS&F, and his deposition admissions regarding comp use. Kennedy admitted at deposition that comp use

**The Court noted that implied license may be found where the copyright holder engages in conduct from which the defendant may infer consent. Silence or acquiescence can also give rise to an implied license.**

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was a common practice in the advertising industry, and that it was one of the means by which advertising agencies obtained approval for licensing high-resolution images from photographers.

The Court then turned to GS&F's fair use argument, which was based primarily on the argument that comp use is transformative: advertising agencies serve as a bridge, bringing the works of photographers to the attention of their clients, who are the final decision makers and ultimate purchasers of publication licenses. GS&F argued that this use did not substitute for, and actually facilitated, the licensing for publication of high-resolution photos that was Kennedy's business objective. Kennedy, by contrast, focused his fair use arguments on the four traditional factors; he claimed that the copying of the entirety of 169 photos could not be a fair use.

The Court embraced the transformative purpose argument, agreeing with GS&F that it used Kennedy's images "in a new context to serve a different purpose" which did not supersede Kennedy's purpose. This transformative purpose allowed the Court to discount the relatively unimportant second fair use factor (the nature of the work) and to take a permissive view of the "amount and substantiality of use" third factor. While the Court viewed each photo as a separate work, it concluded that "even making an exact copy of a work is justifiable where the purpose of the work differs from the original." Finally, as to the "effect on the market" fourth factor, the Court noted that the low-resolution comps did not substitute for high-resolution licensed photos, and Kennedy's express willingness to consent to comp use cut against any argument that he lost revenue from the comp use.

For all those reasons, the Court granted summary judgment on Kennedy's copyright infringement claims based on fair use as well as implied license. This fair use holding had an important effect on the DMCA claim, moreover, because the DMCA provides that it shall not affect fair use rights. Accordingly, since the comp use was fair use, all of Kennedy's DMCA claims were dismissed as well. (GS&F had asserted various other defenses to the DMCA claims, including the argument that a party acting under an implied license cannot violate section 1202, but all of these arguments became moot in light of this holding.)

Interestingly, the Court's summary judgment did not resolve all infringement claims, because the Court left open Kennedy's claim that GS&F's transfer of its files to FAIC, its former client, at the conclusion of the relationship, constituted a separate and independent act of infringement. Less than two weeks after the summary judgment ruling, however, and a few

**The Court's decision is notable as the first ruling addressing directly the advertising industry's practice of making comp use of low resolution photos from the Internet for proposal purposes.**

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days before the scheduled trial, the parties settled that remaining claim, as well as several counterclaims that sought to invalidate Kennedy's copyright registrations.

The Court's decision is notable as the first ruling addressing directly the advertising industry's practice of making comp use of low resolution photos from the Internet for proposal purposes. In one pre-Internet decision, the plaintiff's photo had been used in a comp, and the advertiser was held liable for commissioning another photographer to reproduce all the creative elements of that comp photograph. *Curtis v. General Dynamics Corp.*, 1990 WL 302725 (W.D. Wash. 1990).

Comp use in the advertising agency has long been in a gray area. GS&F had retained several expert witnesses (including a renowned retired St. Louis advertising executive who wrote the famous Budweiser "This Bud's for you" tagline) who would have testified concerning the prevalence of comp use in the advertising industry, to support the implied license and other defenses.

Now, however, with this ruling, there is a precedent that expressly permits comp use, at least of low-resolution images of photographers whose work is considered for publication licensing, on fair use grounds. The ruling also demonstrates that the practice may be protected by implied license, where photographers have understood and acquiesced in the use of their photos as comps in prior dealings. At the very least, both of these holdings provide advertising agencies that follow standard industry comp use practices some protection from willful infringement claims.

*GS&F was represented by Mark Sableman, Gordon Ankney, Michael Nepple, Anthony Blum, and Justin Mulligan of Thompson Coburn LLP in St. Louis. Kennedy was represented by Robert Schultz and Ronald Eisenberg of Schultz and Associates in Chesterfield, MO. FAIC was represented by Mary Ann Wymore of Greensfelder, Hemker, & Gale P.C. in St. Louis.*

## **MLRC Upcoming Events**

### **[MLRC/Southwestern Entertainment and Media Law Conference](#)**

January 14, 2016, Los Angeles, CA

### **[Legal Issues Concerning Hispanic and Latin American Media](#)**

Miami, FL, March 7, 2016

### **[Legal Frontiers in Digital Media](#)**

Mountain View, CA, May 19-20, 2016

### **[MLRC Media Law Conference](#)**

Reston, VA, September 21-23, 2016

# Polish Blasphemy Law Declared Constitutional

## *Missed Opportunity to Protect Freedom of Expression in Poland*

By Dominika Bychawska-Siniarska

In one of her interviews, a famous Polish pop singer called Doda stated provocatively that she “believes more in dinosaurs than the Bible” and that “the Bible was written by some guys drunk with wine and smoking some stuff.”

She was prosecuted under art. 196 of the Polish Criminal Code, penalizing with a fine, restriction of liberty or loss of liberty up to 2 years of prison “whoever offends religious feelings of other people by publicly insulting an object of religious cult or a place for public holding of religious ceremonies.”

After Doda was fined approximately 1,200 EUR, she lodged a Constitutional complaint, claiming that “religious feelings” and “object of cult” as used in the statute were not sufficiently precise (in violation of art. 42 par. 1 combined with art. 2 of the Constitution) and that art. 196 of the criminal code does not comply with freedom of expression (art. 54 of the Constitution). Moreover, the offence should not be prosecuted by the public prosecutor motion, but only based on private complaints (art. 31 par. 3 of the Constitution).

### Decision of the Constitutional Court

On 6 October 2015 the Constitutional Court declared the blasphemy regulations in accordance with the Constitution (case file SK 54/13). The Court stated that the definition of blasphemy is indeed very general, but the notions of “religious feeling” and “objects of worship” were clarified and determined in an extensive jurisprudence concerning art. 196 of the criminal code. Moreover, those notions do not raise any doubts in a social and cultural context. The Constitutional Court argued furthermore, that there is no possibility for the legislature to avoid using general, colloquial notions. An “absolute elimination of such terms from the law, would lead to a utopian postulate of creating a perfect legal system” – argued the judges.

As to Doda’s complaint that the fine was not in conformity with the right to freedom of expression, the Court recalled that the essence of that right cannot be understood as the right to express defaming and insulting statements which offend feelings of others, or similarly showing

**Article 196 of the Criminal Code is used mostly against artists concentrating their works on religious themes. This throughout the years contributed to a large chilling effect and self-censorship among creators.**

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disrespect with offending and degrading opinions, which are not subjected to the true and false qualification. Only a statement intentionally insulting or deprecating somebody's feelings would be qualified as blasphemy.

It was obvious to the Court that art. 196 of the Penal Code limited freedom of expression. However, the blasphemy law interferes with this freedom only to prevent insults which should not be tolerated in a democratic society. The public debate, in which every citizen has the right to express themselves should be conducted in a cultured and civilized manner, without any harm to the rights and freedoms of others.

The Constitutional Court also referred to the sanction imposed on the singer. Judges found that the fine was not an excessive and burdensome sanction. Therefore it was declared proportionate.

Finally the Court dismissed Doda's argument that the offence was prosecuted by a public prosecutor and not any victim of the offensive speech. The Court found that this fact should not have any substantive impact on the scope of the criminalization. Otherwise, the subjective feelings of the victim would impede the prosecution.

The Constitutional Court missed its chance to eliminate blasphemy from the Polish criminal code. In practice, art. 196 of the Criminal Code is used mostly against artists concentrating their works on religious themes. This throughout the years contributed to a large chilling effect and self-censorship among creators. As the Catholic religion is the majority belief in Poland, the vast majority of the cases opened by the prosecution concerned this belief, leaving aside the others. Article 196 is mostly used by conservative, religious groups, lodging regular complaints to authorities to prosecute actors or public figures.

*Dominika Bychawska-Siniarska is a lawyer with the Helskinki Foundation for Human Rights in Warsaw, Poland.*

## **MLRC Bulletin 2015:2 International Media Law Developments**

Why Reading The First Amendment Isn't Easy; To Confront The Assassin's Veto, Or To Ratify It; Hate Speech Under German Law; Canada-A Middle Ground On Hate Speech; Speech Offences In England And Wales; Restriction Of Freedom Of Press Under Turkish Media Law; Developments In Ireland; Press Regulation In The United Kingdom: Where Things Stand At Present And The Clouds On The Horizon; Data Privacy In The United States

# Photos of Children in California a Misuse of Private Information & Breach of Data Protection When Published in England

By David Hooper

In October 2012 photos were taken by a paparazzi photographer in Santa Monica, California of the British musician Paul Weller – a former member of The Jam and Style Council and his 16 year old daughter Dylan and 10 month old twins John Paul and Bowie under the headline that they were “spotted out for a walk and coffee doing some shopping in Venice, California.” The photos were innocuous and not particularly intrusive. They were, however, taken of a private family trip of the children out with their father partly in the streets and partly in a café which was visible from the street. They did not consent to their photographs being taken and there was some evidence that they were given assurances that the photos would be pixilated. In the event the faces of the children were shown unpixilated.

In April 2014, Mr Justice Dingemans held that the publication of these photographs in England by Mail Online was a misuse of private information and a breach of the Data Protection Act 1998 even though the taking of the photographs and their publication was lawful under the laws of California ([\[2014\] EWHC 1163](#)). Dylan was awarded £5,000 and each twin received £2,500. This month the Court of Appeal affirmed. [Weller v Associated Newspapers Limited \[2015\] EWCA Civ 1176](#).

There is not as such an image right under English law. Furthermore, it is accepted that photographs can be published of people in public places, even though they may object to the photograph if the activity photographed is not private. There is, for example, nothing essentially private about an adult popping out to the shops for a bottle of milk and Sir Elton John was unable to obtain a remedy in respect of a somewhat unflattering picture of him in his tracksuit standing on a pavement in a London street with his driver.

The evidence in the *Weller* case was that Paul Weller had objected to the photograph and that he had been given, he said, an assurance that the children's faces would be pixilated. The question was whether the children could assert a right of privacy and obtain damages for the publication of photographs of a private family occasion, albeit that the picture was lawfully

**In the *Weller* appeal, the approach of the Court of Appeal was that the decision as to whether or not there was a reasonable expectation of privacy was essentially a matter of fact and impression for the trial judge.**

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taken in a public place. The real issue was whether this was a misuse of private information. On the facts of this case the claim for breach of the Data Protection Act added nothing to the claim.

The starting point is the test laid down in the House of Lords in *Campbell v MGN Limited* [2004] UKHL 20. Does the claimant have a reasonable expectation of privacy in relation to this information namely the publication of the photographs? If she does not, the claim fails. If she does, there is then a balancing exercise between that person's privacy rights and the right of the publishers to freedom of expression under Article 10. The test is the same for a child. The right of a child to privacy is not of itself a trump card, but it must be given considerable weight. It would require a very powerful Article 10 argument, for example, exceptional public interest reasons to outweigh a child's Article 8 privacy rights where publication would be harmful to the child. In carrying out this balancing exercise the English court would apply its "common sense and own experience."

Essentially, the English court would apply the five criteria set out by the European Court of Human Rights in *von Hannover v Germany* [2012] EMLR 16. These are:

a general requirement that the private information contributes to a debate of general interest. The English court felt that this was no longer determinative as to how, particularly in relation to photographs, the balance between privacy and freedom of speech rights should be struck;

one looks at how well known the person concerned is and what is the subject of the report;

one considers also the prior conduct of the person concerned;

one reviews the content, the form and the consequences of the publication;

one looks at the circumstances in which the publication takes place.

In the *Weller* case claims were brought only on behalf of the children and not the adults. The court recognised that there might be circumstances in which children would have a reasonable expectation of privacy when an adult would not. The court would look at all the circumstances. In the *Weller* case, the Court of Appeal pointed to five important circumstances:

the attribute of age would be important as well as the impact that the intrusion into privacy would have on the child;

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the Court would also consider the nature of the activity concerned. A child's reasonable expectation of privacy must be seen in light of the way in which its family life was conducted. For example, if the family chose to bring the child on to a red carpet at a public function, the argument for privacy would be undermined. It could be relevant if the child courted publicity. In the *Weller* case Dylan had over a period of a year featured in Teen Vogue, but the Court was satisfied that there was nevertheless a breach of her reasonable expectation of privacy on this occasion, given that the taking of the photographs was without her consent;

the Court would also look at the nature of the intrusion. An argument for privacy would be difficult to sustain if, for example, a child was participating in serious rioting and a photograph was published for the purpose of identifying those involved;

a parent's lack of consent will carry particular weight especially the child is too young to form its own informed opinion on matters of privacy;

the effect on the child is usually likely to be highly material. In this case the 16 year old Dylan complained that the actions of the photographer were threatening and said that she was embarrassed by the publication of the photographs. On occasions there may also be an argument that the security of the child is put at risk by the publication of the photographs.

**What is unsatisfactory about the Court of Appeal judgment is that it did not consider in any detail the weight that it felt should be given to the fact that the publication of this Californian photograph was lawful in California.**

The Court also observed that a person's privacy can be infringed in relation to the publication of information in a public place and it referred to the example of the model Naomi Campbell who was photographed in the street outside a clinic where she was receiving therapy. The argument may be even stronger in relation to the publication of photographs relating to children when they are merely ancillary to the activity taking place. The Court also referred to a test that had been laid down by the Press Complaints Commission in an earlier adjudication namely that the acid test to be applied by a newspaper in writing about the children of public figures who were not famous in their own right is whether the newspaper would write such a story if it was about an ordinary person. This principle had been earlier applied where damages had been recovered in relation to the publication of a photograph of the young child of J K Rowling.

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The Court did recognise the difficulty which could confront newspapers in deciding whether or not it was safe to publish photographs of children. In practical terms it seems that it will be important for picture editors to find out in what circumstances the photographs were taken and particularly whether any assurances were given to the person being photographed or whether there was an objection to the photograph being taken. However, with photographs that come from outside agencies such information may be difficult to obtain. It is likely to be prudent to pixilate the photographs of children where consent has not been obtained to the publication of their pictures. Editors will now see the approach of the courts to such privacy claims and they will have to ask themselves the questions set out above.

In the *Weller* appeal, the approach of the Court of Appeal was that the decision as to whether or not there was a reasonable expectation of privacy was essentially a matter of fact and impression for the trial judge. The Court of Appeal will not interfere with the decision of fact unless the judge erred in principle or reached a conclusion which was plainly wrong or that his decision was one that could not reasonably have been reached. The publication of unauthorised celebrity photos has become more difficult. There must always be a real risk that a trial judge will prefer the evidence of the celebrity whose privacy has been invaded to that of the paparazzi photographer.

What is unsatisfactory about the Court of Appeal judgment is that it did not consider in any detail the weight that it felt should be given to the fact that the publication of this Californian photograph was lawful in California. The question in the *Weller* case was whether in respect of the publication in England the children who had close links to England had a reasonable expectation of privacy in relation to the publication of the photographs *within the English jurisdiction*. The Court of Appeal noted that the judge *had* taken into account the fact that the publication was lawful in California and in consequence it was unwilling to interfere with the judge's decision of fact. However, it was noted that the judge had not given much reasoning as to his decision in that regard and it may very well be that in future cases it will be possible to argue that greater weight should be given to the fact that this was the publication of a picture which had been lawfully taken and published in a foreign jurisdiction.

*David Hooper is a lawyer with RPC in London. Plaintiffs were represented by barristers David Sherborne and Julian Santos of 5RB and solicitors firm Clintons. Associated Newspapers was represented by barristers Antony White QC, Matrix Chambers, and Catrin Evans, One Brick Court; and RPC.*

# Across the Pond: Updates on UK and European Media Law

## *Contempt of Court, ECHR and Privacy, Responsible Journalism Defense*

By David Hooper

### GQ Profile of Phone Hacking Trial a Contempt of Court

#### [Her Majesty's Attorney General - And - Condé Nast Publications Limited](#)

Between October 2013 and June 2014 the criminal trial took place of a number of employees of News International accused of being involved in a conspiracy to hack telephones and make corrupt payments to officials in return for newsworthy stories. GQ sent the well-known journalist Michael Wolff to do a profile of the trial which it was envisaged by GQ would be published at the end of the trial. GQ was, however, advised that the article could be published during the trial and in March 2014 the article was published under the headline “*Hacking Exclusive! Michael Wolff at the Trial of the Century*” with a sub-headline “*The Court without a King*”. The point Wolff was making was that no proceedings had been brought against Murdoch but that his influence overlaid the trial. It was a perfectly reasonable article to write after the trial but the problem was that it was written in mid-trial while the Defendants were giving evidence and thus came up against the British Contempt of Court laws.

There was no question but that GQ was acting in good faith and had only published the article when advised that it was lawful to do so. However, under the Contempt of Court Act 1981, contempt is a matter of strict liability and it is the court which decides whether or not the “*publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced*” while the proceedings are active.

Complaints were made by defence counsel to the trial judge who referred to the matter to the Attorney General to bring a Contempt of Court application, if he deemed it appropriate..

Once a person is arrested or charged, the proceedings become “active” and strict liability for contempt of court can arise until the proceedings are concluded. In the absence of specific orders by the court everything that is given in evidence can be reported. However, impressionist sketches and the expression of subjective opinions about the trial can carry the risk of contempt proceedings.

Although 61% of the newsstand copies were retrieved and the story removed from the magazine after complaint was made, it not having been put online and although there had been massive pre-trial publicity of a much more serious nature, the court held that there *had* been a

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substantial risk that the course of justice would be seriously prejudiced or impeded. Substantial risk means a risk which is more than remote or not merely minimal and that it must be judged at the time of publication. Furthermore, the fact that there is some risk of prejudice by reason of earlier publications is not conclusive. If several newspapers publish prejudicial material, they cannot escape by contending that the damage has been already done.

The court concluded that there *was* a risk of the publication coming to the jurors' attention, that there was a risk of serious prejudice and that one could not say that a jury could have been relied upon to use their common sense to ignore the offending words. In the view of the court, the article "*plainly implied*" that Rupert Murdoch had participated in phone hacking, that the defendants must have been aware of the phone hacking and that the defence was funded by him and conducted on the defendants'

instructions so as to protect the interest of Murdoch in a way that might also serve their acquittal. The fact that similar opinions had been widely expressed earlier in the media and before parliamentary committees was of no avail once the proceedings became active. The article included some material which was not before the court such as that the defendant Rebekah Brooks had received a settlement of £10.8m from Murdoch. The article also described Brooks as "*clever, sharp, winning, seductive, cunning – well prepared to do what is required*". Of Coulson it was

said that "*He is the ultimate keeper of secrets. Does anyone know more than Coulson?*", when the issue in the trial was whether they knew about the hacking.

These comments might appear mild by American standards particularly in a case which had attracted such massive pre-trial publicity much of it of a distinctly prejudicial nature. The English court ruled that a contempt of court had been established. There will be a further hearing when the court is likely to impose a fine and an order for the payment of the legal costs of the Attorney General in bringing the matter before the court.



**The original cover of the April 2014 edition of GQ touted Michal Wolff's phone hacking article, but the article was removed and cover changed after the matter was referred to the Attorney General to consider contempt of court proceedings.**

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**Privacy Rights And Public Interest:  
An Important ECHR Decision Concerning The Litigious Monegasque Royals**  
**[Couderc and Hachette Filipacchi v France](#)**

In May 2005 Paris Match published an article about Prince Albert of Monaco which was headlined *Prince Albert of Monaco's secret son: according to certain British and German newspapers Albert of Monaco is the father of a 19 month old boy*. As the headline suggests, the story had been previously ventilated – as it happens in the Daily Mail and the German magazine Bunte. As Prince Albert was at the material time, single and childless and was the ruler of Monaco – a place famously described by the writer Somerset Maugham as “*a sunny place for shady people*” the story had fairly self-evident public interest given the dynastic and financial implications of his procreation. By that time, Prince Albert had admitted paternity having done so before a notary and having made financial provision for the boy albeit not to the extent desired by the mother Ms Coste which might perhaps explain why she was sharing these family matters with the readers of Bunte and Paris Match.

The French law of privacy kicked in big time in the case. Paris Match was ordered to pay €50,000 by the Nanterre Tribunal de Grande Instance and this was upheld by the Versailles Court of Appeal – the court holding that Prince Albert's privacy rights under Article 8 of the European Convention of Human Rights and Articles 9 and 1382 of the French Civil Code having been breached. Furthermore, Paris Match was ordered to publish the ruling of the Versailles court on one-third of the front cover of Paris Match and just to round things off, the Court of Cassation upheld the ruling of the Versailles court. Paris Match appealed to the European Court of Human Rights.

In the meantime, Prince Albert had also taken action against Bunte in Germany. However, the German court upheld the magazine's view that “the child's parentage which would normally have been in the private sphere was a matter of legitimate public interest,” although it did rule that the photograph of Prince Albert holding his offspring could not be published. The German court held that the public had a legitimate interest in being informed about this matter and it was important for the public to receive this information with its political and financial overtones as part of a debate of general interest.



**Paris Match's cover story on Prince Albert's "secret son."**

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Broadly speaking, the Chamber of the European Court of Human Rights in May 2014 concluded that the French decision, held by a majority of 4-3, was a breach of Article 10 of the European Convention of Human Rights on very similar grounds to those applied by the German court.

The French Government as respondent to the appeal appealed to the Grand Chamber of the European Court of Human Rights and that took an even more robust view when it reached a unanimous decision that there had been a breach in France of Paris Match's Article 10 rights. The Grand Chamber held that the article had contributed to a debate on a matter of public interest. The article was not a matter of sensationalism and it could not be reduced to it being said that the publication was simply to satisfy the public's thirst for information about the private lives of others. This went beyond the private sphere given the hereditary nature of the Prince's function as the Monegasque head of state.

The case is, therefore, an important one coming as it does from the Grand Chamber and striking a balance between continental rights of privacy and considerations of public interest which are likely to be found helpful by the media.

**Reynolds' Defence Upheld: Sunday Times'**  
**Use of a Sting Vindicated**  
[Yeo v. Times Newspapers Limited](#)

Tim Yeo was a Member of Parliament from 1983 to 2015. In his last five years he was Chairman of the House of Commons Energy and Climate Change Select Committee. He had held various government posts principally in the environmental field. Prior to entering parliament he had worked in the City of London for 13 years which makes his behaviour even more surprising.

Since the then Prime Minister set up a Committee on Standards in Public Life in 1994 there have been strict rules of conduct for MPs relating to obligations of integrity, avoiding a conflict between personal and public interests, prohibiting acting as a paid advocate in any proceedings in the House of Commons and ensuring that when an MP took part in parliamentary proceedings which related to an area where he had financial interests the benefit that he was receiving should be properly registered and declared. Yeo had acquired something of a reputation with political bloggers for apparent conflict between his business interests and his role as Chairman of the Select Committee. One would get the drift from the headlines such as “Yeo's Lump for Dump” and “Why is Tim Yeo Backing Fracking.”

**The case is, therefore, an important one coming as it does from the Grand Chamber and striking a balance between continental rights of privacy and considerations of public interest which are likely to be found helpful by the media.**

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In any event Yeo had lawfully taken up various directorships in four companies which he had properly declared which produced a total income of just under £200,000 a year for some 560 hours work. All told he had in the period 2010 to 2013 earned about £530,000 from private firms since he had taken over chairmanship of the Select Committee in 2010 and had shares and options worth £585,000 in low carbon companies that had employed him. He was apparently negotiating at the time of the Sunday Times article for two other directorships.

The issue of political lobbying and of MPs for hire had for some time been a matter of political controversy and the subject of various stings by the Sunday Times. However, when on 13 May 2013 two members of the Sunday Times Insight Team sent an email offering Yeo the opportunity of a consultancy for a day or two per month with “*an extremely generous remuneration package*” relating to a Korean leading edge solar technology developer, Yeo fell for it hook, line and sinker. The journalists posed as a fictitious consultancy firm named Coulton & Goldie Global. However, such was the eagerness of Yeo to add to his portfolio that notwithstanding his business and political background he failed to make the rudimentary checks which would have enabled him to sniff out this particular rodent.

To the contrary he gladly accepted their invitation to the then Michelin starred restaurant Nobu. There he expatiated on the services that he could provide for the solar energy company oblivious that his words were being recorded and filmed by secret cameras. A monthly salary of £7,000 was mentioned for approximately a day's work per month, but in fact the journalists on the following day emailed Yeo to say that the job was not available. Yeo responded by expressing relief saying that it become increasingly apparent during the meeting that what was wanted from him was lobbying which he said was a function which was not compatible with his position as an MP and Chair of a Select Committee. However, the trial judge, Mr Justice Warby, was to conclude that Yeo, having learnt that he was not to be offered the opportunity felt it best – with nothing to lose by doing do – to cover his back.

Thereafter the journalists put together two articles about Yeo's lobbying activities the first of which was to be published on 9 June 2013. On Friday, 7 June when the first article had been written and legalled a text was sent to Yeo informing him that a detailed email had been sent to him. At the time Yeo was driving home but was sufficiently unsettled by the text to forget to fill up with petrol and ran out. He had to be rescued by his wife who brought a petrol can. Yeo got home over two hours later and was horrified when he read the email. He called for Carter-Ruck

**When on 13 May 2013 two members of the Sunday Times Insight Team sent an email offering Yeo the opportunity of a consultancy for a day or two per month with “an extremely generous remuneration package” relating to a Korean leading edge solar technology developer, Yeo fell for it hook, line and sinker.**

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who, at 4pm on the Saturday, sent a lengthy letter denying that he had offered to serve as a paid advocate or that he had tutored the Chief Executive of GB Rail Freight on what he should say when giving evidence to a Select Committee or that he ever offered to commit one day a month to helping Coulton & Goldie Global. The video of the Nobu meal was to show the facts were very different.

The 9 June article ran to 27 paragraphs and it alleged in effect that Yeo was prepared to and had offered to act in breach of the MP's Code of Conduct by acting as a paid parliamentary advocate for a foreign energy company and also contained defamatory expressions of opinion to the effect that Yeo had acted scandalously and shown willing to abuse his position as an MP. A similar article was published on 23 June 2013 which Mr Justice Warby concluded carried the defamatory meaning that Mr Yeo had been selling himself as a parliamentary advocate for paying clients and had thereby offered to act in a way that was in breach of the Rules of the House of Commons.

The defence of the Sunday Times was that this story was covered by the defences of responsible journalism – the *Reynolds* defence - truth and honest opinion. In effect the paper had to prove the truth of the central defamatory allegation contained in the 9 June article that Mr Yeo was prepared to act and had offered himself as willing to act in a way that was in breach of the Code of Conduct of the House of Commons by acting as a paid parliamentary advocate who would:

- (a) push for new laws to benefit the business of a client for a fee of £7,000 a day; and
- (b) approach Ministers, civil servants and other MPs to promote a client's private agenda in return for cash.

Mr Justice Warby concluded that the paper had discharged that burden. He likewise concluded that the articles were defensible as an expression of honest opinion. There the requirement is that the statement must be a matter of public interest, it must be recognisable as comment as distinct from an imputation of fact, it must be based on facts which are true or protected by privilege, the article must explicitly or implicitly indicate those facts at least in general terms and it must be a comment which could have been made by an honest person.

However, at the heart of this case was the defence of responsible journalism which protects the publication of defamatory matter to the world at large where it was in the public interest that the information should be published and where the publisher had acted responsibly in publishing the information. This defence was found by Mr Justice Warby to have been made out. Mr Yeo's defence whereby he denied that the publication was justifiable in the public interest and that the newspaper failed in its duty of giving a fair and accurate account of the totality of the evidence and that the article gave an unfair and inaccurate account of his

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behaviour was rejected by the Judge. He concluded that this was a topic of real and abiding public interest at the time of publication.

The Judge also analysed the applicable principles of responsible journalism. The question in each case was whether the defendant had behaved fairly and responsibly in gathering and publishing the information. The publisher must have taken the care that a responsible publisher would take to verify the information but this depends on the nature and source of that information. A publication may be protected by *Reynolds* privilege even if the journalistic exercise has, in some respect, fallen short of the standards to be expected of a responsible journalist.

A *Reynolds* defence is unlikely to get off the ground unless the journalist honestly and reasonably believed that the statement was true. The journalist must also carefully consider the public interest bearing in mind that the allegations may not have been fully investigated or their accuracy determined and weigh these against the risk of unjustified damage to the reputations of those affected. It is not necessary to ask whether every aspect of the journalistic process was carried out to perfection but it was necessary to consider what the journalist knew and believed about Mr Yeo's conduct and whether it was responsible for them (a) to hold the beliefs that they did about the facts, and (b) to publish what they did.

The Judge also considered Convention jurisprudence and in particular *Lingens v Austria* (1986) 8 EHRR 407 “*Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders ... the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual.*” He also considered the case of *Hrico v. Slovakia*, (2005) 41 EHRR 18 “*there is little scope under Article 10(2) of the Convention for restrictions on political speech or on the debate of questions of public interest.*”

The Judge also considered the extent to which Article 8 could impact on what were essentially Article 10 cases. The view Mr Justice Warby took was whether the publication undermined the “personal integrity” of claimant as distinct from merely harming reputation. Article 8 affords politicians carrying out their public or official functions limited protection against media coverage. The mere fact that the article represents a substantial assault on a person's honesty does not necessarily mean that it would be “undermining personal integrity”. Personal integrity in this context, the Judge ruled, appears to have connotations of “wholeness.” A defamatory attack can, it appears, undermine personal integrity if it has “an inevitable direct

**The Judge also analysed the applicable principles of responsible journalism. The question in each case was whether the defendant had behaved fairly and responsibly in gathering and publishing the information.**

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effect” on private life which is severe such as an ostracisation from a section of society. In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life. Here the articles related wholly and exclusively to Yeo's conduct in his public roles and not in any way to his private or personal life.

The Judge upheld the defence of responsible journalism noting that the decision to investigate Mr Yeo had not been challenged at trial nor had the decision to use subterfuge been criticised nor the journalists' honesty impugned. Furthermore it was accepted that they believed that their story was in the public interest. The implications for journalists of this ruling and the steps they should take to obtain the benefit of the responsible journalism defence are set out in an [RPC blog on the case](#).

The evidence of Mr Yeo was criticised in very forthright terms by the Judge, his evidence was “*utterly implausible*.” The Judge shared the *incredulity* of Gavin Millar QC (Counsel for the Sunday Times) - “*answers involving bluster*” - “*he took on an air of exasperation if not anger, which struck me as creative or at least exaggerated for effect*.” Yeo's explanation of what he had said about (unlawful) paid advocacy being a joke was dismissed as “absurd.” Yeo “*waffled*,” his evidence was “*rambling*” and perhaps best of all, “*when a fish wriggles on a hook, it goes deeper into the mouth and guarantees that the fish will not escape so with Mr Yeo's evidence on this issue*” and “*unworthy of belief*.”

The trial lasted one week and there have been various pre-trial applications. Given Yeo's conduct of the case and his rejection of modest settlement terms he was ordered – by consent – to pay costs on the higher indemnity scale. Pending assessment of what those costs amounted to he was ordered to pay £411,000 by 24 December 2015. His reputation may prove to have been torpedoed below the waterline but the financial consequences for Yeo may not be quite as disastrous as they appear as he had secured After The Event insurance.

Yeo proved to be a particularly bad risk for the insurers and indeed for Carter Ruck who were doing the case on a Conditional Fee agreement which would probably have entitled them to double their ways by way of success fee if Yeo had won his case. As it was, with Yeo losing the case they are unlikely to be paid their costs of £580,000 – a salutary reminder of the perils of political libel cases and the risk a Claimant faces in defeating a responsible journalism defence where the steps taken to compile the story are carefully recorded and where there is no evidence to impugn the conduct of the journalists.

Gavin Millar QC and Ben Silverstone of Matrix chambers, instructed by RPC, represented the Sunday Times. Claimant was represented by Desmond Brown QC and Victoria Jolliffe instructed by Carter-Ruck.

*David Hooper is a lawyer with RPC in London.*



# **MLRC Annual Meeting Reviews Accomplishments and Plans for Next Year**

The Annual Meeting of the Media Law Resource Center, Inc. was held on November 11, 2015 at the Grand Hyatt New York. Board Chair Lynn Oberlander called the meeting to order.

## **Elections of Directors**

The membership elected Randy L. Shapiro, of Bloomberg L.P. to the Board, to serve a two year term starting January 2016.

Five currently serving directors were reelected for two-year terms: Marc Lawrence-Apfelbaum, Time Warner Cable; Gillian Phillips, The Guardian; Kenneth A. Richieri, The New York Times Company, Regina Thomas, AOL; and Kurt Wimmer, Newspaper Association of America.

Directors who were elected last year and will be entering the second year of their two-year terms are: Jonathan Anshell, CBS Broadcasting, Inc.; Lynn Oberlander, First Look Media; Mary Snapp, Microsoft Corporation; and Susan Weiner, NBCUniversal.

## **Finance Committee Report**

Kurt Wimmer delivered the Finance Committee's report. He referred the Board and attendees to the Statement of Financial Position and noted that MLRC is in a strong financial position at year end. Dues are up, reflecting the increase in DCS annual dues instituted in 2015. MLRC's reserves are holding strong. And the Finance Committee is looking at new investment strategies that would provide a greater return on investment of the reserve.

## **Executive Director's Report**

Executive Director George Freeman introduced the MLRC staff and thanked them for their work throughout the year and for their assistance with today's events.

He reported that membership is up, which is a great accomplishment in the current environment, with new international and digital company members. MLRC will continue to do membership outreach, e.g., through Northern California meetings with digital companies.

MLRC concluded a contract with Lexis to print the MLRC 50-State Surveys in hardcopy and e-book form. MLRC will continue to be responsible for the content of the books, but Lexis will take over production and distribution of the books. The e-books will allow users to access cases cited in the books electronically. This will be added value for the membership. The dinner

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program includes a page announcing the new partnership with Lexis. The Libel book will be out in December. Lexis will offer price discounts for members to buy the books and will be contacting MLRC members to market the books, as well as using its marketing expertise to grow sales of the books.

MLRC renewed its lease at 520 8<sup>th</sup> Avenue for a ten year term (through 2027) at a good price in the current market. MLRC will look to sublet some empty office to gain additional revenue. MLRC's current subtenant may leave at the conclusion of its lease in March 2017 and that space may also be available for sublease.

George reported on MLRC's successful conference in Paris held on June 1. The goal of the conference was to reach out to lawyers in continental Europe – to proselytize on free speech issues, as we have done in London; and also to encourage new membership.

There will be new capital expenditures of approximately \$25,000 to upgrade MLRC's member database software. MLRC will upgrade to the IMIS 20 system. MLRC will also expend approximately \$50,000 on upgrades to its website. This will provide greater functionality with respect to conference registrations, committee management, and password recovery.

A question was raised about paywall protected content and whether more material could be available ungated. That is something that MLRC will review.

George reported that the MLRC Institute lost its outside funding and staff attorney. After a meeting of the Institute Board, it was decided the Institute should shift focus from its Speakers Bureau project to a new initiative of providing legal training seminars for young journalists, bloggers, and freelancers. The Board felt that one-day workshops on media law topics for journalists would fulfill the Institute's mission of fostering First Amendment values and could be done without seeking additional funding.

Another suggestion was for MLRC to put out short libel and privacy primers for journalists. Historically there has been reluctance for MLRC to produce such primers out of concern that a primer could be used by the plaintiff's bar in media litigation. However, it was noted that the benefit of producing such guides could outweigh the risk of the primer being used against journalists in litigation. George and Sam Fifer will consult the PrePublication Committee to discuss further.

On policy matters, George Freeman noted that MLRC was very active over the year with discussions over the proposed federal anti-SLAPP statute; right of publicity legislation; rules governing access to police body cam footage; and drone legislation. MLRC may also join the National Press Photographers Association in letter to the New York State Office of Court Administration in support of cameras in courts.

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Finally, George noted that planning is well underway for the next Virginia Conference on September 21-23. And an open planning meeting will be held on Thursday evening Nov. 12 for members to weigh in with suggestions for the program.

### **Reports on the London and Miami Conferences**

MLRC Deputy Director Dave Heller reported on MLRC's conferences in London and Miami. The 2015 London Conference was our largest to date with 236 delegates, including lawyers from Eastern Europe and Turkey. The conference is in the black due to the registrations and generous support of the many firms and companies who sponsored the conference, including Bloomberg and Hiscox and their signature conference receptions. The opening session featuring Burt Neuborne and Geoffrey Robertson was among the substantive highlights. And he drew attention to the excellent set of Bulletin articles for the conference, including a chapter from Burt Neuborne's book and several articles discussing the complexities of hate speech laws. Feedback on the Law Society as a new conference venue was also very favorable.

MLRC's third conference on Issues of Concern for Hispanic and Latin American Media was held on March 9 at the University of Miami. Approximately 70 lawyers attended, including over a dozen from Latin America (Argentina, Brazil, Columbia, Mexico, and Costa Rica).

The next conference is scheduled for March 7, 2015 at the University of Miami. Among the topics for the conference are: the situation in Cuba in light of restored diplomatic relations between our countries – and what if anything that's meant for press freedom; and content, production, IP and deal-making issues surrounding the Summer Olympics in Brazil.

### **Reports on the MLRC Forum and Entertainment Conference**

Deputy Director Jeff Hermes gave a preview of the upcoming Forum session. The panel discussion will include U.S. and European law on incitement and hate speech (including the recent *Elonis*, *Delfi* and *M'bala* decisions) and implications for online news sites hosting controversial user comments.

The next Entertainment Law conference will be held on January 14 at the LA Times Building in Los Angeles. The theme is the "Sony Hacks One Year Later - Reverberations in the Industry and the Law. The conference includes three sessions. The first is on the Future of Theaters – The Role of Traditional Distribution in the Digital Era, focusing on mainstream channels of distribution post-Sony. The second session is On the Digital Battlements – addressing security issues arising out of Sony. The third session is a First Amendment session on publishing leaked information from the journalistic and industry perspectives. The panel will

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include Aaron Sorkin, and Prof. Eugene Volokh; and George Freeman will moderate. The conference has a record number of sponsors. MLRC is continuing to work with the Southwestern Law School's Biederman Center and registration will open next week.

MLRC held two Northern California meetings. The first meeting was on hate, threats, and terror on social media. The second was on the privacy ramifications of the Schrems decision and the end of the EU data safe harbor regime for US companies. So far there has been great participation of tech companies, including participation of senior lawyers. These meetings are a great way of showing that MLRC has an ongoing presence on these issues.

### **Report on MLRC's Digital Conference**

MLRC Staff Attorney Michael Norwick reported that MLRC is continuing to partner with the Berkeley Center for Law & Technology to produce the Digital Conference. And the relationship now in its third year is productive. The May 2015 conference covered net neutrality, managing international legal needs, Section 230, the transformative use doctrine, and developments in digital privacy and security.

The next conference is May 19-20, 2016. Among the conference sessions will be ones addressing digital video and the impact of new streaming technologies such as Periscope and Meerkat; the impact of ad blocking and what stakeholders will do in the new environment; copyright and free speech and the doctrinal impact of copyright injunctions; and an international panel session focusing on data privacy developments.

### **DCS Report**

DCS President Sam Fifer welcomed incoming DCS President Chuck Tobin and noted that a full report on committee activities will be given at the DCS Lunch. He highlighted the invaluable work of MLRC's Committees. He encouraged members to promote committees to their colleagues and young lawyers. Lynn Oberlander agreed with the value of the Committees.

### **Open Discussion**

Lynn Oberlander encouraged attendees to give thought to new projects and initiatives. She thanked everyone and the meeting was adjourned.