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



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MEDIA LAW RESOURCE CENTER

ANNUAL DINNER Wednesday, November 12, 2014

Privacy in the Public Eye: A Conversation with Hugh Grant



Hugh Grant Actor, and more recently campaigner



Katie Couric Global Anchor of Yahoo News

Cocktail Reception at 6:00 P.M. Sponsored by AXIS PRO

Dinner at 7:30 P.M.

Grand Hyatt New York Empire Ballroom, 109 East 42nd Street at Grand Central Station

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For further information please c	contact Debra Danis Seiden at dseiden@medialaw.org or 212-337-0200 ext. 204		

MLRC DEFENSE COUNSEL SECTION

2014 ANNUAL MEETING

Thursday, November 13, 2014

Lunch will be served 12:00 NOON to 2:00 P.M.

Meeting will begin promptly at 12:30 P.M.

Proskauer Rose

Eleven Times Square - Conference Room 2700

Visitor entrance is on the NE corner of 41st Street and Eighth Avenue.

Price per person: \$36.00

We are required to submit a list of attendees prior to the event for security purposes so please send in your reservation as soon as possible!

RSVP by November 3, 2014

Reservations are not refundable for cancellations received after Friday, November 7, 2014.

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For further information contact Debra Danis Seiden at dseiden@medialaw.org.

MLRC DEFENSE COUNSEL SECTION

2014 ANNUAL MEETING

\$36.00 per person includes lunch.

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Please reserve _____ seats at the DCS Annual Lunch Meeting for:

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	Please list names of individuals attending below (print clearly)		
Name:	E-mail:		

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For further information contact Debra Danis Seiden at dseiden@medialaw.org. TELEPHONE: 212-337-0200 Fax: 212-337-9893 www.meDiaLaw.org

From the Executive Director's Desk By George Freeman

As I write this, I am in my third week at the MLRC, and I am very excited about leading this wonderful organization in the coming years. For starters, I thank the Board of Directors for selecting me and having the confidence that I will keep MLRC vibrant into the challenging future. I also thank the well over 100 members who were kind enough to write, welcoming me to this new position and offering their

participation and support.



George Freeman

Of course, seven days into this new gig came our Biennial Media Law Conference in Reston, Virginia. Since I did perilously little in planning it, I can be objective: it was a rousing success. We had record registration and attendance numbers: over 390 registered, 60 more than our next best number many years ago, and over 380 attended.

Moreover, the over 40 evaluations we have received thus far confirm that substantively it offered members what they wanted: interesting and timely programs, led and participated in by real media experts, which will help attorneys – both in-house counsel and out - in their everyday practice.

Many attendees remarked that the program certainly reflected the new digital environment in which we find ourselves. This was not your father's Times v. Sullivan agenda (though it is that great case's 50th anniversary). Every plenary session focused on the digital world and the future, from

privacy issues and the cloud to drones and the right to be digitally forgotten. Indeed, though there was the usual good-natured griping about the Conference's crowded and intense work schedule, the three most popular plenary sessions were one on Privacy which began at 8:20pm, one on Drones at a breakfast which was scheduled for 7:45 am (after a long after-party night for many attendees), and the finale on The Next Big Thing, which was the last event of the conference as people were strategizing their escape to the airport. (Aside: isn't Dulles about the ugliest and least efficient airport in the country?)

The above leads me to three points: First, the resilience and interest level of our audience. Despite the rigorous schedule, attendees were excited about their learning experiences, enthusiastic about participating in the breakout and boutique sessions, and really went with the program. In fact, my biggest shock came when I opened the door to the ballroom for the final lunch and Next Big Thing program on Friday afternoon, expecting a half-filled room, and found every table occupied. We had to make the hotel concoct about 100 more box lunches than we had predicted. (This prompts me to sincerely thank two MLRC staffers who worked for months on the program, and then worked heroically at the hotel, Debby Seiden and Amaris Elliott-Engel.)

Second, it leads me to answer here a question I received dozens of times in Reston, whether my administration will lead to the "Boca-ization" of the conference. The answer is a resounding "no". (Btw, while I assume Dulles is named for Secretary of State (of my childhood) John Foster Dulles, I assume Reston is not named (as might be appropriate) for former New York Times star columnist James "Scotty" Reston.) The ABA Communications Law Forum's Boca Conference is characterized for its social ambience, time for athletics and more esoteric programing, such as its series of retrospective programs looking at big cases many years after.

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The MLRC conference is respected for its morning-to night working schedule and its on-the-ground, very practical, learning opportunities. I believe people who register for each know what they are getting; more important, by having different characteristics, they are complementary. I would like to keep it that way, rather having the two morph into mirror images of each other.

Finally, I think the enthusiasm and energy displayed by everyone at Reston vividly confirms what Floyd Abrams touched on in his talk honoring my predecessor Sandy Baron. He described the audience at the Conference, the Media Bar, as unique – as more interesting, more collegial, more spirited than any other groups of lawyers he knew. Not because I have known and admired Floyd for 40 years now (within a year of how long I've known Sandy), but because, as usual, he is right, I totally agree – and that is despite the fact, as I came to learn all too well in my short stint recently at a law firm, many of us are competitors for business.

But even beyond that, I found the energy level and enthusiasm at the Conference both startling and wonderful. No reception was long enough for attendees to be ready for a meal; they just wanted to keep gabbing. The excitement in talking to friends, colleagues and even new acquaintances was palpable. Indeed, while I was in a 2nd floor room at a London Conference Planning Meeting, I couldn't help but hear the excited din coming from the 1st floor bar, where the Next Generation Media Lawyer Committee Social Hour was confabbing (fueled perhaps by free drink tickets provided by MLRC).

I have attended MLRC Biennial Conferences since the first one, in a hotel basement at O'Hare Airport in 1983. But I am not sure I've ever seen the energy level and high which were present at last month's Virginia Conference. Let's revive it at our Forum meeting on the afternoon of November 12 in New York when we will discuss the very practical effects on American lawyers of the EU decision on the right to be forgotten, and, even more so, that evening at our Reception and Annual Dinner. I would think having Hugh Grant and Katie Couric as our speaking duo at dinner shouldn't diminish that energy!



MLRC Annual Dinner Wednesday November 12, 2014

Privacy in the Public Eye: A Conversation with Hugh Grant Moderated by Katie Couric

Grand Hyatt, New York City * RSVP by October 31

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September 2014

MLRC Presents First Amendment Leadership Award to Sandy Baron

At this month's Media Law Conference, MLRC presented its First Amendment Leadership Award to Sandy Baron, who retired from MLRC after almost 21 years as its executive director. The award honors attorneys who have made stellar contributions to the development of First Amendment law and to MLRC – and Sandy was a most worthy recipient.

The award was presented to Sandy by her former boss and leading First Amendment luminary Floyd

Abrams. Among other things, he recognized her achievements in fostering and developing the media law bar with irrepressible energy and enthusiasm. "The enduring reality about Sandy is that she's changed the world enormously for the better. In an area in which everyone says he or she loves the First Amendment but in which true and consistent and meaningful supporters of the First Amendment are few, Sandy has been a stalwart First Amendment defender and advocate. Her stewardship of this organization has both defended

and advanced the First Amendment significantly. She deserves our gratitude and appreciation and I'm delighted to have the opportunity to present to her the MLRC's First Amendment Award."

Addressing nearly 400 or her colleagues and friends Sandy made the following remarks:

First, I want to thank Floyd Abrams. Not merely for tonight, but for years of friendship and support. When I first met Floyd, I was involved with an organization seeking to regulate media content. But for Floyd, I might have stayed on that path, or in producing television programming, my first jobs out of law school– and no doubt been represented at some point by one or more



Sandy Baron

of you! Floyd made the difference, as he so often does. Thank you.

And thank you, all of you, for what you have meant to me and to MLRC.

How far we have all come together.

When I joined this organization – then the Libel Defense Resource Center – it, as the name suggests, focused on libel, with a nod to privacy – that's the Prosser four prong privacy – and reporters privilege.

These remain critical issues. Rumors to the contrary, libel is not dead, but remains an active media law area pre and post-publication. Reporters privilege continues to reflect deeply important principles. It is a target for those who would cabin or defeat it. MLRC members still need to attend to these areas of law. Protections once won are never out of risk, and require our vigilance. But it isn't enough any longer for MLRC or media lawyers to focus only on these and other traditional media law areas.

MLRC's docket today reflects the

considerably wider and growing list of issues that engage media counsel. And, at the same time, MLRC has expanded to embrace members from a more diverse cross section of media.

As our perception of media has encompassed all things digital and international, information and entertainment along with news, the growth of this membership to include those with expertise on these areas has been invaluable to all of us.

We, as media lawyers, have to embrace – and in fact, reach out to – any and all new comers to the information and content field. Yes, of course, MLRC

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members need to share a core sense of values, at its most fundamental, starting with:

* belief in utmost protection for free expression;

* respect for independent media -- free of undue government interference and restraints – whether direct interference or intrusions, or those of excessive or overly stringent content-based laws such as libel and privacy.

These are core values.

MLRC provides for its members, who represent so many different kinds of media enterprises, a venue for

finding common ground out of these values, even as MLRC provides a forum for airing disagreements where they arise. We have together created vehicles that promote learning from one another, allow us to strategize, and then go out to obtain what we think is necessary to promote our values – we know, as the LDRC founders knew – that our 1+1 – or more aptly, our 1000 + 1000 or more, add up to more than the sum of our individual parts.

This room is evidence of that, and I am so proud to have had the opportunity to be a part of the growth

of this membership and the MLRC overall, to have been in a position to advocate for our expansion. I am so grateful to have been a part of the world- changing development of media and media law, and our community's growth to encompass both.

I see men and women in this room who have been with MLRC as long as I have. I think we can agree that we have had a remarkably good time even as we felt we were doing good.

To you I say, it is up to us to mentor and encourage new lawyers to join our ranks and find community and fulfillment in this field as we have done.

"In an area in which everyone says he or she loves the First Amendment but in which true and consistent and meaningful supporters of the First Amendment are few, Sandy has been a stalwart First Amendment defender and advocate."

Technology is dynamic, and intriguing. Its unique concerns must be added to our toolkit and those of our younger colleagues. But without freedom for the content it transmits, it is but engineering. All of us need to make the case – with our colleagues, clients, and community - for the commitment to the protections necessary for the creation and distribution of content, regardless of the technology our clients develop or use for its transmission.

On a granular, issue-based level, I have many concerns – both from a defense posture and a more dynamic, let's get them, perspective. Reporters

privilege, data privacy, access, Anti-SLAPP, European Court of Human Rights ... my list of issues is far too long for this thank you. But, I will no doubt be unable to resist the temptation to pitch them, and MLRC efforts on them, over the next two days.

Which perhaps is another way of saying that my passion for all that we have worked on together is not diminished. My optimism for what we can accomplish together is high. Knowing and working with you all has been an evergreen source of energy and inspiration.

I include in that the men and women who are and have been staff of MLRC over the last 20 years. Dedicated, talented people to whom I am indeed grateful. The directors of MLRC, the many members of the DCS Executive Committee and the trustees of the MLRC Institute – to all of whom, I express my deepest appreciation.

My best of wishes going forward to Debby, David, Michael, Dorianne, Amaris, Jake, Andrew, Jeff and George, the current MLRC staff.

I thank MLRC for this honor, but mostly for the honor of working with all of you at MLRC. And while it will be in other ways, I look forward to working with you in the future.

Jury Awards \$1 Million In False Light Damages to Women Falsely Identified as Porn Star

Radio Hosts Relied on Listener Texts and Quick Google Search

On September 26, 2014, a federal jury in the District of Kansas awarded plaintiff, Ashley Patton, \$250,000 in compensatory damages and \$750,000 in punitive damages, after she had been mistakenly identified as a "porn star" by two radio personalities on a morning radio program airing on KRBZ 96.5 FM "The Buzz." *Patton v. Entercom Kansas City LLC*, No. 13-2186 (D. Kan.).

Background

On February 7, 2012, the two hosts of the "Morning Buzz" radio show, known by their on-air identities, "Danny

Boi" and "Afentra," invited listeners to text them with the identities of local porn stars. Two texts with the name "Ashley Patton" were sent to the radio station, and Danny Boi read one on the air, "Ashley Patton, Olathe South." He then Googled the name.

The search returned pornographic images and/or videos of a women named "Ashley Payton," but the

hosts erroneously continued to connect the images to plaintiff, who was a resident of Olathe (a suburb of Kansas City), a graduate of Olathe South High School, and a law student at the time of the radio broadcast.

Danny Boi commented, "Oh God, that poor girl, why would she go into that kind of pornography?" and "Don't choke her, Jesus." Plaintiff was not involved in the porn industry.

Following the broadcast, the show posted on the radio station's website a list of alleged local porn stars, including the plaintiff, and a podcast of the radio show. Plaintiff did not hear the broadcast live, but was alerted to it that same day by a friend who had heard it. She then looked at the radio station's website page identifying her as a porn star and listened to the podcast.

The plaintiff contacted the station's program director who, after two phone calls, agreed to change the name on the website after repeatedly asking the plaintiff if she was, indeed, a porn star. After another phone call to the radio station's lawyer, the podcast was also removed from the station's website. Both plaintiff's name and the podcast were removed from the website by approximately 1:00 p.m. on the day of the broadcast.

False Light Claim

In the lawsuit, filed April 19, 2013, plaintiff sued for false light seeking damages for, inter alia, mental distress, sleeplessness, anxiety, humiliation a n d embarrassment. (A second claim for negligent supervision was dismissed on a motion for judgment summary as impermissible in the absence of a physical injury to the

plaintiff.)

Notably plaintiff did not sue for defamation and did not claim loss of reputation. It is not clear if this was a tactical decision or the result of the one-year statute of limitations for defamation having run by the time the lawsuit was filed.

During the course of the litigation, plaintiff acknowledged that she was not aware of any person who heard her name on the radio show and believed the allegations to be true, and she also acknowledged that the broadcast did not hurt any of her personal relationships or employment opportunities.

The plaintiff chose to bring the action in federal court, (Continued on page 12)



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suing only the radio station's owner, Entercom Kansas City, LLC, a company organized in Delaware with a principal place of business in Pennsylvania. She did not name either radio host, or the individual listeners who texted plaintiff's name to the radio station, individuals who might have destroyed federal diversity.

Summary Judgment Denied

In June, the trial judge, the Hon. Daniel D. Crabtree, denied the defendant's motion for summary judgment on the false light claim. *Patton v. Entercom Kansas City LLC*, (D. Kan. June 6, 2014). The court concluded that plaintiff was a private figure, but under Kansas law she still had to establish that the radio hosts acted with knowledge of falsity or reckless disregard, citing earlier District of Kansas precedent and the Restatement (Second) of Torts § 652(E).

The judge concluded that a jury could find reckless disregard based upon the radio hosts' reliance on two unverified anonymous texts and their misidentification of plaintiff based upon a quick Google search. The court also cited as proof of the hosts' doubts about the allegations their on-air statements that the list, posted on the radio station's website, was an "unofficial porn list" and that "we don't know for sure where these people are from but you guys are owning up to it."

Trial

At a four day trial, plaintiff testified that the defendant's actions have left her humiliated and that she still struggles with anxiety and sleeplessness as a result of this incident which occurred over two years ago. The radio hosts, Afentra and Danny Boi, testified that they had made a mistake on the air; a mistake that defense counsel argued did not amount to a "reckless disregard" of the truth.

A jury of five women and two men, in the first stage of deliberations, awarded plaintiff \$250,000 in compensatory damages. While the jury was deliberating during a second punitive damages stage, the attorneys for both parties entered into a high/low settlement agreement which placed an undisclosed ceiling and floor on damages, and foreclosed the possibility of appeal. The specific terms of the agreement are unknown, and it is not clear whether plaintiff will receive the entirety of the \$1 million verdict.

Plaintiff was represented by Frederick H. Riesmeyer, II and Shannon Cohorst Johnson, Seigfreid Bingham, P.C., Kansas City, MO. Entercom Kansas City was represented by Arthur A. Benson II and Jamie Kathryn Lansford, Arthur Beson & Associates, Kansas City, MO.

MLRC Defense Counsel Section Annual Meeting

Thursday, November 13, 2014 12:00 to 2:00 P.M.

Proskauer Rose, Eleven Times Square, New York City Price per person: \$36.00

We are required to submit a list of attendees prior to the event for security purposes so please send in your reservation as soon as possible!

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September 2014

Texas Court Says "No" to Post Libel Trial Injunctions, "Yes" to Post-Adjudication Removal *Post-Trial Injunction Would Be a Prior Restraint*

By Jim Hemphill

Free-speech advocates in Texas breathed at least a halfsigh of relief on August 29, 2014, when the Texas Supreme Court rejected an argument that the state's long-standing ban on prior restraint should be relaxed in light of modern communication technology. <u>Kinney v. Barnes</u>, 2014 WL 4252272 (Tex. Aug. 29, 2014). However, the court ruled that an injunction ordering the "removal" of speech "that has been adjudicated defamatory" violates neither the federal nor state

constitutions, allowing a lawsuit seeking such an injunction to proceed.

In a companion case argued the same day, the court applied <u>Kinney</u>'s holding to affirm the vacation of a broad injunction against repetition of speech found after a jury trial to be false and defamatory, which also prohibited a long list of allegedly similar speech. <u>Burbage v. Burbage</u>, 2014 WL 4252274 (Tex. Aug. 29, 2014).

Kinney v. Barnes Dispute

Plaintiff Robert Kinney worked as a legal recruiter for BCG Attorney Search, Inc.; defendant Andrew Barnes was BCG's president. Kinney left BCG and started a competing firm. Barnes later posted

statements on his firm's websites implicating Kinney in an alleged kickback scheme while Kinney was employed by BCG.

After some litigation in California, Kinney sued Barnes in Texas, eventually dropping all his money damages claims. Rather, he sought only an injunction (1) requiring Barnes to remove the offending statements from Barnes' websites, (2) mandating Barnes to request that the statements be removed from third-party websites, and (3) enjoining Barnes from making the same or similar statements in the future. Kinney initially also sought an order commanding Barnes to post the that request. Barnes moved for summary judgment, arguing that the

injunction on his website and issue an apology, but dropped

relief sought by Kinney would constitute an unconstitutional restraint on speech. The trial court granted the motion, and the Court of Appeals affirmed. *Kinney v. Barnes*, 2012 WL 5974092 (Tex. App. – Austin 2012) (not reported in S.W.3d).

Texas Precedent on Injunctions Against Speech

Free-speech advocates in Texas breathed at least a half-sigh of relief on August 29, 2014, when the Texas Supreme Court rejected an argument that the state's long-standing ban on prior restraint should be relaxed in light of modern communication technology. In the Court of Appeals, Kinney argued that the requested injunction would not constitute an unconstitutional prior restraint because it would not be "prior" – that is, an injunction would issue only *after* Barnes' speech, and only *after* a judicial determination that the speech was false and defamatory. The Court of Appeals rejected this argument, relying on Texas Supreme Court precedent applying the state constitution to prohibit injunctions against speech.

Article I, Section 8 of the Texas Constitution provides, in relevant part:

Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse

of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.

As early as 1920, the Texas Supreme Court held that an injunction barring speech violated this constitutional prohibition. In *Ex parte Tucker*, 110 Tex. 335, 337, 220 S.W. 75, 76 (Tex. 1920), the court observed that the Texas Constitution guaranteed that free speech "shall be free from

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all species of restraint," and that "misuse" of the privilege of free speech is subject to subsequent, post-speech punishment only: "Punishment for the abuse of the right, not prevention of its exercise, is what the provision contemplates." *Ex parte Tucker*, 220 S.W. at 76.

The *Tucker* court vacated a finding of contempt against a union representative who had violated an injunction against "vilifying, abusing, or using opprobrious epithets to or concerning any party or parties in employment of" a telephone company with which the union was involved in a dispute. Tucker had allegedly made "slanderous epithets to the female telephone operators in [the phone company's] employ." *Id.* at 75.

The Texas Supreme Court reinforced *Ex parte Tucker* in *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253 (Tex. 1983). The plaintiff car dealership sued for libel an unhappy customer who painted on the side of his vehicle that the

dealership sold him a "lemon," and sought an injunction barring the customer from driving around town while displaying the message. The trial court granted the injunction and was affirmed by the court of appeals. The Texas Supreme Court made short work of the case, reversing and dissolving the injunction in a *per curiam* opinion without oral argument. Citing *Ex parte Tucker*, the *Hajek* court stated that "Defamation alone is not a sufficient

justification for restraining an individual's right to speak freely." 647 S.W.2d at 255.

In the early 1990s, a series of Texas Supreme Court decisions stated that the free speech protections of the Texas Constitution – particularly those barring prior restraint – were even broader than those of the First Amendment, based on the language emphasizing subsequent punishment. *See, e.g., Davenport v. Garcia*, 834 S.W.2d 4, 8-9 (1992) ("[O]ur free speech provision is broader than the First Amendment."). However, the court later backtracked, stating, "We know of nothing to suggest that injunctions restricting speech should be judged by a different standard under the state constitution than the First Amendment." *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546, 559 (Tex. 1998).

Kinney sued Barnes in Texas, eventually dropping all his money damages claims. Rather, he sought only an injunction

Texas Supreme Court's Opinion in Kinney v. Barnes

Though Kinney argued that the injunction he sought was constitutionally permissible because it would apply only after an adjudication that the speech to be enjoined was not constitutionally protected, he conceded that he wanted to enjoin post-adjudication repetition of the speech, *and* some future speech. *Kinney* at *5. Justice Debra Lehrmann, writing for a unanimous court, stated that "Kinney's request for injunctive relief may be broken down into two categories": first, an order that Barnes remove the challenged statements from his website, and second, a permanent injunction prohibiting Barnes "from making similar statements (in any form) in the future." *Kinney* at *5.

Before addressing each category, the court surveyed its opinions regarding the scope of the Texas Constitution as compared to the First Amendment, deciding that it "need not determine whether the Texas Constitution provides greater

protection than the First Amendment on the specific issue presented to us, as the U.S. Supreme Court has not definitively addressed it." *Kinney* at *3. The court stated that it would look to federal cases "for guidance, not as binding authority." *Id.*

"Takedown" Injunctions

The court dispensed fairly quickly with the novel issue: whether post-adjudication

injunctions may be constitutional if they are limited to orders that the speech at issue be "taken down" or removed. The court held that an injunction ordering a party "to remove the statements at issue from his websites (and request that thirdparty republishers of the statements do the same)" is not an unconstitutional restraint on speech. "Such an injunction does not prohibit future speech, but instead effectively requires the erasure of past speech that has already been found to be unprotected in the context in which it was made. As such, it is accurately characterized as a remedy for one's abuse of the liberty to speak and is not a prior restraint." *Id.* at *4.

In its discussion of post-adjudication injunctions, the Texas Supreme Court cited only *Ex parte Tucker* and *Hajek*

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v. Bill Mowbray Motors, neither of which included language approving of post-adjudication injunctions. Both cases did, however, recite that punishment subsequent to speech, not restraint prior to speech, is the remedy for "abuse" of free speech. The *Kinney v. Barnes* court – without citing or discussing any additional authority – concluded that a post-adjudication injunction is subsequent punishment, and thus not unconstitutional.

Nor did the *Kinney* court grapple with the possible consequences of post-adjudication injunctions on other media. Presumably, a book publisher with warehoused, unsold copies of a book judged to have a defamatory passage could be prohibited from distributing those copies, and could be ordered to request that bookstores stop selling the book (or ordered to remove the book, if the publisher still holds title to unsold books at a bookstore). While libraries presumably wouldn't be the subject of a suit for adjudication of defamation liability, would they be subject to subsequent injunction suits to remove books? What about newspaper archives?

Post-Adjudication Injunctions Against Similar Future Statements

With regard to the second issue – whether Kinney was entitled to an injunction barring the future utterance of the same or similar statements should he prevail on the merits – the court found this to be "the essence of prior restraint." *Id.* at *5. Noting that the U.S. Supreme Court "has not decided whether the First Amendment prohibits the type of injunction at issue in this case," the court held that an injunction against future speech is not permissible under the Texas Constitution. *Id.*

The majority rejected Kinney's attempt to draw parallels with permissible injunctions against speech adjudicated to be obscene, noting that those injunctions barred only specific speech already held to be constitutionally uprotected, whereas Kinney sought to enjoin speech that was "similar" to the speech at issue. The court also reinforced the Texas law that defamation alone will not support an injunction, declining to join the "small number of states … holding that narrowly drawn, post-trial injunctions against defamatory speech are constitutional." *Id.* at *7.

Justice Lehrmann noted the futility of an injunction that would bar only the verbatim repetition of a statement found to be false and defamatory: "Such an order would only invite the defamer to engage in wordplay, tampering with the statement just enough to deliver the offensive message while nonetheless adhering to the letter of the injunction." *Id.* at *8. Kinney suggested the post-adjudication injunction could also reach speech that was "substantially the same" as that found unprotected, but the court recognized that "expanding the reach of an injunction in this way triggers the problem of overbreadth." *Id.* "Given the inherently contextual nature of defamatory speech, even the most narrowly crafted of injunctions risks enjoining protected speech because the same statement made at a different time an in a different context may no longer be actionable." *Id.* at 9.

Rejecting the notion that a speaker under an injunction could simply move a court to modify or dissolve an injunction if the speaker believed that a change in context made his speech allowable, the court noted, "We think it is no answer that a person must request the trial court's permission to speak truthfully in order to avoid being held in contempt." *Id.*

Kinney argued that subsequent punishment in the form of damages for defamation is often inadequate because defamers may be judgment-proof. The court answered this concern by observing that "the constitutional protections afforded Texas citizens are not tied to their financial status." *Id.* at *11. The court also noted that nominal damages, rather than injunctive relief, are awarded when actual damages are difficult to prove or not claimed, providing a mechanism "of vindicating the plaintiff"s character by a verdict of a jury that establishes the falsity of the defamatory matter." *Id.*

At the oral argument, several justices expressed concern that the Internet may be a "game-changer" (to use the court's term) "because it enables someone to defame his target to a vast audience in a matter of seconds." *Id.* (quoting Kinney's brief). The court made two points in response: first, that the U.S. Supreme Court has steadfastly declined to draw different constitutional lines for protected speech based on technology, and second, that some prior restraints may be allowable, such as when speech "poses a threat of danger." *Id.* at 12.

Application of Kinney v. Barnes in Burbage v. Burbage

Kinney's companion case – argued and decided on the same day – was a dispute over a family funeral home business. In *Burbage v. Burbage*, the owner of the funeral

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home through inheritance, Kirk Burbage, sued his brother, Chad Burbage (who did not inherit an ownership in the home), for statements made on Chad's website, in flyers distributed around town, and in letter to persons who had purchased burial plots in the Burbage cemetery.

Among other things, Chad had alleged that the brothers' grandmother had been the victim of "elder abuse" at Kirk's hands through exercise of undue influence, and that Kirk "has also been known to abuse the dead" (Chad testified that this referred to Kirk's mistreatment of a relative by claiming that she owed Kirk money at the time of her death, while Kirk's lawyer argued that a reasonable reader would equate the charge with "doing something to the physical corpses of the loved ones").

While Kirk, the plaintiff, was represented by experienced counsel, Chad (who is not a lawyer) defended himself at trial. The result was perhaps predictable: the jury awarded Kirk more than \$6.5 million and the funeral home \$3.8 million. For both parties, the largest sums were for future reputation damages and punitive damages (the punitive damages awards were reduced pursuant to Texas' statutory cap). In addition, the trial court entered a permanent injunction barring Chad from making certain statements in the future: a four-page list that included not only a prohibition on repeating those statements found false and defamatory by the jury, but also many other statements, often defined only by broad subject.

On appeal, Chad was represented by *pro bono* counsel. The court rejected Chad's arguments on liability and damages issues (including privilege, jury charge error, and insufficient evidence), but reversed and vacated the injunction. Chad sought Texas Supreme Court review on liability and damages; Kirk sought review on the injunction. The Supreme Court granted both parties' petitions for review.

The Texas Supreme Court vacated all but \$2,000 of the damage award and affirmed the vacation of the injunction. (*See sidebar on damages issue.*) The Supreme Court noted that the injunction "permanently enjoined Chad from 'publishing, disseminating or causing to be published or disseminated, ... to third-parties by any means, ... any statement or representation that states implies or suggest in whole or part' any of four pages of forbidden topics." *Burbage* at *11. In addition to the statements found false and defamatory by the jury, the injunction prohibited Chad from

asserting "that he or *any* third party suffered from *any* of Kirk's selfish, greedy, or unlawful actions." *Id.*

The unanimous court found that "[t]his extraordinarily broad prohibition on future speech need not detain us long." *Id.* Citing its same-day decision in *Kinney v. Barnes*, the court held that the injunction was an "impermissible prior restraint," as are all "[p]rohibitive injunctions of future speech that is the same or similar to speech that has been adjudicated to be defamatory." *Id.*

In a footnote, the court observed that a "mandatory injunction requiring the removal or deletion of posted speech that has been adjudicated defamatory is not a prior restraint on speech," citing *Kinney v. Barnes*. But Chad's website and flyers were taken down before trial, so the injunction did not reach the precise speech found to be false and defamatory, so the injunction was vacated in full.

What's Next?

In the few weeks since *Kinney* and *Burbage* have been decided, no appellate cases have cited them on any injunction issue. It is conceivable, given the frequency with which takedown requests are made to website operators, that the opinions will engender new lawsuits seeking injunctive relief, either solely or along with claims for actual or nominal damages.

If such lawsuits come – particularly if they are filed against traditional media – it will be interesting to see how lower courts apply *Kinney*'s approval of "removal" injunctions to statements published the old-fashioned way, in newspapers, magazines, or books.

In any event, the Texas Supreme Court has drawn a clear line between injunctions prohibiting future speech, which are *never* allowed (even if applied only to verbatim repeating of speech adjudicated to be false and defamatory), and injunctions requiring takedown or removal, which are constitutionally permissible (at least under the Texas Constitution).

Jim Hemphill is a shareholder at MLRC member firm Graves Dougherty Hearon & Moody, PC in Austin, Texas, and is co-chair of the MLRC DCS Litigation Committee. Graves Dougherty shareholder Pete Kennedy argued Burbage v. Burbage in the Texas Supreme Court, and shareholder Bill Christian was also on the briefs.

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<u>Sidebar</u>

Presumed Damages in Texas: Now Nominal Only?

By Jim Hemphill

A line of recent Texas Supreme Court defamation cases appears to have clarified state law on presumed damages, entitling a plaintiff who establishes defamation *per se* and carries its burden of proving actual malice, but lacks evidence of actual reputational damages, to nominal damages only.

These cases have their genesis in *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002), in which a libel-plaintiff judge was awarded \$7 million in mental anguish damages against a public-access cable TV host. The Texas Supreme Court reversed that award and remanded for remittitur, holding that the First Amendment "requires appellate review of amounts awarded for non-economic damages in defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries and is not a disguised disapproval of the defendant." 94 S.W.3d at 605. However, the *Bentley* court also restated the long-standing rule that "Our law presumes that statements that are defamatory per se injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish." *Id.* at 604.

Ten years later, the Texas Supreme Court observed that while presumed damages may be recovered in appropriate circumstances, "the law does not presume any particular amount of damages beyond nominal damages." *Salinas v. Salinas*, 365 S.W.3d 318, 320 (Tex. 2012). But the court also said that "under presumption of damages applicable to libel per se, damages are within the jury's discretion." *Id.* at 321. This seemed to leave open the question of whether a jury had discretion to award more than nominal damages when a plaintiff could not produce evidence to support an award of actual economic damages.

The court continued to nail the coffin shut on presumed damages in *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, 434 S.W.3d 142 (Tex. 2014), a defamation case between two corporate competitors. The jury found defamation *per se* and actual malice, and awarded \$5 million in reputation damages after being charged on presumed damages in a manner consistent with then-existing Texas law (the jury awarded a smaller amount of actual economic damages). The Texas Supreme Court reversed the reputation damage award, holding the plaintiff was entitled to only to nominal reputation damages.

The court held that reputation damages are non-economic, even when sought by a for-profit corporation. 434 S.W.3d at 155. The court then vacated the jury's award of reputation damages because the plaintiff did not have evidence "quantifying" its injury to reputation. *Id.* at 160. The plaintiff was thus entitled only to nominal reputation damages. Setting aside the issue of how non-economic damages are to be quantified, *Waste Management* would appear to restrict damages (other than nominal damages) for corporate libel plaintiffs to only those that are quantifiable – possibly only the functional equivalent of special damages.

Finally, in *Burbage v. Burbage*, 2014 WL 4252274 (Tex. Aug. 29, 2014), the Texas Supreme Court flatly stated that although damages are presumed in defamation *per se* cases, "this presumption yields only nominal damages. Beyond nominal damages, we review presumed damages for evidentiary support." *Id.* at *8 (citation omitted).

Burbage appears to have clarified the law to allow only nominal presumed damages. Though the Texas Supreme Court has not confronted this question recently in the context of a claim against a media defendant, the cases discussed above do not indicate that the outcome in such a case would be any different.

Florida Appellate Court Reverses TRO Enjoining Political Website

Judge Sued Website and Opponent for Defamation and Invasion of Privacy

The "most important"

reason for reversing

the injunction was that

it was an improper

prior restraint on

political speech.

By Robert L. Rogers, III

In an opinion explaining its reversal two weeks earlier of a temporary injunction that prohibited constitutionally protected statements about a sitting judge on the eve of election day, a Florida appellate court explained that its "most important" reason for quashing the injunction was that it was "a classic example of a prior restraint on speech triggering First Amendment concerns." <u>Concerned Citizens for Judicial Fairness, Inc. v. Yacucci</u>, No. 4D14-2971 (Fla. App. Sept. 3, 2014) (Gross, Warner, May, JJ.).

Background

The case involved statements made about a county court judge on a website operated by an electioneering communications organization affiliated with his opponent. The website contained headlines claiming that investigations by the state attorney and a regional newspaper had revealed accusations against the judge of spousal battery, aggravated assault with a firearm, unlawful compensation, and failure

to pay child support. The headlines also linked to full stories in the newspaper about such subjects (most of which were first published more than 20 years ago). The website also contained links to political commercials referencing the same alleged accusations, as well as the judge's salary and the foreclosure of his home.

The judge filed a verified complaint seeking to enjoin the operation of the website, alleging that statements in the newspaper articles linked by the website were false and misleading because criminal charges were never filed. The judge also attached a copy of a Close Out Memo by the state attorney appointed to investigate the criminal allegations that explained in detail why no charges were filed. Following a hearing at which attorneys for all parties appeared, but where no evidence was introduced and no witnesses were called, a circuit court in the county where the judge presided entered an order enjoining the electioneering communications organization "from operating [the website] from disseminating any material contained therein in the form of websites, direct mailers, television commercials, radio commercials and/or any other format for dissemination, or any other information about the Plaintiff." The court made no findings of fact and appears to have accepted the allegations in the complaint as established fact.

Appellate Court Proceedings

To its credit, the Florida Fourth District Court of Appeal acted promptly and stayed the operation of the injunction five days after it was entered (thirteen days before the election), then reversed the temporary injunction nine days later. The District Court of Appeal then issued the subject opinion explaining the basis for its reversal two weeks later.

The District Court explained that the injunction was impermissible for "numerous reasons," including the procedural defects that the injunction order was overly broad, contained no factual findings, and was not supported by evidence. But the District Court stated that the "most important" reason for reversing the injunction was that it was an improper prior restraint on political speech, as the "First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." The District Court explained:

"[P]rior restraints on speech and publication are the most serious and least tolerable infringement on

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First Amendment rights." To allow a temporary injunction such as this one to stand would be to make courts into censors, deciding what candidates can and cannot say. The political process should not be subject to the whims of a local judge who may favor one candidate over another. "The concept that a statement on a public issue may be suppressed because it is believed by a court to be untrue is entirely inconsistent with constitutional guarantees and raises the spectre of censorship in its most pernicious form."

The District Court also reversed the injunction because,

regardless of the political content of the restricted speech, "the general rule in Florida is that temporary injunctive relief is not available to prohibit the making of defamatory or libelous statements," since defamation plaintiffs have an adequate remedy at law (an action for damages). Although other courts in Florida have recognized an exception in circumstances where the defamation plaintiff establishes that the defamatory words were made in furtherance of the commission of another intentional tort, the judge failed to plead facts that would fit within this exception.

Robert L. Rogers, III is an attorney with Holland & Knight LLP in the firm's Orlando office. The plaintiff was represented by Ashley N. Minton of Minton Law, P.A. The defendant was represented by Louis C. Arslanian.

Recent MLRC Publications

MLRC Model Shield Law

The MLRC Model Shield Law was developed by the MLRC Model Shield Law Task Force. It will update a prior Model that we developed a number of years ago. The Model Shield Law has been designed to assist in the creation, or updating, of state shield laws.

MLRC Bulletin 2014 Issue 2: Legal Frontiers in Digital Media

All Native Advertising is Not Equal — Why that Matters Under the First Amendment and Why it Should Matter to the FTC • The Google Books and HathiTrust Decisions: Massive Digitization, Major Public Service, Modest Access • The Authors Guild v. Google: The Future of Fair Use? • The Computer Fraud and Abuse Act – Underused? Overused? Misused?

2014 Report on Trials and Damages

MLRC's 2014 Report on Trials and Damages updates our study to include 12 new cases from 2012 and 2013. Our trial database now includes trial and appellate results in 632 cases from 1980-2013.

Resource Materials on the Definition of "Journalist" and "Media" in Litigation and Legislation

Who qualifies as "the media," it seems, is the perennial million-dollar question in an age when the "pen," the camera, and the "press" are all combined in a single device that fits easily in your purse—if not your back pocket—and everyone is a potential publisher. This updated report offers a review of that question by examining legislative developments and court decisions in a variety of situations, ranging from libel and right of publicity issues, to state shield laws and reporter's privilege changes, to application of state and federal open records laws.

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Eighth Circuit to Sammy Hagar: <u>"Finish What Ya Started"</u>

Court Reverses Grant of Summary Judgment in Libel Case Over Autobiography

By Leita Walker

A libel case involving ex-Van Halen lead singer Sammy Hagar and a former lover is headed to trial after the Eighth Circuit reversed the district court's dismissal on summary judgment. <u>Doe v. Hagar</u>, No. 13-2156 (8th Cir. Aug. 28, 2014) (Bright, Loken, Gruender, JJ.).

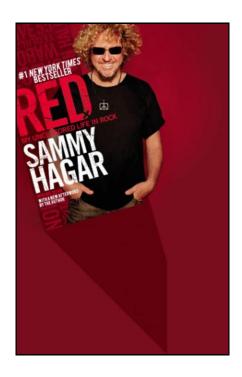
Background

The plaintiff, referred to only as Jane Doe, sued Hagar for claiming in his autobiography *Red: My Uncensored Life in Rock* that, 22 years prior, she had extorted him by claiming she was pregnant with his child.

In fact, in the summer of 1988, the plaintiff did inform Hagar that she believed she was pregnant with his child and the parties negotiated an agreement under which Hagar paid Doe to remain silent as to her belief. Doe also promised to submit the child for paternity testing within six months of its birth, and both parties agreed to keep the agreement confidential. However, no paternity test was ever performed on the child, who died a few days after birth.

In his book, Hagar disputed that Doe was ever even pregnant, writing:

About ten days later, Leffler gets the phone call. She's pregnant. I smelled a setup. . . . I knew it was not my baby. It was extortion. ... A couple days later, Leffler gets another call. The baby died. I don't believe she ever had a baby. She may have had an abortion early on. ... I never heard from her again.



Obviously, it wasn't my baby, and they knew it. They just extorted me as long as they could. No one ever saw her again.

Doe sued for libel per se, false light invasion of privacy, intentional infliction of emotional distress ("IIED"), breach of

> contract, and breach of the duty of good faith and fair dealing. The district court granted summary judgment to Hagar, applying Iowa law to the libel, false light and IIED claims, and New York law to the contract claims (pursuant to a contractual choice of law provision).

Eighth Circuit Decision

The Eighth Circuit reversed except that it affirmed dismissal of the IIED claim and the breach of good faith/fair dealing claim

In considering the libel per se claim, the Eighth Circuit rejected Hagar's argument that Doe's claims were barred by Iowa's prohibition against self-publication. Although Doe had told friends and family that she was mentioned in Hagar's book, the Court held that if certain people read the book *before* Doe told them she was

mentioned in it, then Hagar "published" the statement to those individuals. It concluded that "[i]t is for the jury to determine whether Doe's actions amount to self-publication." *Id.* at 8.

The court also rejected Hagar's argument that the statements were not "of and concerning" Doe because extrinsic knowledge was necessary for a reader to understand that the challenged statements were about her. Relying on Iowa Code § 659.1, the court held that because those who *(Continued on page 21)*

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In a small "win" for the

defense bar, however,

the Eighth Circuit

seemed to confirm what

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lowa, false light claims

require a showing of

actual malice.

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already knew the "story" of Hagar and Doe would recognize her as the subject of Hagar's statements, summary judgment was precluded on the question of "of and concerning."

The court then turned to Hagar's "defenses" of substantial truth and non-actionable opinion and rejected both, finding that there was sufficient evidence to submit to the jury the following questions: (1) whether "Doe, a relative stranger to

Hagar, approached him to engage in sexual intercourse" and (2) whether "Doe subsequently lied about the identified of the father her child in order to extort him." *Id.* at 11. As for the opinion defense, the court found that Hagar had accused Doe of the crime of extortion, and that "an accusation of a crime is laden with factual content." *Id.* (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21–22 (1990)).

In response to Doe's false light claim, Hagar raised only one argument: that she did not satisfy the "publicity" element of the tort—which requires communication to the

"public at large"—because only a small group of individuals knew that Doe was the subject of the statements at issue. The Eighth Circuit rejected this, seemingly based on its own narrow definition of "community" —those "individuals that could recognize Doe as the subject of the statements—and its finding that within *this* community, the statements were "widely available." In a small "win" for the defense bar, however, the Eighth Circuit seemed to confirm what other cases have at least implied: that in Iowa, false light claims require a showing of actual malice.

Finally, with regard to the breach of contract claim, the parties did not dispute that the confidentiality provision of the agreement unambiguously prohibited them from disclosing its existence or terms. However, they disagreed as to whether

> Hagar's reference to providing financial assistance to Doe amount to a disclosure of a term of the Agreement. The district court found that Hagar's statements were just a "vague reference" to Hagar's relationship with Doe, but the Eighth Circuit disagreed, holding that a jury could find that Hagar disclosed a term even though he did not describe his financial assistance as a legal obligation.

> Leita Walker is a senior associate practicing media law in the Minneapolis office of Faegre Baker Daniels. Plaintiff was represented by Howard Cooper and David H

Rich, Todd & Weld LLP, Boston, MA; and David Brown and Alexander Wonio, Hansen, McClintock & Riley, Des Moines, IA. Sammy Hagar was represented by James Wesley Kinnear, Kinnear Law Firm, PC, San Francisco; and Frances M Haas and Richard J Sapp, Nyemaster Goode, PC, Cedar Rapids, IA.

MLRC UPCOMING EVENTS

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> MLRC Annual Dinner November 12, 2014 | New York, NY

> DCS Annual Lunch & Meeting November 13, 2014 | New York, NY

Camera-Shy Public-Figure Defamation Plaintiff Must Sit for His Video Deposition

No First Amendment Right to Keep Private Information Provided Through Discovery

By Amy B. Ginensky, Kaitlin M. Gurney, and Eli Segal

A prominent Philadelphia union leader and camera-shy defamation plaintiff must sit for his videotaped deposition, an *en banc* panel of the Pennsylvania Superior Court has held – even though the defendant is a newspaper columnist who the plaintiff alleged might use the video to embarrass him in subsequent news stories. <u>Dougherty v. Heller</u>, No. 2014 PA Super. (Aug. 14, 2014).

In a wide-ranging opinion explaining that pre-trial discovery should be considered public barring a protective

order making it private, the Court soundly dismissed Plaintiff John Dougherty's argument that a so-called First Amendment privacy interest provided good cause to shield him from *Philadelphia Inquirer* columnist Karen Heller's attempt to take his video deposition. Heller argued that parties associated with the media had a right to be accorded the same rights as any other party in a lawsuit to take a videotaped deposition.

Dougherty relied on the United States Supreme Court's decision in *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), which held that there was no First Amendment right of access to information gained through the

discovery process, as well as Pennsylvania cases adopting the decision, and suggested they stood for a constitutional right to keep private information provided through discovery.

The Superior Court disagreed: "[T]hese cases do not recognize a 'compelling privacy interest' of any origin, certainly not one of constitutional strength, and we are aware of no authority suggesting a litigant's privacy interest warrants protection, absolute or independent of other relevant interests," the six-judge majority opinion stated. "Rather, the decision whether a litigant's privacy interest is afforded protection rests upon a showing of good cause."

"Appellant does not identify expressly for the Court the origin of this privacy interest; he does not define its nature or limits; and he fails to suggest a meaningful way of examining any potential intrusion upon it."

Background

At issue in the defamation case is a November 28, 2009 opinion column by Heller that criticized Plaintiff and his Philadelphia union, the International Brotherhood of Electrical Workers Local 98, for overcharging for a holiday lights display in a public park. The column contained a mistake that was corrected —with an apology—as soon as Heller learned about it.

Discovery in the case was nearly complete in March 2012

when Dougherty arrived for his deposition at the law offices of Pepper Hamilton LLP but left almost immediately, refusing to have his deposition videotaped without agreement to his counsel's on-the-spot demand not to disseminate the video to any third party absent court permission. Heller's counsel responded that she had no present intention to use the videotape for purposes outside of the litigation and that she would, of course, comply with any obligations imposed by the Rules of Civil Procedure and Professional Conduct.

After Dougherty's aborted deposition, Heller moved to compel Dougherty to appear

for his videotaped deposition without any limitations on the video's dissemination beyond what the Rules themselves impose. Dougherty moved for a protective order, asking the trial court to either bar Heller from videotaping his deposition or prohibit Heller from using the video for any non-litigation purpose. After oral argument, the trial court granted Heller's motion and denied Dougherty's because he had failed to establish "good cause" for a protective order, and ordered him to sit for a rescheduled deposition. Dougherty refused to comply and appealed to the Pennsylvania Superior Court.

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In a July 1, 2013 decision, a three-member Superior Court panel affirmed the trial court's decision, rejecting Dougherty's allegations that good cause for a protective order was established by the fact that Heller was a journalist or because of the alleged animosity between the parties—which the Panel found unsupported by the record—and finding the trial court acted within its discretion. However, Dougherty requested reargument before an *en banc* panel, which the Court granted.

The parties submitted new briefs and oral argument before a nine-judge panel of the Court was held in April. Six judges joined the majority opinion upholding the trial court opinion and the original panel decision that Dougherty had failed to establish good cause for a protective order, one judge concurred in the result, and two judges dissented.

En Banc Decision

With respect to Dougherty's principal argument that were was a constitutional privacy right protecting him from a video deposition that might easily be modified and disseminated to the public, the Court rejected Dougherty's position, emphasizing that "Appellant does not identify expressly for the Court the origin of this privacy interest; he does not define its nature or limits; and he fails to suggest a meaningful way of examining any potential intrusion upon it."

In addition, the Court noted that a case cited by Dougherty, *Baker v. Buffenbarger*, 2004 WL 2124787 (N.D. Ill. 2004), rather than standing for the proposition that pretrial discovery was exclusively private, relied on authority finding the opposite. In that case, *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994), the court established that "[a]s a general proposition, pretrial discovery must take in . . . public unless compelling reasons exist for denying the public access to the proceedings."

With respect to Dougherty's second argument that the trial court abused its discretion by failing to find good cause for a protective order, both parties offered the Court examples of federal and state court video deposition decisions from across the country, some in which the courts found good cause for a protective order curtailing a party's right to disseminate a video deposition, and some in which the courts did not. The majority decision held that these cases were of no importance, as Dougherty failed to establish good cause for a protective order on the facts of the case, and the trial court did not abuse its discretion.

The two-judge dissent, in contrast, found that Dougherty had established good cause for a protective order because of a history of defamation litigation between Dougherty and *The Philadelphia Inquirer* and the fact that Heller's counsel refused to agree not to disseminate the deposition tape "allow for an inference that Appellee sought his videotaped deposition for an improper purpose."

A petition for allowance of appeal with the Pennsylvania Supreme Court was filed on September 12, 2014, meaning Dougherty's deposition will not take place until at least 2015.

Amy B. Ginensky, Michael E. Baughman, Eli Segal, and Kaitlin M. Gurney of Pepper Hamilton LLP, Philadelphia, PA, represented defendants. Plaintiff was represented by Richard A. Sprague and Joseph R. Podraza, Jr. of Sprague & Sprague.

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Models' Right of Publicity Claims Assignable and Not Preempted by Copyright Act

Decision Will Likely Encourage Lawsuits and Increase Costs

By Karen Henry and Ambika K. Doran

The California Court of Appeal held this month that certain right of publicity claims are freely assignable, and that the Copyright Act does not preempt a right of publicity claim where the defendant has no legal right to publish the copyrighted work. *Timed Out v. Youabian*, No. B242820 (Cal. App. Sept. 12, 2014) (Kitching, Klein, Aldrich, JJ.).

The decision, will encourage right of publicity lawsuits and increase the costs associated with rights clearances.

Background

The defendants in Timed Out. cosmetic surgeon Kambiz Youabian and his company Youabian, Inc., provide cosmetic medical services in the greater Los Angeles area. To advertise, Defendants displayed photographs of two models on their website. After learning about this, the Models assigned their misappropriation claims to Timed Out, LLC, a company "specializ[ing] in protection of personal image rights."

Plaintiff sued Defendants for statutory and common law misappropriation of likeness. Defendants moved for judgment on the pleadings, arguing (1) Plaintiff lacked standing to assert the Models' rights of publicity because such rights are personal and not assignable, and (2) the Copyright Act preempted Plaintiff's claims. The trial granted the motion. The California Court of Appeal for the Second Appellate District reversed.

Assignability of Right of Publicity Claims

The appellate court determined that the right of publicity is freely assignable during the owner's lifetime,

and that consistent with the "broad rule of assignability" in Civil Code §§ 953 and 954, right of publicity claims *involving purely pecuniary interests* also are assignable. Civil Code § 954 provides that "[a] thing in action, arising out of the violation of a right of property or out of an obligation, may be transferred by the owner." Civil Code § 953 defines a "thing in action" as "a right to recover money or other personal property by a judicial proceeding."

The appellate court observed that the trial court's contrary finding apparently was based on its

misapprehension of the California Supreme Court's decision in <u>Lugosi v.</u> <u>Universal Pictures</u>, 25 Cal. 3d 813 (1979).

In *Lugosi*, the heirs of Bella Lugosi sued Universal Pictures for common law misappropriation, arising from the studio's use of the actor's name and likeness in merchandising. Lugosi never assigned his publicity rights to his heirs. He did, however, assign his right of publicity to Universal Pictures to promote the classic horror film *Dracula*. His heirs claimed the assignment was limited and did not include the right to use Lugosi's

persona in merchandising unrelated to that film. In concluding the heirs lacked standing, the California Supreme Court explained that, while the right of publicity is assignable, it is a "personal" right that only can be assigned during the owner's lifetime. *Id.* at 821.

In the view of the appellate court, the trial court in *Timed Out* apparently mistook the *Lugosi* Court's characterization of the right of publicity as "personal" to mean the right constitutes a *personal tort* that is not assignable. *Timed Out*, 2014 Cal. App. LEXIS 830, *10. However, as the appellate court clarified, in describing the right as "personal," the *Lugosi* Court was not (Continued on page 25)

The Timed Out decision will likely increase the volume of right of publicity claims as models, actors and other entertainers assign their publicity rights to companies in the business of filing such claims.

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addressing whether the right can be assigned; it was addressing *who* can assign the right.

The appellate court thus found that the Models' claims for misappropriation of likeness were assignable. Emphasizing California's basic policy favoring assignability, the court explained that the exception to that policy "is confined to wrongs done to the person, the reputation, of the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage." In contrast, "choses in action arising out of an obligation or breach of contract [and] those arising out of the violation of a right of property or a wrong involving injury to personal or real property" are assignable. Since the Plaintiff sought only to recover "pecuniary damages for Defendants' alleged commercial misappropriation of the Models' images[,]" and did not seek to recover for

emotional distress, hurt feelings, or reputational injury, "the broad rule of assignability of things in action applie [d]."

Copyright Preemption

The appellate court also concluded that the Copyright Act did not preempt Plaintiff's misappropriation claims because the claims were not based on publication of the photographs. "Rather, it

is Defendants' use of the Models' likenesses pictured in the photographs to promote Defendants' business that constitutes the alleged misappropriation." Quoting Nimmer's treatise on copyright law, the appellate court noted:

The work that is the subject of the right of publicity is the *persona*, *i.e.*, the name and likeness of a celebrity or other individual. A persona can hardly be said to constitute a writing of an author within the meaning of the Copyright Clause of the Constitution. A *fortiori*, it is not a work of authorship under the Act. Such name and likeness do not become a work of authorship simply because they are

The Models assigned their misappropriation claims to Timed Out, LLC, a company "specializ[ing] in protection of personal image rights."

embodied in a copyrightable work such as a photograph.

Id., quoting *Nimmer on Copyright* § 1.01 [B][1][c] (2013) (emphasis in original).

The appellate court concluded that its holding was consistent with *Fleet v. CBS, Inc.*, 50 Cal. Ap. 4th 1911 (1996) because "the court in *Fleet* found the misappropriation claim was preempted where the only misappropriation alleged was the film's authorized distribution by the exclusive distributor." *Timed Out,* 2014 Cal. App. LEXIS 830, *22 n.8, quoting *KNB Enterprises v. Matthews,* 78 Cal. App. 4th 362, 364 (2000).

According to the court, "Fleet stands for the solid proposition that performers in a copyrighted film may not

use their statutory right of publicity to prevent the exclusive copyright holder from distributing the film." *Id.*, quoting *KNB*. Since there was no allegation in the Complaint in *Timed Out* that the Defendants had a legal right to publish the copyrighted works, the appellate court held that *Fleet* did not apply and Plaintiff's claims were not preempted.

The *Timed Out* decision will likely increase the volume of right of publicity claims, as models, actors and other

entertainers, for whom litigation would otherwise be prohibitively expensive or inconvenient, assign their publicity rights to companies in the business of filing such claims. Moreover, the *Timed Out* Court's view on preemption may call into question protections on which content creators have relied to evaluate the costs associated with creating works.

Karen Henry is counsel and Ambika K. Doran a partner with Davis Wright Tremaine LLP. Plaintiff was represented by Timothy A. Hall, Law Offices of Hall & Lim, Encino, CA.; and Eric S. Engel, Conkle Kremer & Engel, Santa Monica, CA. Defendant was represented by Raymond J. McMahon and Kevin J. Grochow, Bonne, Bridge, Mueller, O'Keefe & Nichols, in Los Angeles.

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MLRC MediaLawLetter

Texas Web Publishers Earn Novel Protection Against Stale Lawsuits

By Paul C. Watler

In a case of first impression for Texas state appellate courts, the Fourteenth Court of Appeals found that the single-publication rule applies to media reports posted on the internet. <u>Mayfield v. Fullhart</u>, 14-13-00268-CV, 2014 WL 4100403 (Tex. App.—Houston [14th Dist.] Aug. 21, 2014, no. pet. h.) (Frost, Donovan, Brown, JJ.).

Background

Helen Mayfield, a disbarred attorney, was indicted by a grand jury in 2007 on multiple counts of forgery. *Id.* at *1. In July 2008, Mayfield was convicted and sentenced to two years confinement in state jail. *Id.* The Waco Court of

Appeals affirmed the conviction, and the Texas Court of Criminal appeals refused her petition for review. *Id.* Mayfield sued Steve Fullhart and Gray Television Group, Inc. D/B/A KBTX-TV ("Appellees") based on reports regarding Mayfield's indictments that Appellees broadcast on television and posted on the internet. *Id.* at *1.

Gray Television Group, Inc. D/B/A KBTX-TV ("Gray") is a television station in College Station, Texas. *Id.* Fullhart was a news reporter for Gray. *Id.* Gray broadcast

two reports regarding Mayfield's indictments—one by Fullhart on October 5, 2007 and another by another Gray reporter on July 25, 2008. *Id.* Both reports were published on Gray's website the same day they were originally broadcast. *Id.* On April 29, 2011, Mayfield sued Appellees for libel. *Id.*

Appellees moved for summary judgment, contending that Mayfield's libel suit was barred by the applicable one-year statute of limitations. *Id.* Thereafter, the trial court signed an order granting Appellee's motion for summary judgment and dismissing Mayfield's claims against Gray and Fullhart. *Id.* Mayfield filed an original and supplemental brief, contending, among other things, the statute of limitations did not bar her libel suit. *Id*.

Analysis

The Fourteenth Court of Appeals was tasked with determining whether, among other things, the "single-publication rule" —which precludes a person from recovering more than one cause of action for damages for libel or any other tort founded upon a single publication—applies to internet publications. *Id.* at *3. Historically, the rule had only been applied by Texas courts to cover single publications in print media (*i.e.*, one edition or issue of a

newspaper, book, or magazine) and single broadcasts over radio or television. *Id.* (quoting *Holloway v. Butler*, 662 S.W.2d 688, 690–91 (Tex. App.—Houston [14th Dist.] 1983, writ ref 'd n.r.e.)). The singlepublication rule had never been applied to internet publications by either the Texas courts of appeal or the Texas Supreme Court. *Id.*

The court began its analysis by recognizing that, under the rule, a libel action accrues for statute of limitations

purposes upon "publication." *Id.* As the court explained, "publication is complete on 'the last day of the mass distribution of copies of the printed matter' because that is the day 'when the publishers, editors and authors have done all they can to relinquish all right of control, title and interest in the printed matter." *Id.* (quoting *Holloway*, 662 S.W.2d at 692). Mayfield contended that the single-publication rule should not apply when a news report is posted on a publisher's webpage, reasoning that "a report posted on the internet has a greater potential than a report published in a newspaper or on television to remain publicly available for a long period, be repeatedly viewed, and be viewed by a wide

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The single-publication rule had never been applied to internet publications by either the Texas courts of appeal or the Texas Supreme Court.

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audience." *Id.* at *4. Mayfield argued that a new cause of action for libel accrues, for limitations purposes, each day that an allegedly libelous report remains on the internet. *Id.* The court disagreed.

The court noted that the Fifth Circuit had predicted that the Texas Supreme Court "would apply the rule to a report published on the internet and reject the 'continuous publication rule' suggested by Mayfield—that when such a report remains constantly available on the internet, each day results in a new publication." *Id.* (citing *Nationwide Bi-Weekly Administration, Inc. v. Belo Corp.*, 512 F.3d 137, 141 -46 (5th Cir. 2007)). The court found that the factors relied on by the Fifth Circuit in applying the single-publication rule—namely, the "functional similarities" between print and internet publications and the public policy of avoiding the chilling of internet publications by an endless retriggering of limitations periods—warranted adoption of the rule in Texas. *Id.* at *4-6. Accordingly, the court held that, because Mayfield filed suit more than one year after the original date that each report was broadcast on television and posted on Gray's website (*i.e.*, the publication date), her libel claim was barred by the statute of limitations. *Id.* at *6. In doing so, the court joined the majority of jurisdictions who have applied the single-publication rule to internet publications. *Id.* at *5.

Paul C. Watler, a partner at Jackson Walker LLP in Dallas, TX, represented defendants in this case. Plaintiff was pro se.

MLRC UPCOMING EVENTS

MLRC Forum: Controlling Data, Forgetting Data: What U.S. Lawyers Need to Know About the Right to Be Forgotten November 12, 2014 | New York, NY

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Legal Frontiers in Digital Media May 14-15, 2015 | Palo Alto, CA

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MLRC MediaLawLetter

Florida Court Rejects Libel Action by Real Estate Attorney

Article Quoting Experts About Attorney's Mortgage "Fraud" Is Protected

By Robert L. Rogers, III

A Circuit Court in Sarasota, Florida entered summary judgment, rejecting a libel action by a local real estate attorney against the *Sarasota Herald-Tribune*, several of its editorial staff and sources, and the Suncoast News Network, based on a report about her mortgages. *Weintraub v. Halifax Media Group LLC, et al.*, No. 2014 CA 002822 NC (September 19, 2014).

Judge Charles E. Williams held that the article contained accurate and fair accounts of public records and were protected by Florida's fair report privilege, and that quotes

from several expert sources calling her dealings possible "fraud" were protected opinions.

Background

Plaintiff Anne Weintraub's one-count action for defamation was premised on a 75paragraph *Sarasota Herald-Tribune* investigative news article, as well as a story broadcast by the Suncoast News Network that summarized the article. In the article, the *Sarasota Herald-Tribune* reported that Weintraub represented that she would

occupy three separate properties as her "principal residence" in five residential mortgages in 2005 and 2006, and also reported the opinions of several experts that such those representations may have been fraudulent.

The article recited the date, amount, and pertinent portions of each publicly recorded mortgage in which Weintraub claimed each property as her primary residence. The article also noted that each mortgage provided for a written waiver of the requirement from the lender or excusal from the obligation in the face of "extenuating circumstances." The newspaper interviewed Weintraub—who was a regular source of the newspaper's for stories on the real estate market, and who had been featured on a recurring local TV news segment—several weeks before publishing the story. After the newspaper provided her copies of the mortgages and invited her to respond, she generally denied all wrongdoing but refused to discuss any specifics.

The newspaper reported her statements in the story, along with the fact that the public record contained no written waiver from the bank, the bank would not provide any details, and Weintraub would not discuss whether she claimed any "extenuating circumstances." The newspaper also reported that neither law enforcement nor The Florida Bar were investigating her.

> In her lawsuit, Weintraub claimed that the article was defamatory because its "gist" was that she had committed multiple acts of mortgage fraud. She further alleged that the *Sarasota Herald-Tribune* and its editorial staff, as well as the experts quoted in the article, had not adequately investigated the subjects of the article, and therefore lacked sufficient knowledge to suggest that Weintraub had committed fraud.

> Weintraub conceded that the article contained accurate descriptions of her mortgages. She further admitted that that the newspaper asked her and her lender about

the possible existence of such waivers or circumstances, and that both refused to answer such questions on grounds of privacy. Weintraub nevertheless claimed that statements concerning possible fraud in Weintraub's mortgages were false and defamatory because, given Weintraub's refusal to discuss whether any waivers or extenuating circumstances existed, the newspaper and its sources could not possibly have known whether Weintraub had committed fraud.

The *Sarasota Herald-Tribune* moved to dismiss or, alternatively, for summary judgment, and some of the expert sources sued by Weintraub filed motions adopting the newspaper's documents.

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The court specifically held that the article "reflected an accurate report of the content of public records and an accurate paper trail of the transactions involving the Plaintiff" and her lender.

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Circuit Court Decision

In his eight-page order granting the motions, Judge Williams held: "The contents of the article and the opinions expressed within it are protected under the law by years of legal precedent and the deference courts in this state and nationally give to the press and media."

Explaining its decision, the court held first that "the elements of false and defamatory statement(s) are lacking" because the article was accurate and fair. The court specifically held that the article "reflected an accurate report of the content of public records and an accurate paper trail of the transactions involving the Plaintiff" and her lender. The court also cited the article's multiple cautionary statements, including that Weintraub was not under investigation or charged with a crime, and also that Weintraub might not have committed fraud because the lender may have consented to Weintraub not using the subject properties as her primary residence.

The court further held that dismissal was warranted because the article "as written was additionally protected as privileged under Florida's Fair Report Privilege," since it was "a fair republication of information obtained from official sources." Moreover, the court held that statements by the *Sarasota Herald-Tribune*'s sources about possible fraud were not defamatory as a matter of law because they were "protected opinion gathered and formulated solely from the public documents reviewed and publicly recorded transactions performed by the Plaintiff" and her lender.

The court also rejected any suggestion by Weintraub that the defendants had violated her privacy by reporting the possible fraud in her mortgages. The court explained that the newspaper industry "serves one of the most vital of all general interests" in disseminating news about issues of public concern. It then pointed out that Southwest Florida "was ground zero during the real estate boom, subsequent bust, and the inevitable foreclosure crisis that resulted." "The article in question is a natural result of this crisis in that the transactions mentioned all occurred during this period thus making the article newsworthy."

Robert L. Rogers, III with Holland & Knight LLP's Orlando office, along with Chuck Tobin from the firm's Washington D.C. office, represent the Sarasota Herald-Tribune and its journalists in this litigation. Defendant LDB Media, LLC d/b/a Suncoast News Network is represented by Carol Jean LoCicero and Rachel E. Fugate of Thomas & LoCicero PL., Tampa, FL. Defendants Matthew D. Weidner and Matthew D. Weidner, P.A. are represented by D. David Keller and Raymond L. Robin of Keller Landsberg PA.. Ft. Lauderdale, FL. Defendants Gary E. Lacefield and Lacefield Compliance Consulting, LLC are represented by Daryl L. Jones and Faequa A. Khan of the Law Offices of Daryl L. Jones, P.A., Miami, FL. Defendant Dennis J. Black was represented by Thomas Carrero, Jr. of Carrero Law Group, Port Charlotte, FL.

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Texas Court Limits Use of Pre-Suit Discovery to Unmask Anonymous Internet Posters

Potential Plaintiffs Must Show Texas Would Have Personal Jurisdiction Over Anonymous Potential Defendant

By Marc Fuller

In a case that many expected to set the constitutional standards in Texas for unmasking anonymous speakers in Internet defamation cases, the Texas Supreme Court instead imposed a new procedural requirement that will go a long way in protecting anonymous online speech and commerce in the pre-suit discovery context. <u>In re John Doe a/k/a</u> <u>"Trooper,"</u> 2014 WL 4783574 (Tex. Aug. 29, 2014).

Texas has long had the nation's broadest pre-suit discovery procedure, Texas Rule of Civil Procedure 202. Under *Trooper*, however, a potential plaintiff will not be allowed to

use Rule 202 to unmask an anonymous potential defendant unless the plaintiff shows that the defendant would be subject to personal jurisdiction in Texas.

Background

This dispute arises out of an online attack by a blogger calling himself "the Trooper," against The Reynolds & Reynolds Co. and its CEO, Robert Brockman. Reynolds develops and markets software for use by auto dealerships. *Id.* at *1. The company is headquartered in Ohio, with

offices in Texas and other locations. Brockman is a resident of Houston. In his posts, Trooper criticized Reynolds' products as "crap" and called Brockman an "idiot," a "lunatic," and a "crook," comparing him to Bernie Madoff, Satan, and Bobo the Clown.

In an effort to unmask Trooper, Reynolds and Brockman (collectively, "Reynolds") filed an action under Rule 202, seeking an order requiring Google (the blog's host) to identify Trooper and provide his contact information. According to Reynolds, it anticipated filing suit for libel and business disparagement against Trooper in Texas state court. *See* Tex. R. Civ. P. 202.1(a) (potential plaintiff may file

petition to perpetuate or obtain the testimony of any other person for use in an anticipated suit).

Google did not oppose Reynolds's Rule 202 petition. Instead, it notified Trooper, who appeared anonymously to challenge the court's exercise of personal jurisdiction over him and to argue that the discovery would violate his First Amendment right to speak anonymously. The trial court rejected both arguments. Trooper unsuccessfully sought mandamus in the intermediate appellate court.

Ruling

The Texas Supreme Court instead imposed a new procedural requirement that will go a long way in protecting anonymous online speech and commerce in the pre-suit discovery context. The Supreme Court split 5-4 on the issue of personal jurisdiction. According to the majority opinion, authored by Chief Justice Nathan Hecht, the district court was not a "proper court" under Rule 202 because Reynolds did not show that the Texas court could exercise personal jurisdiction over Trooper. Justice Hecht analyzed the history of Rule 202 and its predecessors, concluding that the "proper court" requirement was intended to mean that the Rule 202 court must be one in which the anticipated suit actually could be filed. *Id.* at *2-3. For

example, Rule 202 may not be used to obtain discovery relating to claims over which the state court would lack subject-matter jurisdiction, such as patent or federal antitrust claims. Similarly, a "proper court" must have personal jurisdiction over the anticipated defendant.

The majority identified two reasons for imposing a personal-jurisdiction requirement. First, "[t]o allow discovery of a potential claim against a defendant over which the court would not have personal jurisdiction denies him the protection Texas procedure would otherwise afford." *Id.* at *3. These protections include the procedures for challenging personal jurisdiction, which limit discovery and require *(Continued on page 31)*

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courts to consider the issue at the outset of the case. Moreover, the majority was concerned that a potential plaintiff might exploit Rule 202 to obtain discovery for use in proceedings in another state—effectively securing through Rule 202 what the other state's procedures might deny it.

Second, the majority held that the absence of a personaljurisdiction requirement would unreasonably expand Rule 202: "If a Rule 202 court need not have personal jurisdiction over a potential defendant, the rule could be used by anyone in the world to investigate anyone else in the world against whom suit could be brought within the court's subject-matter jurisdiction." *Id.* at *4. In short, the majority stated that it "will not interpret Rule 202 to make Texas the world's inspector general." *Id.* at *5.

Dissent

The dissent, authored by Justice Debra Lehrmann, was sharply critical of the majority's holding. Justice Lehrmann predicted that the ruling would effectively deprive plaintiffs of their ability to obtain redress for defamatory speech online. She also attacked the majority opinion as analytically unsound, arguing that a court's minimum contacts analysis cannot be conducted "while wearing a blindfold." *Id.* at *7. The dissenting opinion did not take a position on the issue of which First Amendment standard should be adopted by Texas courts, stating only First Amendment considerations should be taken into account in determining whether a Rule 202 petitioner has satisfied its burden to obtain the requested presuit discovery. Id. at *8.

Outlook

As Justice Lehrmann's dissenting opinion observed, "the Court's holding does not reduce or circumscribe pre-suit discovery of anonymous parties, in Texas. Instead, it is the end of such discovery." *Id.* at *8. Whether the *Trooper* test will prove to be an impossible standard, or merely a difficult one, remains to be seen. Although it is possible to envision situations in which the poster's state of residence is apparent from the subject of his posts, there will be many cases in which a potential plaintiff will have no way to establish personal jurisdiction over the poster without first identifying him, and no practical way to rebut the affidavit of a "John Doe" who denies that he has minimum contacts with Texas.

Moreover, *Trooper* likely will have an even greater impact in cases outside the context of the lone, anonymous speaker. Many companies have recently taken to Rule 202 in efforts to identify website users *en masse*, in order to crack down on aftermarket sellers of its products through eBay, Amazon, or craigslist. It is difficult to see how such pre-suit discovery can survive *Trooper*.

Marc Fuller is counsel at Vinson & Elkins in Dallas, TX. Relator John Doe (Trooper) was represented by Claire James, James Blume, and Shelly Skeen of Blume Faulkner Skeen & Northam PLLC. Real Party in Interest Robert Brockman was represented by Angus Dodson, Anthony Kaim, Audrea Gulley, Brian Ross, Grant Harvey, and Jeffrey Kubin of Gobbs & Bruns, LLP.



MLRC Annual Dinner Wednesday November 12, 2014

Privacy in the Public Eye: A Conversation with Hugh Grant Moderated by Katie Couric

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the United Kingdom saw outbreaks of measles and other

no connection between the MMR vaccine and autism. In

February 2004, London's Sunday Times published a lengthy

report by Brian Deer, which revealed that several of the

twelve anonymous children had been sourced through anti-

vaccine litigation groups and that Wakefield was being paid

Deer's subsequent reporting in the Sunday Times and in a

Subsequent medical studies have established that there is

No Personal Jurisdiction in Texas Over U.K.-Based Medical Journal and Reporter

Plaintiff Sued over Criticism of His Infamous 1998 Article Linking Vaccines to Autism

preventable diseases.

News & Views ~

as a consultant in that litigation.

Campaigns

By Marc Fuller

Andrew Wakefield, the disgraced doctor who sparked a major public health controversy by suggesting that a common childhood vaccine causes autism, cannot bring libel claims in Texas against the *British Medical Journal* ("*BMJ*"), its editor, and an investigative reporter, based on a series of reports and editorials that called Wakefield's research "fraudulent." *See Wakefield v. British Medical Journal Publishing Group, Ltd.*, 2014 WL 4723556 (Tex. App.—Austin, Sept. 19, 2014, no pet.).

thebmi

Research ~

In affirming the district court's dismissal on personal jurisdiction grounds, the Austin Court of Appeals held that the BMJ's 48 Texas-based subscribers and the reporter's emails to Wakefield at his Texas clinic were insufficient to warrant the exercise of specific jurisdiction over the U.K.-based defendants.

Background

In 1998, Wakefield published a paper in the prestigious medical journal, the

 Feature

 Secrets of the MMR scare

 How the case against the MMR vaccine was fixed

 BMJ 2011 ; 342 doi: http://dx.doi.org/10.1136/bmj.c5347 (Published 06 January 2011)

 Cite this as: BMJ 2011; 342:c5347

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 Brian Deer, journalist

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 In the first part of a special BMJ series, Brian Deer exposes the bogus data be launched a worldwide scare over the measles, mumps, and rubella vaccine, a the appearance of a link with autism was manufactured at a London medical

Education ~

Channel 4 documentary revealed additional undisclosed conflicts of interests and inaccuracies in Wakefield's Wakefield's medical paper. license was eventually revoked, based on multiple "serious findings 0 f professional misconduct," ranging from his role in the MMR research to his admission that he once paid children attending his son's birthday celebration £5 each to have their blood drawn at the party. The Lancet has since retracted Wakefield's paper in

Lancet, which suggested that the measles-mumps-rubella (MMR) vaccine might cause autism. The paper was based on research Wakefield had performed on twelve anonymous children who presented at a hospital outside London during the mid-1990's.

According to Wakefield, their parents claimed that the children were progressing normally through developmental milestones until they received the MMR vaccine, after which they began showing signs of regressive autism. Wakefield's paper and subsequent media interviews about it sparked a public health disaster, as immunization rates plummeted and its entirety.

In 2004, Wakefield and his family moved from London to Austin, where Wakefield began working at a clinic and research facility while continuing his worldwide anti-vaccine activism. Deer, too, continued his reporting on Wakefield. In 2011, the *BMJ* published a three-part series by Deer, entitled "Secrets of the MMR Scare." Based on Deer's reporting, an accompanying *BMJ* editorial opined that Wakefield's research was "fraudulent."

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One year later, Wakefield sued Deer, the *BMJ*, and its editor, Dr. Fiona Godlee, for libel in Texas state court. All defendants moved to dismiss for lack of personal jurisdiction and, subject to their special appearances, they also moved to dismiss the case under Texas's anti-SLAPP statute, Texas Civil Practice & Remedies Code § 27.001 *et seq.* The trial court rejected Wakefield's attempt to strike defendants' special appearances, holding that their filing of the anti-SLAPP motion did not waive their right to challenge personal jurisdiction.

Wakefield then sought and obtained discovery on jurisdiction and anti-SLAPP issues. After that discovery was complete, the trial court set both motions for hearing. On August 3, 2014, the trial court granted defendants' special appearances, dismissing the claims against them for lack of personal jurisdiction.

Waiver

The Austin Court of Appeals rejected all of Wakefield's waiver arguments. Although Wakefield had argued in the trial court that defendants' anti-SLAPP motion waived their special appearances, he conceded on appeal that it had not. Rather, on appeal, Wakefield based his waiver argument on four other actions by defendants: (1) obtaining a complex-case assignment, so that the action would be overseen by a single judge instead of a rotating panel of judges; (2) seeking to continue the hearings on both motions in order to complete court-ordered discovery; (3) responding to anti-SLAPP discovery while the special appearance was pending; and (4) requesting a briefing schedule for the jurisdiction and anti-SLAPP motions.

The Austin Court of Appeals held that none of these actions violated the Texas rules governing special appearances, and the Court found further support for its holding in a provision of the anti-SLAPP statute that states it "does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case or common law or rule provisions." Tex. Civ. Prac. & Rem. Code § 27.011.

Minimum Contacts

In its analysis of minimum contacts, the Austin Court of Appeals rejected arguments by Wakefield that the Texas court could exercise specific jurisdiction over the defendants under *Keeton v, Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and *Calder v. Jones*, 465 U.S. 783 (1984).

With regard to *Keeton*, the Austin Court of Appeals recognized that *BMJ* had 48 subscribers in Texas, which was less that 1% of the journal's worldwide subscription base. The Court held that this total was insufficient to satisfy the "substantial circulation" requirement under *Keeton*. In doing so, it rejected Wakefield's argument, based on *Paul Gillrie Institute, Inc. v. Universal Computing Consulting, Ltd.*, 183 S.W.3d 755, 761 (Tex. App.—Houston [1st Dist.] 2005, no pet.), that an otherwise insufficient subscription count can still be "substantial" where the publication at issue is a niche or trade publication, not a general interest magazine or newspaper.

The Austin Court of Appeals also rejected an argument by Wakefield that the *BMJ*'s subscription counts was "substantial" because many of the 48 subscriptions were online, "institutional" subscriptions, through which medical schools and hospitals purchase access for all of their students or staff. The Court explained that any interpretation of "circulation" to include potential readers with licensed access would expand *Keeton*'s reach too broadly.

Finally, with regard to *Calder*, the Austin Court of Appeals noted that the *BMJ* publications did not mention Texas, nor did they concern Wakefield's activities in Texas. It acknowledged that Deer had emailed Wakefield several years earlier, using the email address associated with Wakefield's Austin clinic, but the Court found this evidence insufficient to support a finding that Deer and the *BMJ* had directed their conduct at Texas.

Moreover, the Court held that the *BMJ*'s promotional activities relating to the publications, including sending a press release to an email list that included several Texas-based journalists, were insufficient to sustain jurisdiction under *Calder*.

Finally, the Court held that the *BMJ*'s unrelated advertising and other commercial activities in Texas were not relevant to the issue of whether the publications at issue were directed at Texas.

Defendants were represented by Marc Fuller and Tom Leatherbury of Vinson & Elkins LLP, Dallas TX; and Lisa Bowlin Hobbs of Kuhn Hobbs, PLLC, Austin, TX. Plaintiff was represented by Bill Parrish and John Saba of DiNovo, Price, Elwanger & Hardy, LLP, Austin, and Brendan McBride of The McBride Law Firm.

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MLRC MediaLawLetter

Seventh Circuit Affirms Photo on T-Shirt Is Fair Use

Court Expresses Skepticism Over Transformative Use Test

The Seventh Circuit this month affirmed that the use of a photograph on a satirical T-shirt was a fair use. *Kienitz v. Sconnie Nation*, No. 13-3004 (7th Cir. Sept. 15 2014) (Easterbrook, Bauer, Williams, JJ.). The panel found that defendant's T-shirt incorporating plaintiff's photograph was not a substitute for the original and would not reduce demand for the original or any contemplated use of it.

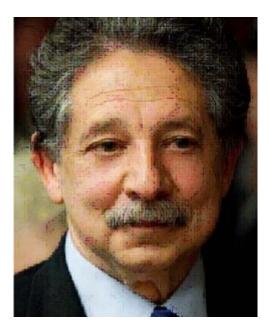
Judge Easterbrook, writing for the panel, deliberately avoided applying the "transformative use" test and, in fact, expressed skepticism about it. Instead the traditional non-exclusive four factor test was appropriate to resolve the case – particularly the fourth prong's consideration of impact on the market.

Background

At issue was the use of a photograph of Madison, Wisconsin Mayor Paul Sogin taken by plaintiff Michael Kienitz, a professional photographer. Defendants "posterized" the photo, added the slogan "Sorry For Partying," and used it on T-shirts and tank tops sold in connection with an annual Madison street party.

Mayor Sogin had participated in the party as a student protestor in the 1970's, but more recently tried to shut the party down – thereby making him a target for the satire.

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Left, plaintiff's photograph; right, defendant's parody t-shirt

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Last year, a Wisconsin federal district court granted summary judgment in favor of the defendants based on fair use. *See* <u>965 F. Supp. 2d 1042</u> (W.D. Wisc. 2013). The district court analyzed the four fair use factors, but noted "the robust transformative nature" of the T-shirts.

Seventh Circuit's Fair Use Analysis

On appeal, the Seventh Circuit affirmed but without relying on "transformative use." Judge Easterbrook noted that "transformative use" is not a statutory fair use factor, but something the Supreme Court mentioned in *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) and the Second Circuit has "run with" it. *See, e.g., Cariou v. Prince*, 714 F.3d 694 (2nd Cir. 2013) (holding "appropriation art" was transformative).

Judge Easterbrook opined that "we're skeptical of *Cariou*'s approach because asking exclusively whether something is 'transformative' not only replaces the [four-factor test] in § 107" but could override the copyright protection for derivative works. "To say that a new use transforms the work is precisely to say that it is derivative, and thus, one might suppose protected under § 106(2)."

Judge Easterbrook then applied the four statutory factors. First, the purpose and character of the use did not weigh one or the other between the parties. The T-shirts were sold for profit but were made for political commentary. Second, the nature of the copyrighted work was "unilluminating." Third, the amount and substantiality of the use weighed in favor of defendant since it "removed so much of the original that, as with the Cheshire Cat, only the smile remains." Fourth, and most importantly, the effect of the T-shirt upon the potential market for or value of plaintiff's photograph weighed in favor of the defendants. The T-shirt incorporating plaintiff's photograph was not a substitute for the original and the use would not reduce the demand for the original work or any contemplated use of it.

In dicta, Judge Easterbrook suggested that plaintiff could have argued that his long-range economic interest was harmed since people might not want to use him as a photographer if the photos appear on undignified T-shirts. But the argument was not made, and would likely have failed on the facts where the photograph was substantially altered.

Plaintiff was represented by James D. Peterson and Jennifer L. Gregor, Godfrey & Kahn, S.C., Madison, WI. Defendants were represented by Eric Hatchell, Jeffrey Simmons and Naikang Tsao, Foley & Lardner LLP, Madison, WI.

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Copyright and Trademark Claims Over Biographical Movie Dismissed *Recreation of Old Movie Scenes Was Fair Use*

A New York federal court dismissed copyright and trademark claims against the producers of the movie *Lovelace*, a biographical portrayal of the star of the infamous 1970's porn movie *Deep Throat*. <u>Arrow Productions v. The</u> <u>Weinstein Company</u>, No. 13-cv-05488 (S.D.N.Y. Aug. 25, 2014) (Griesa, J.). The court held that the reenactment of scenes from the 1970's movie was a fair use as a matter of law.

Background

In 2013, the Weinstein Company released the movie *Lovelace* about Linda Lovelace, later Linda Marchiano, portraying her entry into the pornography business, her troubled marriage to Chuck Traynor, who allegedly abused her and coerced her into participating in *Deep Throat*, and her transformation from a famous porn star to an outspoken critic of pornography in later life. *Lovelace* does not contain any pornographic scenes or nudity.

Plaintiff Arrow Productions owns the copyright to the 1972 movie *Deep Throat* as well as trademarks for "Deep Throat" and "Linda Lovelace." Plaintiff alleged that three scenes in *Lovelace* violated its copyright and trademarks by reproducing dialogue, camera angles, lighting, costumes and settings from *Deep Throat*.

<text>

Looking at the purpose and character of the use the court held that *Lovelace* was transformative, i.e, it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Quoting Cariou v. Prince*, 714 F.3d 694, 705 (2nd Cir. 2013). As the court explained:

[D]efendants' use, or recreation, of the three scenes from Deep Throat constitutes

transformative use, adding a new, critical perspective on the life of Linda Lovelace and the production of Deep Throat. Deep Throat is a pornographic containing seventeen film scenes of explicit sexual content. Conversely, Lovelace is a critical biographical film that documents the tragic story of Linda Lovelace and provides a behind-the-scenes perspective on the filming of Deep Throat. It does not contain any nudity. Defendants have recreated the three challenged scenes in order to focus on a defining part of Lovelace's life, her starring role in Deep Throat.

The judge summarily dismissed the plaintiff's trademark claims for

Fair Use Analysis

Following a blow-by-blow comparison of the scenes from the two movies, the court ruled *Lovelace* was fair use as a matter of law. The court noted that as a critical biographical work, the defendants' movie was entitled to a presumption of fair use. infringement, false designation of origin and trademark dilution after concluding that the plaintiff failed to adequately plead those claims.

Evan Mandel, Mandel Bhandari, LLP in New York, represented plaintiff Arrow Productions. Benjamin Stewart Akley and Tom J. Ferber, Pryor Cashman LLP in New York, represented defendant The Weinstein Company, LLC and the other defendants.

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Judge Lifts Prior Restraint Baring Newspaper From Reporting On Pipeline Safety Report

Restraint Was Erroneously Entered Upon "Phantom" National Security Claims

By Dennis R. Bailey

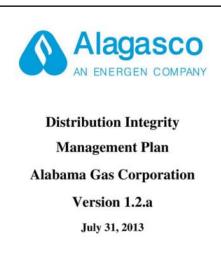
On September 23, Alabama Circuit Court Judge Robert C. Vance lifted a temporary restraining order barring the Montgomery Advertiser and Gannett from publishing information contained in a gas pipeline safety report. *Alabama Gas Corporation v. The Advertiser Company et al.* The Judge acknowledged that he erred in granting a TRO by relying on the gas company's unsubstantiated claims that disclosure could cause terrorism and sabotage.

Background

In May of this year Kala Kachmar, a reporter for *The Montgomery Advertiser*, made a routine open records request of the Alabama Public Service Commission for the written Distribution Integrity Management Program (DIMP) of Alabama Gas Corporation ("Alagasco"). The <u>190 page document</u> was emailed from the agency regulating the gas utility to the newspaper reporter in June "With the permission of the National Safety Transportation Board."

About three months later, on Friday afternoon, September 12, 2014, and with

no prior notice to the newspaper, Alagasco obtained an *ex parte* temporary restraining order enjoining the newspaper and Gannett from publishing any "non-public" materials in the DIMP document. In its filings, Alagasco asserted that the DIMP contained proprietary information and was "unlawfully obtained." But the allegation that caught the attention of Judge Robert Vance of Birmingham was the bald assertion that the DIMP contained information of value to terrorists that if published would harm national security. It was the first time an Alabama newspaper had been subjected to a prior



Alagasco DIM Plan Version 1.2.a

restraint in the 143-year existence of The Alabama Press Association.

The background facts showed that prior to the issuance of the TRO and after learning the newspaper had been sent the DIMP, Alagasco on July 3, 2024, wrote counsel for the newspaper contending the PSC had improvidently released the DIMP, that it was proprietary, and that Alagasco would appreciate an opportunity to respond to any questions about

> the DIMP before publication. As part of a national investigation into pipeline safety by USA Today, on August 20, 2014, Kachmar submitted several pointed questions to Alagasco that delved into the existence of old cast iron gas piping in areas served by Alagasco and the propensity for such pipes to leak. Nine days later Alagasco demanded the return of the DIMP and destruction of all emails concerning it by September 3, 2014.

> Gannett legal counsel responded on September 9, 2014, that the DIMP contained pipeline leak information that was a matter of public concern and that Gannett would not agree to return it or not publish information contained in it. The letter cited cases quoting the standard required for a prior restraint.

Four days later Alagasco obtained the TRO with a brief which failed to acknowledge the utility was seeking a prior restraint and failing to cite the heavy burden required to obtain a prior restraint.

Motion to Lift Restraining Order

On Tuesday September 16, 2014, the newspaper filed a motion to dissolve the TRO. <u>Alabama Gas Corporation v.</u> <u>The Advertiser Company et al.</u> The motion included three (Continued on page 38)

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basic grounds: (1) The order was an unconstitutional prior restraint on freedom of speech and of the press under the Alabama and U. S. Constitutions; (2) The order failed to comply with Alabama Rule of Civil Procedure 65 and (3) The Birmingham court lacked venue over The Advertiser Company which published the newspaper in Montgomery, Alabama. The venue challenge was eventually overruled by the court.

As part of the constitutional argument, the newspaper asserted that "claims of irreparable harm relating to the release of the report appear to be nothing more than hyperbole." As support, the newspaper's motion pointed out that the DIMP was freely released by the regulatory agency in Alabama and was not marked "Secret," "Confidential" or "Proprietary." Attached were DIMP reports from other companies which had been easily found on the internet. It

was also noted that the rights-of-ways for gas pipelines are recorded in property records, the pipelines themselves are marked with warning signs and the utility will freely mark the precise locations as part of their 811 "Call Before You Dig" program.

Although the utility did not initially specify what information in the DIMP was non-public or sensitive, Alagasco eventually filed a redacted DIMP which removed pages showing the locations of "mains," the point where large transmission lines feed the smaller distribution lines. However, investigation revealed that one of the three "mains" serving Montgomery was located in

a field clearly visible from a major highway, the area was not fenced and the doors to the underground valves did not appear to even be locked.

The next day, September 17, 2014, Alagasco filed a motion "to respond and present evidence" at the hearing for preliminary injunction set for September 25. The newspaper responded the next day and stated:

"The current status quo is not a constitutional status quo. 'Where the freedom of the press is concerned...the status quo is to publish news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion."" "The status quo that has been created by the Temporary Restraining Order is an ongoing violation of freedom of the press. When the United States Supreme Court was petitioned by the *New York Times* and *Washington Post* to challenge judicial orders prohibiting publication of the information from the 'Top Secret' Pentagon Papers, the Court addressed the petition on an expedited basis and issued an opinion lifting the prior restraint in six days."

The response quoted the *Carroll v. Princess Anne* decision which stated that while "[t]here is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration, but there is no place within the basic freedoms guaranteed by the First

Amendment for such orders where no showing is made that it is impossible to serve or notify the opposing parties and to give them an opportunity to participate."

The opposition concluded:

"It is therefore inexcusable and ironic that the Plaintiff claims it needs more time to have an opportunity to respond and present evidence to support a prior restraint of the press that has already been entered thereby disturbing the constitutional status quo of press freedom in this country."

That same day, Judge Vance, in response to the motion to dissolve the TRO, set a hearing on that motion for September 22, 2014.

On September 19, 2014, the Alabama PSC released a statement that it released the DIMP because it had not been marked "proprietary" by Alagasco and the burden of doing so rested with the utility.

On September 22, 2014, immediately before the hearing on the motion, Alagasco filed a brief in opposition to the motion to dissolve. In it and at the hearing Alagasco argued that the TRO was not a "prior restraint" because the DIMP was unlawfully obtained by the newspaper. They argued that (*Continued on page 39*)

The allegation that caught the attention of Judge Robert Vance of Birmingham was the bald assertion that the DIMP contained information of value to terrorists that if published would harm national security.

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a regulation of the PSC required the newspaper to notify Alagasco that it was requesting the DIMP from the PSC before the DIMP was released. *The Advertiser*'s failure to do so, Alagasco argued, took the matter out of the realm of "prior restraint" protection because prior restraint cases only protected lawfully obtained information.

Judge Vance immediately challenged that argument and referenced the Pentagon Papers decision where the top secret papers were apparently unlawfully leaked. Alagasco responded that the newspapers had done nothing wrong in that situation but that in this case, *The Montgomery Advertiser* had acted unlawfully by failing to submit the proper paperwork to Alagasco so that the utility could have objected to the release of the DIMP before it was turned over by the PSC.

Counsel for the newspaper made several arguments in response. The paper argued that the case did involve a prior

restraint and that prior restraint cases were very rare by constitutional design. They pointed out that no Alabama appellate decision had ever upheld a prior restraint because Alabama's Constitution has broader protection for free expression than the U. S. Constitution and prohibits prior restraint of freedom of speech. In addition to the First Amendment's protection of freedom of speech and the press, the Alabama Constitution provides that "any person may speak, write, and publish his sentiments on

all subjects, being responsible for the abuse of that liberty."

As an alternative, counsel argued that under federal authority prior restraints are allowed but only if there are specific facts presented that establish the publication will inevitably, directly and immediately harm a state interest of the highest order and that the government's interest is so great, so grave and so certain that it cannot be protected by any means other than a prior restraint. Counsel also argued that the TRO had procedural problems because it did not maintain the status quo of a free press deciding what and when to publish, that it was issued ex parte without notice in violation of Rule 65 and the *Carroll v. Princess Ann* decision and that the prohibition against publishing "non-public" information in the report was too vague.

But the main argument was focused on the fact that the filings of Alagasco failed to provide a single fact establishing

that the release of the DIMP presented a clear and present danger to national security. Furthermore, the actions of Alagasco, the PSC and NTSB in handling the DIMP were not consistent with that of entities handling a highly-sensitive document. It was not marked confidential, it was released by regulators of the industry familiar with its contents and after release it took Alagasco months to request its return which, perhaps not coincidentally, was just after Alagasco received pointed questions about its use of old cast iron pipes. To allay the judge's fears, counsel also argued that the location of pipelines is in the public domain.

As for the "unlawfully obtained" document argument, the newspaper argued that it was irrelevant whether or not the paper obtained the document legally. The only focus should be on whether publication of it presented a clear and present danger to national security.

To Judge Vance's credit, during the argument he took responsibility for entering the order without notice but

pointed out that the affidavit supplied stated that publication of the report was "imminent." He promised a ruling by noon the next day because, as he stated, each day that passed was a further potential infringement on free expression.

Early the next morning, the newspaper responded to the brief filed at the hearing citing cases supporting the argument that even if the newspaper committed acts that were improper to obtain a document prior restraint standards still must be met. Shortly

thereafter Alagasco released on its website a redacted version of the DIMP containing 173pages.

It also filed a "Motion to Clarify" the TRO by specifying the parts of the DIMP that could not be released and which parts could. Essentially, the Alagasco version redacted the location of records, the names of employees and removed 17 pages describing the distribution pipeline system and the general locations of gas mains.

Then, at 8:31 a.m., Judge Vance issued his order dissolving the TRO adding his own personal touch to prior restraint law. Primarily relying upon *CBS*, *Inc. v. Davis*, 510 U.S. 1315 (1994), Judge Vance cited the test that the "evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures." Then he stated, in his own words:

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The newspaper asserted that "claims of irreparable harm relating to the release of the report appear to be nothing more than hyperbole."

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"At this stage, the court cannot see such a clear and present danger. In its motion for a temporary restraining order, the plaintiff raised the danger of terrorism and sabotage if data within its Distribution Integrity Management Plan were publicly disclosed. While such possibilities might exist, they now appear to be only vague phantoms. On reflection, the court finds that it too readily focused on such ghosts in entering the Temporary Restraining Order sought by the Plaintiff."

The day the order dissolving the TRO was entered, USA Today published its feature on national pipeline safety that months earlier had been the reason reporter Kachmar had made the original request. Linked in the on-line version was the complete 190-page Alagasco DIMP provided to Kachmar by the Alabama PSC with only the names of Alagasco employees redacted. The article reported that a gas leak in Birmingham had, just months before, caused an explosion and death. It was believed the cause was a collapsed cast iron pipe.

Once the DIMP was published, Alagasco issued a strident press release critical of *USA Today* and stating that the media organization had rendered their fight to protect the DIMP document from falling into the hands of the public moot. Within minutes, Alagaso voluntarily dismissed their case and Judge Vance entered an order confirming the dismissal. The question of the safety of miles of cast iron pipes was now a matter for editors to publish without fear of the censorship that is politely called "prior restraint."

Dennis R. Bailey, a partner with Rushton, Stakely, Johnston & Garrett in Montgomery, AL, represented the newspaper and Gannett in this case.



Ninth Circuit Reinstates Rape Victim's Negligence Claim Against Modeling Website

Allegation That Website Failed to Warn Not Barred By Section 230

A Ninth Circuit panel reinstated a negligence claim against a modeling industry website, holding that Section 230 was not applicable to plaintiff's claim because she was not seeking to hold the website liable as a "publisher or speaker" of third party content. *Doe No. 14 v. Internet Brands, Inc.* No. 12-56638 (9th Cir. Sept. 17, 2014) (Schroeder, Clifton, Cogan, JJ.). Instead, the Court reasoned, plaintiff was attempting to hold the website liable for failing to warn her that third parties were targeting and luring victims who appeared on the site.

Plaintiff alleged that two rapists pretending to be talent scouts lured her to a fake audition in Florida where they

drugged and raped her to create a pornographic video. She also alleged that the website operator was aware that multiple women had similarly been lured to Florida and victimized but failed to warn her or other users of the site. Defendant specifically denied the allegations, including that the assailants found plaintiff through the website.

The district court dismissed, holding the

case was barred by the Communications Decency Act, 47 U.S.C. § 230(c) (2012). The Ninth Circuit panel reversed. The Court took no position on the viability of plaintiff's failure to warn claim, which requires a special relationship between the parties, but held the claim was not within the scope of immunity provided by Section 230.

Section 230 Analysis

The Court panel explained that in general Section 230 protects websites from liability for material posted on the website by someone else. But here plaintiff "does not seek to hold Internet Brands liable as a 'publisher or speaker' of content someone posted on the Model Mayhem website, or for Internet Brands' failure to remove content posted on the website."

Plaintiff's failure to warn claim would not require the website to remove any user content or otherwise affect how the site publishes its content. The website would just have to have warned users about what it knew of the rape luring scheme. Such a warning would be defendant's own content and thus would fall outside Section 230. According to the Court:

Jane Doe's failure to warn claim has nothing to do with Internet Brands' efforts,

or lack thereof, to edit or remove user generated content. The theory is that Internet Brands should be held liable, based on its knowledge of the rape scheme and its 'special relationship' with users like Jane Doe, for failing to generate its own warning. Liability would not discourage 'Good Samaritan' filtering of third party content. The

core policy of section 230(c), reflected in the statute's heading, does not apply, and neither does the CDA's bar.

The Court acknowledged that the website was in some sense an "intermediary" between plaintiff and her assailants as a "but for" cause of her injuries. But "Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet."

Plaintiff was represented by Jeffrey Herman and Stuart S. Mermelstein, Herman Law, Boca Raton, FL. Defendant was represented by Wendy E. Giberti, iGeneral Counsel, P.C., Beverly Hills, CA; and Patrick Fraioli, Ervin Cohen & Jessup LLP, Beverly Hills, CA.

"Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet."

Texas Court Strikes "Improper Photography" Statute as Facially Unconstitutional

By Grayson McDaniel

On September 17, 2014, in an 8-1 ruling, the Texas Court of Criminal Appeals struck down as facially unconstitutional the state's improper photography statute. *Ex Parte Thompson*.

Background

On July 6, 2011, Ronald Thompson was arrested after he was caught recording women in bikinis without their consent. *Ex Parte Thompson*, 414 S.W.3d 872, 874 (Tex. App.—San Antonio 2013, pet. granted). Thompson was charged with twenty-six counts of improper photography or visual recording in violation of section 21.15(b)(1) of the Texas Penal Code, commonly known as the "improper photography" statute, which provides:

A person commits an offense if the person: (1) photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of another at a location that is not a bathroom or private dressing room: (A) without the other person's consent; and (B) with intent to arouse or gratify the sexual desire of any person.

TEX. PENAL CODE § 21.15(b)(1).

Thompson filed a pre-trial writ of habeas corpus, arguing that the improper photography statute impermissibly regulated the content of speech and was both overbroad and vague, in violation of the First Amendment and Article I, Section 8 of the Texas Constitution. The Bexar County District Court denied his petition on the merits. Thompson appealed the decision, and the San Antonio Court of Appeals reversed, holding that the improper photography statute was facially unconstitutional. Analysis on Appeal

The San Antonio Court of Appeals stated that the improper photography statute regulated the ability to take photographs, a constitutionally protected right, as well as an individual's thoughts. *Thompson*, 414 S.W.3d at 877 (noting that by referencing a perpetrator's "intent to arouse or gratify . . . sexual desires," the statute "also restricts a person's thoughts, which the U.S. Supreme Court has held is wholly inconsistent with the philosophy of the First Amendment" (internal quotation marks and citation omitted)).

The court analyzed the statute under intermediate scrutiny, deciding that it regulated photography in a content-

neutral manner, "not favor[ing] one type of photograph over another." *Thompson*, 414 S.W.3d at 878 (citing *Turner Broad. Sys.*, *Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994)). The court then held the statute to be impermissibly overbroad because it criminalized photographing or recording people in public, where they have no reasonable expectation of privacy.

The court concluded that section 21.15(b) (1) was void on its face and remanded to the trial court to enter an order dismissing all charges against Thompson on alleged violations of the statute. *Id.* at 881.

Analysis on Discretionary Review

The Texas Court of Criminal Appeals granted discretionary review of Thompson's case on November 27, 2013. Briefing was complete in early 2014 and the court heard oral argument on May 7, 2014, with Thompson giving some of his argument time to law professor Eugene Volokh, who represented amicus Reporters Committee for Freedom of the Press. On September 17, 2014, in an 8-1 ruling, the Texas Court of Criminal Appeals affirmed the Court of Appeals, striking down the improper photography statute as *(Continued on page 43)*

The Court began its analysis by holding that photography is "inherently expressive," and as such always falls under First Amendment protection, despite the State's argument to the contrary.

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unconstitutional. Justice Keller authored the opinion. Justice Meyers dissented.

The Court began its analysis by holding that photography is "inherently expressive," and as such always falls under First Amendment protection, despite the State's argument to the contrary. *Ex Parte Thompson*, No. PD-1371-13, slip op. at 9, 12 (Tex. Crim. App. Sept. 17, 2014) (citing *Kaplan v. Calif.*, 413 U.S. 115, 119 (1973)). The act of taking a photograph—the "purposeful creation" of a protected form of expression—is also entitled to the same First Amendment protection as the photograph itself, the Court held. *Id.* at 14.

The State argued that the improper photography statute did not regulate protected content. It posited that because the statute's specific intent element—only regulating photographs taken with the "intent to arouse or gratify ... sexual desire"—transformed it from a statute that regulated photography to one that regulated intent. *Id.* at 4 (describing the state's argument that the statute merely "regulates a person's intent in creating a visual record and not the contents of the record itself.").

The Court rejected this argument, noting a prior holding that regulation of actions taken with specific intent to arouse or gratify sexual desire was not removed from First Amendment protection. *Id.* at 15-16 (citing *Ex Parte Lo*, 424 S.W.3d 10, 25-26 (Tex. Crim. App. 2013)).

The State then argued that the improper photography statute did not regulate protected speech because it only regulated photographs taken "without ... consent." *Id.* at 4-5. The State contended that individuals consent to have anything they show or do in public photographed or recorded, and that the statute therefore only regulates photography of non-public content. Under the State's theory, a photograph taken of a woman dancing in public would be taken with her implicit consent. It would not fall under the improper photography statute even if it was taken with the intent to arouse or gratify sexual desire. A photograph taken up a woman's skirt at what was not publicly visible, however, would not be taken with the subject's implicit consent and would be regulated by the statute.

The Court disagreed with the State's underlying theory, that individuals implicitly consent to be photographed in public. Defining "consent" in this way, the Court reasoned, would give the word a different meaning than it has in other legislation, such as another part of the Texas Penal Code, where it is defined as "assent in fact, whether express or apparent." TEX. PENAL CODE § 1.07(a)(11). The Court stated that it was not the judiciary's place to unilaterally broaden the definition of "consent." *Thompson*, slip op. at 20 -21.

The Court, having determined that Thompson's conduct (a) was subject to First Amendment protection and (b) was regulated under the improper photography statute, turned next to the improper photography statute's constitutionality.

Contrary to the Court of Appeals, which held that the statute was content-neutral and subject to intermediate scrutiny, the Court of Criminal Appeals determined that the regulations imposed by the statute were content-based and thus subject to strict scrutiny. *Id.* at 32. The Court's analysis stemmed from the point made by *amici* that the improper photography statute regulates photography "*of another*." TEX. PENAL CODE § 21.15(b)(1) (emphasis added). The Court decided that "another" meant that only photographs of people fall under the statute, not photographs of non-human content. The statute also "favored one type of photograph over another" because it only regulated photography of another taken with the specific intent to arouse or gratify sexual desire.

Content-based regulations, the Court stated, are "presumptively invalid" and rarely permissible. *Id.* at 33 (citing *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2667 (2011)). The State's asserted interest in protecting the privacy of the individuals photographed was, the Court stated, substantial, but was misplaced, as the statute regulated a much broader swath of conduct than would be needed to satisfy privacy concerns. The provision thus failed to satisfy strict scrutiny.

As a final measure, the Court addressed whether the statute was so overbroad as to be facially invalid. Describing the statute's breadth as "alarming" and "breathtaking," the Court held that it was, and affirmed the Court of Appeals' decision that section 21.15(b)(1) was void on its face.

Justice Meyers dissented from the judgment, but did not write separately.

Grayson McDaniel is an associate at Vinson & Elkins in Austin, TX. Defendant was represented by Donald H. Flanary III, Goldstein, Goldstein & Hilley, San Antonio, TX. The Reporters Committee for the Freedom of the Press filed an <u>amicus brief</u> arguing that the Texas statute was an impermissible content-based restriction on constitutionally protected speech.

Bankruptcy Court to Consider Unsealing Evidence in Asbestos Litigation

By Steven F. Pflaum & Andrew G. May

In a ruling with major implications for the national controversy surrounding asbestos litigation, a district judge in North Carolina recently reversed orders entered by a bankruptcy judge closing portions of a key evidentiary hearing to the public and sealing testimony and documents bearing on allegations that the debtor had been victimized by pervasive fraud committed by asbestos plaintiffs and their lawyers. *Legal Newsline v. Garlock Sealing Technologies LLC*, No. 3:13-cv-00464 (W.D. N.C. July 23, 2014) (Cogburn, J.).

The debtor in the chapter 11 bankruptcy case, Garlock Sealing Technologies, is a manufacturer of gaskets and other products containing asbestos. In June 2010, Garlock sought bankruptcy protection due to an onslaught of lawsuits alleging personal injuries (primarily mesothelioma) from exposure to asbestos from Garlock's products. Like many of the more than 100 manufacturers across the country that have filed bankruptcy due to asbestos litigation, Garlock sought a plan of reorganization that included establishment of a trust to resolve all current and future asbestos claims against the company. In addition, Garlock filed adversary complaints against several of the lawyers who had represented asbestos plaintiffs against Garlock, alleging that the lawyers committed fraud by claiming that Garlock was solely responsible for their clients' asbestos-related illnesses, while simultaneously pursuing other companies for the same injuries, thereby "double-dipping" in their legal recoveries.

A three-week evidentiary hearing (the "Estimation Trial") was conducted in the summer of 2013 before U.S. Bankruptcy Judge George R. Hodges in Charlotte, North Carolina, to determine how much money Garlock should be required to set aside, in its chapter 11 plan of reorganization, to compensate current and future asbestos claimants. A central focus of the Estimation Trial was to decide the extent to which past was prologue—in other words, whether the prior verdicts and settlements against Garlock provide an accurate yardstick for estimating its future liability for asbestos claims. Garlock argued that its pre-bankruptcy claims experience had been inflated due to fraud committed

by asbestos attorneys. At the instance of lawyers representing asbestos plaintiffs, much of the evidence at the Estimation Trial was admitted under seal and portions of the trial were closed to the media and other members of the public.

Shortly after Judge Hodges first closed a portion of the Estimation Trial to the public, *Legal Newsline*, an Internetbased newswire, filed a motion to intervene for the purpose of preserving access to the trial by the media and the public. *Legal Newsline* argued that closing the courtroom did not comply with the substantive and procedural protections afforded by the First Amendment. Judge Hodges denied *Legal Newsline's* motion, concluding that certain confidentiality considerations outweighed the public's interest in access to the trial. *Legal Newsline* appealed and the appeal was assigned to U.S. District Judge Max O. Cogburn, Jr.

Legal Newsline's appeal was still pending when Judge Hodges issued his decision on the subject of the Estimation Trial. Rejecting the \$1 billion to \$1.3 billion estimate of Garlock's liability for mesothelioma claims extrapolated by representatives of existing and future asbestos disease claimants from previous verdicts and settlements involving Garlock, Judge Hodges estimated Garlock's liability to be \$125 million. In a landmark 65-page ruling, Judge Hodges summarized voluminous evidence-much of which was submitted under seal or when the courtroom was closed to the public-and concluded that the evidence revealed a "startling pattern of misrepresentation" and "suppression of evidence" by the asbestos plaintiffs' lawyers that "had a profound impact on a number of Garlock's trials and many of its settlements such that the amounts recovered were inflated." The ruling was the focus of widespread media attention, including articles in The Wall Street Journal, The New York Times, Forbes, and other publications.

In the wake of Judge Hodges' ruling, *Legal Newsline* filed a second motion to intervene for the purpose of requesting that the court unseal the evidence upon which the ruling was based. In its second motion, *Legal Newsline* contended that (*Continued on page 45*)

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the First Amendment and common law's protection of the public's right of access to court proceedings applies with special force to evidence on which court decisions are based. Various manufacturers of products containing asbestos, including Ford Motor Company and Honeywell International, Inc., as well as other interested parties, filed motions seeking to unseal all of the evidence that had been admitted under seal at the Estimation Trial.

In April 2014, Judge Hodges denied the motions to unseal evidence. Although Judge Hodges did not conclude that the motions lacked merit, he denied the motions in order to expedite the district court's ability to decide what should be unsealed—a decision Judge Hodges felt was related to the

pending appeal from his denial of *Legal Newsline's* motion to keep the Estimation Trial open to the public. *Legal Newsline*, Ford, and the other parties that had sought the unsealing of evidence appealed the denial of their motions to unseal. All of those appeals were assigned to Judge Cogburn.

On July 23, 2014, Judge Cogburn issued an opinion holding that Judge Hodges had erred in closing the courtroom and sealing evidence. Finding that the bankruptcy judge should not have deferred to assertions of confidentiality by counsel for various parties and discovery respondents, Judge Cogburn reversed the orders denying *Legal*

Newsline's motion to keep the Estimation Trial open to the public and the motions by *Legal Newsline* and others to unseal evidence from the Estimation Trial:

While a court may seal any number of documents, proceedings, or applications for appropriate reasons, it simply cannot delegate that responsibility to the litigants by giving deference to protective orders. As a gatekeeper, a judge must consider sealing as the exception not the rule..., give the public notice of its intent to seal, require counsel to provide valid reasons for such extraordinary relief, and then explain that decision as well as the reason why less drastic alternatives were not employed. The reason is simple: the public and the

Judge Hodges' decision of the forthcoming motions to keep evidence under seal, which is expected sometime before the end of the year, will be closely watched by lawyers and policymakers across the country.

press have a co-extensive right to view and consider documents tendered a judge and/or jury when a dispute in brought in the ultimate public forum, a courtroom.

Judge Cogburn stopped short of ordering that any evidence be unsealed immediately. He remanded the case to the bankruptcy court with instructions to decide, first, whether the source of the right to access was the First Amendment or the common law, and next, whether the facts justify sealing under the legal standard pertaining to the applicable right of access.

On August 1, 2014—a year to the day after *Legal Newsline's* motion to keep the courtroom open was denied—

Judge Hodges entered an order establishing a protocol for determining whether any of the evidence from the trial will remain under seal. The protocol requires anyone wishing to keep evidence under seal to file a motion seeking that relief.

Judge Hodges' decision of the forthcoming motions to keep evidence under seal, which is expected sometime before the end of the year, will be closely watched by lawyers and policymakers across the country. His decision of the Estimation Trial issues had been simultaneously hailed by asbestos defendants and their allies, who declared the ruling a vindication of their longstanding criticism of what they perceive

to be abusive asbestos litigation, and condemned by lawyers who represent asbestos plaintiffs, who termed the decision an "outlier" that is not supported by the evidence. The evidence at issue is believed to involve the activities and practices of some of the nation's leading asbestos plaintiffs' lawyers. Disclosure of that evidence may boost legislative efforts to bring reforms to asbestos litigation if the evidence reveals that Judge Hodges' findings were well-founded, and especially if it suggests that the abuses to which Garlock was subjected are typical of those to which other asbestos defendants have been subjected.

Steven F. Pflaum is a partner, and Andrew G. May an associate, in the Chicago-based firm of Neal, Gerber & Eisenberg LLP. Messrs. Pflaum and May represent Legal Newsline in the Garlock litigation.

Circuit Recognizes First Amendment Right to Certain Grand Jury Contempt Information

There is a First Amendment right to access information about people held in contempt of grand juries, the Ninth Circuit has ruled in an apparent case of first impression. *United States v. Index Newspapers*, No. 13-35243 (9th Cir. Sept. 5 2014). However, the appellate court held there is no First Amendment right to the portions of contempt proceedings containing discussion of grand jury matters.

Background

On May Day in 2012, Seattle demonstrators dressed in black smashed windows, used large sticks to damage buildings, spray-painted cars and committed other crimes of vandalism in the city's downtown. Matthew Duran and one other person only identified by his or her initials were subpoenaed to testify before a federal grand jury about the criminal aspects of the demonstration.

Duran and the other person were held in contempt for refusing to testify in the grand jury proceedings and ordered to jail for possibly as long as 18 months. Five months later, the district court concluded that continued confinement would not make the pair testify and that their solitary confinement had caused their mental and physical health to deteriorate. They were released.

Index Newspapers, doing business as *The Stranger*, sought to unseal the court filings and the transcripts of proceedings about Duran being found in contempt and being held in jail for five months. U.S. District Judge Richard A. Jones of the Western District of Washington ruled that *The Stranger* had no right to access the portions of the contempt proceeding in which grand jury secrets were exposed. The judge allowed access only to the open part of the contempt hearing in which he had announced that the two witnesses were in contempt.

Only access to Duran's proceedings was appealed.

On Appeal

Judge Morgan B. Christen, writing for the panel, first held

that a direct appeal, not *The Stranger's* petition for mandamus, was the correct mechanism to challenge access to the grand jury contempt proceedings.

The panel applied the *Press Enterprise Co. v. Superior Court* "experience and logic test" to determine if there is a First Amendment right of access to the various court proceedings regarding Duran's confinement for contempt: one, "whether the place and process have historically been open to the press and general public," and, two, "whether public access plays a significant positive role in the functioning of the particular process in question."

The court held that there is a First Amendment right to orders holding people in contempt of court, transcripts of court proceedings and court filings related to people being held in jail on contempt, court filings about unsealing court files related to contempt proceedings, and court filings in appeals from orders related to the sealing or unsealing of judicial records.

The First Amendment right to these court proceedings and documents are qualified, the panel said. "Courts must carefully consider whether closure or sealing is nevertheless required to prevent harm to a compelling interest, which in this context will likely be the need to maintain the secrecy of grand jury information and the need to avoid compromising and grand jury investigations," the panel said.

Jones also was ordered to unseal the docket to allow the public to access transcripts and filings related to Duran's contempt proceeding. With the entire docket sealed, "the public had no way of accessing the [portion of the] transcript the court intended to unseal," Judge Christen said.

The appellate court, however, did not find a First Amendment right of access to the filings and transcripts related to motions to quash subpoenas to appear before the grand jury, motions to hold a grand jury witness in contempt and portions of contempt proceedings discussing grand jury matters.

There is a compelling need to keep matters occurring before a grand jury secret, which trumps the First Amendment right of public access to courts, the panel said.

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Dutch Court Rejects Right to Be Forgotten

More Freedom of Speech for Search Engines, Less Right to Be Forgotten For Criminals

By Joran Spauwen and Jens van den Brink

This month, the Court of Amsterdam in preliminary relief proceedings got a chance to shed light on the consequences of the European Court of Justice's much-discussed right to be forgotten decision. Case No. C/13/569654 / KG ZA 14-960 (Sept. 19, 2014). As far as we are aware, this is the first national court in the EU to interpret and apply the *Google Spain* ruling.

Background

The proceedings in Amsterdam centred on one of the many "right to be forgotten" requests Google received after the *Google Spain* judgment. This request was made by the owner of an escort agency who was sentenced to six years in prison in 2012 for "attempted incitement of contract killing," which is still under appeal. He had been caught on camera by Peter R. de Vries – a well-known Dutch crime journalist, who got international attention for his coverage of the Nathalie Holloway case.

This year the man wanted to have links removed to online publications linking him to the crime he had committed. Although Google was willing to remove part of the search results he complained about, the search engine refused to comply fully with his request. The complainant decided to bring suit in order to have other search results removed as well.

While the Court of Justice of the European Union ("CJEU") seemed to suffer from a slight case of privacy tunnel vision, the Court of Amsterdam displayed a more practical approach and arguably paid more attention to the freedom of speech issues concerned with these kinds of requests. The Court rejected the claims of the owner of the escort agency.

Dutch Court's Analysis of RTBF

The Court of Amsterdam displayed a more practical approach and arguably paid more attention to the freedom of speech issues concerned with these kinds of requests.

The interesting thing about the judgment is how the Amsterdam court reached this conclusion. The Dutch Court briefly summarized the test provided by the CJEU, giving it a personal twist:

"The [Google Spain] judgment does not intend to protect individuals against all negative communications on the Internet, but only against 'being pursued' for a long time by 'irrelevant', 'excessive' or 'unnecessarily defamatory' expressions."

The elements 'being pursued for a long time' and 'unnecessarily defamatory' are not quotes from *Google Spain*. Apparently the Dutch Court read those elements into the CJEU decision. This, however, provides a more

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balanced view than that that of the CJEU because it does not imply that privacy outweighs free speech and the freedom of information (which the CJEU suggested in the *Google Spain* decision).

The Dutch court added that it will be hard for a person convicted of a serious crime to meet these criteria:

"The conviction for a serious crime such as the one at issue and the negative publicity as a consequence thereof, in general provide information about an individual that will remain relevant. The negative qualifications that may be involved will only be 'excessive' or 'unnecessarily defamatory' in very exceptional cases, for instance when the offense committed is brought up again without a clear reason, apparently for no other purpose than to damage the individual involved, if reporting is not factual but rather a 'slanging-match'."

It was clear to the Court of Amsterdam that the request of the complainant did not meet these criteria.

Full Last Name and Auto-Complete Function

The Dutch Court also confirmed that it is common practice in Dutch journalism to anonymize convicted persons by only mentioning the first letter of their last name. Nevertheless, the Court underlined that this does not mean that an enforceable standard exists:

"Furthermore, the claimant apparently assumes that there is an enforceable standard which obliges journalists – including, according to the claimant, search engines like Google Search – under all circumstances to anonymize a suspect or a convict of a criminal offense. However, such an enforceable standard does not exist."

Therefore, the fact that some Google search results contain the full name of the claimaint, while the media abbreviated his last name, did not persuade the Court to have these links removed for this reason alone.

The Court further doesn't consider it illogical or unlawful that the auto-complete function of Google suggests journalist 'peter r de vries' as soon as the name of the claimant is typed in. Google automatically makes these suggestions on the basis of earlier search requests. Apparently, Google users still search for the claimant's name in combination with Peter R. de Vries relatively often. Furthermore, the Court does not share the opinion that through the auto-complete function internet users would be able to find out the full name of the claimant.

Communication of Removed Results

As mentioned above, Google did remove a number of search results following complainant's request. In this regard, claimant also objected to the following notice, which Google displays when you search for his name: "Some results may have been removed on the basis of European data protection legislation. More information." Google contended that since June 2014 it includes this notification in all search requests for a personal name, unless "it is the name of a well-known person."

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We were not aware of this policy and we wonder how it is applied exactly. When searching for our own name on Google (of course purely for editorial purposes), even our name appeared to be sufficiently famous to show this notification. The question is if we should feel flattered or whether Google does not apply very strict requirements as to what constitutes "well-known" (or it doesn't strictly uphold its own policy).

The Court rejected the objections because Google's notification does not create incorrect suggestions.

Sufficient Urgency

The Court also questioned if the claimant had sufficient urgency to bring his suit in preliminary relief proceedings. He alleged that Google's search results hindered him in his business life, as well as his private life. According to the Court, this was not sufficiently substantiated. The Court observed in this regard that people in the claimant's immediate circle would already be aware of his criminal past:

"It can provisionally be assumed that relatives, friends and acquaintances of the claimant know what fact(s) the claimant is suspected of and for which fact(s) he was convicted by this court. After all, in the program "Misdaadverslaggever" of Peter R. de Vries of 27 May 2012 the claimant was shown on television in great detail. In this program, footage that had been surreptitiously recorded was shown in which the claimant, mentioned by his first name and the first letter of his last name, discussed with an alleged contract killer the best way of liquidating or having liquidated a competitor of the claimant in the escort sector. In this footage the claimant was shown extensively and recognizably, and no image or sound distortion was used. Subsequently, the claimant was in prison for quite a while. Under these circumstances it cannot be understood, without further explanation of the claimant – which was not given – that the claimant, who has now been released to await his appeal, is seriously hindered in his private life as a result of the actions of Google Inc."

Conclusion

All in all, this ruling is good news, because it provides a more workable interpretation of the *Google Spain* judgment and the *right to be forgotten* under Dutch law, justifiably leaving a lot more room for the freedom of speech. However, the question is whether this case will actually have an impact. What would the outcome be in a case which doesn't concern a crime of the seriousness at play here?

In this respect, we leave you with a small reprimand of the Court (<u>which ties in nicely with the Springer</u> judgment of the ECtHR):

"The claimant now has to bear the consequences of his own actions. One of the consequences of committing a crime is that a person can be in the news in a very negative way and this will also leave its tracks on the Internet, maybe even for a very long time."

Joran Spauwen and Jens van den Brink are lawyers with Kennedy Van der Laan in Amsterdam.

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

Serious Harm, Trial by Jury, Right to Be Forgotten, IPSO and More

By David Hooper

The Serious Harm Threshold <u>Cooke v MGN Limited</u> [2014] EWHC 2831

Under section 1 Defamation Act 2013 which came into force on 1 January 2014 the threshold for libel claims was significantly raised in that in addition to the requirement of the offending words being likely to lower the reputation of the complainant in the eyes of right-thinking people there is a requirement that the words complained of must have caused or be likely to cause serious harm. The tendency of the words to damage a person's reputation is no longer sufficient. In the case of a company trading for profit there is a similar requirement of serious financial harm which is even more difficult to establish given that indicators such as a fall in the share price is not sufficient and that experience has shown that it is very difficult to prove specific damage such as a marked fall in business and to be able to link that to the defamatory publication.

The Cooke case arose out of a television series dealing with those living on social benefits and housing benefits. This led *The Sunday Mirror* to run a story about a housing association and its chief executive headlined "*Millionaire Tory cashes in on TV benefits*". The article was certainly critical of the chief executive pointing to her salary of £179,000 and her mansion in the Gloucestershire countryside which were in stark contrast to the living conditions of those in receipt of housing benefits who were paying rent to her company.

When a complaint was made on her behalf the newspaper – very wisely as it turned out – very promptly published an apology to the housing association and Mrs Cooke. The terms of the apology were not agreed with the other side, but they made it clear that the company was a not for profit housing and care charity and took its responsibilities to the

A requirement of serious harm is a game changer. Claims that would previously have been successful will now fail leaving the claimants to bear the costs of the action.

community very seriously and the newspaper apologised to both the company and Mrs Cooke. They sued nevertheless and Mr Justice Bean who has now been promoted to the Court of Appeal had to decide whether serious harm had been caused or was likely to have been caused. The time at which that assessment is made is at the time of the institution of proceedings.

The claimants had the difficulty that normally arises in such instances that they could not produce witnesses who thought any less of the claimants as a result of reading the article. Claimants normally have to rely on people they know and those people tend to continue to hold the claimants in the same measure of esteem as before the publication of the offending article. The claimants did produce witness statements seeking to establish the likelihood of serious harm and the Judge indicated that unless the accusation was self-evidently highly damaging such as for example an accusation of terrorism or paedophilia such evidence would normally be required.

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The Judge considered the change in the law and recognised that the introduction of the words serious harm had raised the bar for determining what was actionable but he did not seek to define what would amount to serious harm, as he indicated that these were words in common usage and did not need definition nor did he lay down guidelines as to the sort of evidence that would be required in the future. The consequence therefore is that the issue which constitutes serious harm is likely to be further litigated. However this was a claim which would almost certainly have succeeded under the old law, albeit that the prompt publication by the newspaper of its apology would have mitigated damages.

A requirement of serious harm is a game changer. Claims that would previously have been successful will now fail leaving the claimants to bear the costs of the action. What was of particular significance was the importance the Judge attached to the apology. It was reasonably prominent in the newspaper, although not as prominent as the offending article, but what did resonate with the Judge was that it was very readily accessible on the internet so that anyone looking up the story would have their attention immediately drawn to the fact that there had been an apology. The Claimant was awarded his legal cost up to and including the publication of the apology abut had to pay the Defendant's including the costs of trial thereafter.

What one learns from the case, therefore, is the merit of apologising very promptly and in being reasonably generous in the wording and positioning of the apology and ensuring that it is going to show up prominently on any internet search on the topic. If that is done – however counter-intuitive – there is a strong possibility that libel claims of this nature can no longer be brought successfully.

The trial judge, Mr Justice Bean has now given permission to appeal. He was persuaded to do so on the basis that this was the first case which considered the meaning of serious harm under Section 1 Defamation Act 2013 and that there were potentially far-reaching consequences in his interpretation of the meaning of serious harm, which it was argued overturned centuries old common law principles.

Juries and Libel Actions

Yeo v Times Newspapers Limited [2014] EWHC 2853

This concerned a Member of Parliament who sat on various parliamentary select committees who joined a longish list of rapacious members of parliament who had been deceived by apparent businessmen with fat cheque books who turned out to be investigative journalists from *The Sunday Times*. Mr Yeo's Sunday breakfast was therefore somewhat spoilt by headlines such as "*Top Tory in New Lobbygate Row – the chairman of a commons committee has boasted of how he can promote businesses in which he has an interest.*"

The newspaper availed itself of the changes in the law under section 11 Defamation Act 2013 and section 69(3) Senior Courts Act 1981 to the effect that an action shall be tried without a jury unless the court in its discretion orders it to be heard by a jury and sought to argue that dealing with such a fundamental matter as the integrity of Members of Parliament one needed the enhanced impartiality of a decision taken by members of the public. Such is the low esteem in which most members of the public hold Members of Parliament that the newspaper may have felt that it could hardly fail if 12 members of the electorate started dissecting the ethics of a Member of Parliament.

However, the recently appointed libel judge, Mr Justice Warby, in a lengthy and impressively reasoned judgment, made it clear that it will only be in very rare circumstances that there will be a jury trial where, for example, there might be thought to be a risk of some involuntary bias in the case of a judge alone. All other factors pointed in favour of trial by judge alone. It was less costly and more proportionate to have trial by judge alone, the case was easier to manage and preliminary points which might be determinative could be resolved at an early stage and there would be the advantage of a reasoned judgment.

Despite its long history dating back to Fox's Libel Act 1792 which had then made juries the normal way of hearing libel actions and afforded protection to newspapers against establishment-minded judges, Mr Justice

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Warby gave effect to the virtual abolition of jury trials by virtue of Defamation Act 2013. Jury trials had become increasingly rare by virtue of section 69 Senior Courts Act 1981 whereby there was to be no jury if the court was of the opinion that the trial required any prolonged examinations of documents, accounts or scientific matters.

The real question was whether there was still any mileage in the constitutional principle enunciated by Lord Denning in *Rothermere v Times Newspapers Limited* [1973] 1WLR 448 regarding the importance of a jury, if the newspaper had criticised the great and powerful on a matter of public interest, which had been considered by Lord Bingham in *Aitken v Guardian Newspapers*, noting that it was an important consideration in favour of a jury trial arises where the case involves prominent figures in public life and questions of great importance although in Aitken's libel case there was no jury.

Judges do still have a discretion to order trial by jury, but it will only be extremely rarely that a jury will be held to outweigh the perceived advantages of trial by judge alone of reasoned judgment, proportionality and case management considerations. In any event, Mr Justice Warby considered that although Mr Yeo held an important position in the House of Commons, he was not a member of the government and not, the judge appeared to think, a figure of sufficient public distinction and importance to trigger the Lord Denning principle.

The case also was noteworthy for its analysis of how the defamatory meaning is determined. The defences were justification, a Reynolds defence and fair comment. The judge ruled that the words fell within what is known as a Chase 1 meaning, that is to say that the paper had to justify that the MP was guilty of the conduct it alleged rather than being able to substantiate its case by proving that there were reasonable grounds for suspecting that the allegations were true.

A More Realistic Approach to Public Interest in the ECHR

There have been two interesting decisions recently where the European Court of Human Rights has reined back the French and German courts respectively, which had made findings against the media on the grounds of lack of sufficient public interest, where to American and English eyes the stories were self-evidently of legitimate public interest.

The first concerned Paris-Match, which published an article with photographs of a French lady taken in her flat



with her son from a prior relationship with Prince Albert II of Monaco. <u>Couderc and Hachette Filipacchi Associés v France</u> [2014] ECHR 6004 (decision in French). Prince Albert apparently had not publicly acknowledged the child as his son, but seemingly he had done so privately before a notary in 2003. The mother wrote about her relationship with Prince Albert, his subsequent reaction to her pregnancy and his conduct towards the child.

The French courts had been persuaded by the representatives of Prince Albert that there was no matter of general interest justifying the publication of the article. As the child was illegitimate, he was unable to succeed under the Constitution of Monaco to the throne, that there really was, they argued, no public interest in making the paternity of the child public. The French courts had agreed and awarded \notin 50,000 against *Paris-Match*. The trial court had required *Paris-Match* to put an extract of the judgment on the *entire* front cover of the magazine.

The Court of Appeal at Versailles had reduced this to a mere *one third* of the front cover. By a majority of 4 to 3 the European Court took a wider view of what constituted a contribution to a debate of

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public interest bearing in mind that Prince Albert was head of state, albeit of Monaco, as famously described as "*a sunny place for shady people*." The European Court considered that the French courts got the balance between the public interests of the magazine and privacy rights of Prince Albert wrong.

To broadly similar effect was the decision in <u>Axel Springer AG (No.2) v Germany</u> [2014] ECHR 745 (decision in French). There the German tabloid newspaper Bild had published an article which was critical of the recently retired Chancellor Gerhardt Schroder as chairman of the supervisory board of a German-Russian consortium which built gas pipelines. It followed an agreement that had been signed in April 2005 in the presence of Mr Schroder and Mr Putin. The article was headlined "What does he really earn from the pipeline project? Schroder must reveal his Russian salary." The article also contained speculation by a German politician, Mr Thiele, who was the deputy president of the FDP parliamentary group, that Schroder had resigned from his political office because he



had offered this well-paid job and that Schroder's decision to call early elections had been taken with that self-interested aim.

Although *Bild* had correctly reported what the politician had said, the German Regional Court considered that *Bild* had published serious and insulting suspicion against Schroder. While acknowledging that the article concerned a matter of public interest, they criticised the newspaper for lacking objectivity and balance and for failing to consult Mr Schroder or one of his team prior to publication.

The European Court, however, felt that the case

concerned matters of public interest. The former chancellor, having held one of the highest political offices in the Federal Republic of Germany had a duty to show a much greater degree of tolerance than a private citizen to such articles. The article did not relate to his private life with the aim of satisfying public curiosity, but concerned his controversial appointment to a Russian-German gas consortium shortly after he had left office.

Bild had not exceeded the limits of journalistic freedom and the German court had failed to establish that there was a pressing social need to put the protection of the reputation of the Chancellor above the right of the press to freedom of expression. In the political arena freedom of expression was of the utmost importance and the press had a vital role as public watchdog. The German courts had therefore violated article 10 when they had made an order prohibiting any further publication of the passage in the article which reported the comments of Mr Thiele.

Parody Can Be Fair Dealing in Copyright

On 1 October 2014, British copyright law is changed by the implementation of <u>Regulation 30A Copyright and</u> <u>Rights in Performances (Quotation and Parody) Regulations 2014</u>. This provides that fair dealing with a work for the purpose of caricature, parody or pastiche does not infringe copyright in the work. Up until that time there was a real risk that a parody could be viewed as involving the unlawful copying of a substantial part of the original work.

Fair dealing itself is not defined, but there are some guidance notes from the Intellectual Property Office, which gives some indications of how one judges whether or not it is fair dealing. One would look at whether the amount taken from the original work was fair and reasonable and whether the new work would be said to be a competing work in the sense that it affects the market for the original work. One would also need to look at the question of whether the amount taken from the original work in the parody is fair and reasonable.

Essentially, anyone will be able to parody a copyrighted work if it evokes the original work, it is noticeably different from the original work, it is humorous and there is a fair balance in how the parody is used. Ideally one

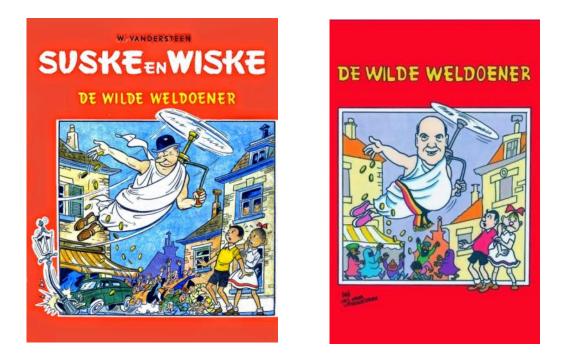
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will want to make the judge smile. The scope for the new parody exception could be very considerable in the commercial as well the literary sector. It will be easier to mock titles in advertisements by parodying their advertising campaigns and the exception is also likely to be exploited by TV production companies, computer game publishers, theatre production companies, musicians and video-hosting websites.

CJEU Parody Decision

This change in the British law of copyright mirrors the decision in <u>Deckmyn v Vandersteen</u> in the Grand Chamber of the European Court of Justice on 3 September 2014. This concerned a political parody of a wellknown (to Belgians) Belgium comic called Spike and Suzy (Suske En Wiske to give the Flemish names). The cartoon characters appeared on a calendar based on the cartoon characters and produced by a Flemish nationalist party. The purpose was to attack the Major of Ghent, but the parody pictures had certain racial and discriminatory overtones.



Original cartoon cover, left; defendant's parody cover, right.

The case concerned a preliminary ruling on the interpretation of article 5(3)(k) of Directive 2001/29/EC which provided for a copyright defence in cases of use for the purposes of caricature, parody or pastiche. The European Court held that the essential characteristics of parody are firstly to evoke an existing work, while being noticeably different from it, secondly, to constitute an expression of humour or mockery. The parody should display noticeable differences with respect to the original parodied work and it should be reasonable attributed to a person other than the author of the original work and it should be seen to relate to the original work itself or mention the source of the parodied work. A fair balance is to be struck between on the one hand the interests and rights of the copyright holders and on the other freedom of expression of the user of the protected work who is relying on the exception for parody.

The interesting point in the Belgian case was that the rights holder in a comic series for children would be likely to object strongly to the discriminatory message based on race, colour and ethnic origin which the calendar

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appeared to highlight. The European Court indicated that copyright holders could oppose a parody if it communicated a discernible message which they could legitimately not want to be associated with. While parody is within these parameters a transformative use of the copyright work which can be made without the permission of the copyright holder, all these factors had to be balanced and the European Court referred the matter back to the Belgian courts to decide where that balance should be struck. This parody would seem to be in real danger of being held not to be sufficiently humorous or mocking and not to strike a fair balance in the sense that the parodied use might be thought to damage the rights of the copyright holder.

Right to be Forgotten – Latest Developments

The principle ramifications of <u>Google Spain SL v Agencia Espanola de Proteccion de Datos</u> have included the tens of thousands of requests to have disagreeable, personal data expunged. A recent case in Amsterdam, however, has given some grounds to hope that the *Google Spain* ruling will be applied more sparingly. There the owner of an escort agency who had been sentenced to six years imprisonment for attempted incitement of a contract killing wanted all links giving details of his crime removed.

Google were not prepared to agree to the width of his request. The judge ruled that the decision in <u>Google</u> <u>Spain</u> was not intended to protect individuals against all negative communications on the internet, but only against

those being pursued for a long time by irrelevant or excessive or unnecessary defamatory expressions. The fact that the complainant had been convicted and sentenced to a term of imprisonment was already well-known in Holland. The information complained of did not appear to be unnecessarily defamatory and it appeared in the judge's view relevant, even after the elapse of a certain period of time. For a more detailed discussion of this case see the article by Jens van den Brink and Joran Spauwen.

Google Spain was considered in slightly different circumstances in England in the case of <u>Heglin v Persons Unknown</u> [2014] EWHC 2808. The claimant was a businessman in Hong Kong and relying on sections 10 and 14 Data Protection Act 1998, he sought to prevent Google processing data which was likely to cause him damage or distress. He was seeking the permission of the court to serve proceedings under the Data Protection Act on Google Inc in the United States, claiming that England was the appropriate forum for the dispute.

The European Court indicated that copyright holders could oppose a parody if it communicated a discernible message which they could legitimately not want to be associated with.

The claim arose out of a series of anonymous, abusive posts. It was accepted by the Claimant that Google had cooperated in taking down the posts, but there remained an issue for trial as to whether Google had done all that it could to have prevented publication of the material complained of and as to the extent of Google's obligations as defined in the Google Spain case in complying with its obligations under the relevant data protection legislation in processing the data. The argument of the Claimant is that Google was under an obligation enforceable in England to comply with the requirements of the Data Protection Act, including an obligation to prevent the processing of the personal data of the claimant, which was inaccurate, or was likely to cause him substantial damage or distress. The matter is likely to come on for trial in November 2014.

In the meantime, the House of Lords Home Affairs, Health and Education EU Sub-Committee has concluded that the decision in Google Spain relating to personal data which was inaccurate, irrelevant, no longer necessary, or excessive in relation to the purpose for which it had originally been processed was "*misguided in principle and unworkable in practice*." However, what notice – if any- will be taken in the European Union as to their

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recommendations of their lordships and ladyships regarding proposals to remove any right to be forgotten or right to erase remains to be seen. It is however, indicative of the level of political controversy which has arisen in relation to this decision giving large measure to the tens of thousands of applications for the erasure and to the public perception that people, often of dubious antecedents are able now to launder their past.

As some measure of the political controversy which the Google Spain case has attracted the European Commission has rather bizarrely produced what it calls a fact-sheet entitled <u>"Myth-busting the Court of Justice of the EU and the 'Right to be Forgotten</u>" which in a simplistic and crude fashion describes six myths against which a red cross is placed directing one's attention to the facts against which a green tick is placed so that the good burgers of Europe can be reassured that all is right with the world.

Damages for Distress under the Data Protection Act

AB v Ministry of Justice (2014) EWHC 1847

There was an interesting decision of Mr Justice Baker which was another example of the growth of remedies under data protection legislation. There a solicitor who sought information from the Ministry of Justice under the Data Protection Act following his wife's death took action against the Ministry on the basis that they had withheld one piece of information and had failed to provide other information within the statutory time limits. Under section 13(2) Data Protection Act the claimant is entitled to compensation for distress only where he has suffered damage. This was previously thought to mean specific financial damage but this limitation appeared to have been side-stepped by the Judge who awarded $\pounds 1$ general damages onto which he tagged $\pounds 2,500$ for the distress suffered.

Open Justice

PNM v Times Newspapers Limited [2014] EWCA Civ 1132

The judgment of Lady Justice Sharp LJ in the Court of Appeal upheld the High Court decision of Mr Justice Tugendhat that a court would not make an order for non-disclosure in favour of a person investigated but not charged in the course of a criminal inquiry into sexual offences against children.

PNM was not himself charged although others in a ring of sexual predators were and were convicted. PNM's name did however feature in the course of the trial and the media wanted to be able to report that evidence. He sought to prevent it being published pointing out that it could place his family and himself at risk.

The court felt however that his rights were outweighed by the higher degree of public interest in reporting proceedings which were held in open court. The court also considered that the public would discern the difference between suspicion and guilt and would understand and accept that PNM was in any event entitled to the presumption of innocence. In so saying the courts may perhaps have over-estimated the sense of fair play of the British public who have on occasions had difficulty in differentiating between paediatricians and paedophiles and have happily thrown bricks through the windows of the hapless doctors. However, the case was a reassuring reassertion of the right to report proceedings in open court. The case may be heard in the Supreme Court and the orders for anonymity remain in place until the case is concluded.

Protection of Sources and Abuse of RIPA Powers

Evidence has emerged as to how the police have investigated unauthorised dealings between journalists and the police with the result that the police have been able to obtain whole-scale evidence as to journalist sources. On occasions there have been instances where the dealings between tabloid journalists and the police have breached

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the criminal law, but the police do have well-recognised powers to investigate crime and to get the appropriate production orders or warrants.

What has increasingly been happening is that the police have circumvented the procedural safeguards under the Police and Criminal Evidence Act 1984 (PACE) with the protections that they provide for journalists and journalistic materials. There are special provisions under PACE for "Journalistic Material" which is material acquired or created for the purpose of journalism in the possession of the person who so acquired or created it. For the police to get hold of such material they have to go to a judge and satisfy him or her that there are reasonable grounds for believing an indictable offence has been committed, that there are reasonable grounds to believe that any material on the premises specified in the application is likely to be of substantial value to the investigation and that other methods of obtaining the material have been tried without success.

The police also have to satisfy a public interest test and the media organisation would normally have seven days to comply with the production order and they have an opportunity of challenging the order. That way a balance is struck between the prosecution of crime and the protection of sources.

However what the police have now been doing is using their powers under the Regulation of Investigatory Powers Act 2000 (RIPA) where such safeguards do *not* exist and the gateway to the material is obtaining permission from a senior officer of the police that normally tends to be a little more accommodating and unquestioning to his officers than a judge. The upshot is that under RIPA the police then go to the telephone

company and get a print-out of all the numbers the journalist has been calling on his phone. That way they know who the journalist has been talking to which might include not only improper transactions involving corrupt police officers (where there have been a number of recent trials) but will almost certainly also include the numbers of a large number of unrelated sources. While it is right that crime is investigated, there are well-recognised procedures under PACE, but these are being circumvented under RIPA and at the same time a lot of confidential and unrelated information is being secretly and unaccountably hoovered up.

This has become routine and arbitrary and a challenge is being made by the Bureau of Investigative Journalists to the European Court of Human Rights as to whether UK legislation adequately protects journalist sources from routine government surveillance and mass scrutiny. The upshot is that under RIPA the police then go to the telephone company and get a printout of all the numbers the journalist has been calling on his phone.

IPSO Opens for Business

The <u>Independent Press Standards Organisation</u> (IPSO) was launched on 8 September 2014. It replaces the discredited Press Complaints Commission (PCC) and is the product of consider able debate and controversy following the recommendations of the Leveson inquiry. There are some newspapers who have not signed up for IPSO. The aim of IPSO is to be "*rigorous, independent, fair and transparent*." It sees its objective as helping rebuild public trust in the Press through a system of independent fair and transparent regulation. It will operate the standards of the Editor's Code of Practice and its Chairman is the retired Court of Appeal judge Sir Alan Moses.

The first case which IPSO may be called to adjudicate upon arises out of the resignation of the Minister for the Civil Service, Brooks Newmark. He was the victim of a tabloid newspaper sting which had him believing that he was flirting with an attractive Tory PR woman called "Sophie Wittam" and according to no less an authority than Mark Stephens sending her selfies of his todger. The discovery that the PR lady was contrary to the impression

given by the photographs he had been sent in fact a male freelance reporter of the *Sunday Mirror* was a matter of some surprise and disappointment to Mr Newmark and his resignation followed swiftly.

Another MP who claims he was likewise approached by "Sophie Wittam" but did not feel the need to send her a selfie has asked IPSO to investigate the question of entrapment and any wrongdoing. The newspaper claims that the subterfuge was justified in the public interest. The matter will provide IPSO with an excellent opportunity to demonstrate how it will deal with such complaints.

Public interest may be used as something of a yardstick for critical assessment of IPSO. Many felt the PCC gave too much latitude to the media's claimed defence of public interest as opposed to the complaints of the public about apparent breaches of the Code. It looks as if the Newmark case may bring the issue into sharp focus in one of its first decisions

In the meantime the Information Commissioners Office has produced a booklet entitled <u>Data Protection and</u> <u>Journalism – A guide for the media</u> which explains how the Data Protection Act applies to journalists and explains what is good practice and what is the role of the Information Commissioners Office. It is simply guidance and does not replace any codes and it has also produced a quick guide for journalists which, given the increasing importance of data protection, most journalists are likely to want to have readily available.

David Hooper is a lawyer with Reynolds Porter Chamberlain LLP in London.

MLRC UPCOMING EVENTS

MLRC Forum: Controlling Data, Forgetting Data: What U.S. Lawyers Need to Know About the Right to Be Forgotten November 12, 2014 | New York, NY

> MLRC Annual Dinner & Forum November 12, 2014 | New York, NY

DCS Annual Lunch & Meeting

November 13, 2014 | New York, NY

MLRC/Southwestern Entertainment and Media Law Conference January 15, 2015 | Los Angeles, CA

> Legal Frontiers in Digital Media May 14-15, 2015 | Palo Alto, CA