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

MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through November 25, 2013

MLRC

LIBEL AND PRIVACY

Chris Matthews, left,and Aaron Sorkin at the MLRC Annual Dinner, November 13, in New York City.

MLRC Annual Dinner 2013

"A Conversation With Aaron Sorkin"

On Wednesday, November 13, 2013, nearly 700 MLRC members and friends gathered for MLRC's Annual Dinner at the Grand Hyatt in New York.

Acclaimed screenwriter and playwright Aaron Sorkin was interviewed by Chris Matthews, host of MSNBC's *Hardball with Chris Matthews*.

Aaron Sorkin is an Academy-Award winning writer and renowned playwright. His works include the theater production and film version of *A Few Good Men*, the feature films *The Social Network* for which he won the Academy Award for Best Adapted Screenplay, *Malice*, *The American President* and *Charlie Wilson's War*. He adapted *Moneyball* along with Steve Zalillian and story by Stan Chervin, for which he received the Critics Choice Award and New York Film Critics Award for Best Adapted Screenplay, and will next adapt *Steve Jobs*, the Walter Isaacson biography of the late Apple co-founder.

For television Mr. Sorkin created and produced the multiple Emmy-Award winning series *The West Wing*, produced and wrote the television series *Sports Night* and created the series *Studio 60 on the Sunset Strip*. Mr. Sorkin's HBO hit series, *The Newsroom*, debuted in 2012 and recently concluded its second season.

Chris Matthews is one of America's most renowned journalists covering politics today. His career includes presidential speechwriter, top aide to legendary Speaker of the House Thomas P. "Tip" O'Neill, Jr., print journalist and best-selling author. Mr. Matthews is currently the host of *Hardball* on MSNBC and appears regularly on other MSNBC and NBC programs, including election coverage. For over a decade, Mr. Matthews also hosted a Sunday morning program for NBC, *The Chris Matthews Show*. He is the author of seven books including the recent best sellers, *Tip and the Gipper: When Politics Worked*, published October 2013, and *Jack Kennedy: Elusive Hero*, published November 2011.

RETURN TO TABLE OF CONTENTS

MATTHEWS: Your story line in A Few Good Men is about the maturation of a lawyer into becoming a Marine.

SORKIN: Exactly right. And the fact of the matter is that the climax--you can't handle the truth is the line that people remember from A Few Good Men, but the climax of the movie and the climax of that scene is when Nicholson has gotten completely out of control, and he's cursing Tom Cruise out, and calls him son. And Cruise says, don't call me son. I'm a lawyer, and an officer in the United States Navy, and you're under arrest, you son of a bitch. So the climax of that movie is when he fills out his uniform and suddenly becomes proud of it.

SORKIN: Mark Zuckerberg was the first antihero I wrote, and I had to sort of drop my love of writing romantically and idealistically, and I was writing something else this time. But I really did like this story. When you are writing an antihero, whether it's Zuckerberg in the Social Network or Nicholson's character in A Few Good Men, you can't judge them. You have to like them. You have to write them as if they're making their case to God why they should be allowed into heaven. In writing the Social Network, I didn't want the movie to take a position on whether or not the Winklevoss twins had stolen Facebook, who was right and who was wrong. I wanted those arguments to happen in the parking lot. And they sure did because by and large, if you were over 30, you thought that this was a cautionary tale, and if you were under 30, you thought Zuckerberg was a rock star.

RETURN TO TABLE OF CONTENTS

MATTHEWS: You write people with bad manners. Everybody's talking over each other.

SORKIN: I do it for all the reasons you just described. Mostly I do it because I like that sound, too. Listen, I like making all kinds of sounds, whether it's a drum solo or three violins. I like the sound of people stepping on each other.

* * *

MATTHEWS: West Wing is closer to reality than almost anything you see on television about politics. How did you know there was that much idealism in those West Wing rooms?

SORKIN: I didn't. I just wanted there to be. By and large in popular culture, we portray our leaders as either Machiavellian or dolts. And I just wanted to do something else. I wanted to show a very competent group of people agree or disagree with their political ideology, but you can't argue the fact that they wake up in the morning trying to do good.

* * *

MATTHEWS: You once said it was fun to tell stories about people who are trying to change everything. I think the pattern here. Moneyball, Billy Bean, Zuckerberg, even the different kind of president, single president is going to live like a single guy in America in the 21st Century. What is it Americans like about that? ...

AARON SORKIN: I'm not sure if it's a uniquely American thing or not. After all, for me, kind of at the root of all of this is Don Quixote, who I think he's the greatest character in literature. Here's the thing. We root for that guy when we're in a movie theater, and we make fun of that guy when we're not. I wish that weren't quite so much the case.

RETURN TO TABLE OF CONTENTS

Online Advertising Takes Center Stage at 2013 MLRC Forum

This year's annual Forum – scheduled right before the cocktail hour of the Annual Dinner – tackled the technical and policy issues surrounding online advertising networks and programmatic buying. The program, which was supported by **Microsoft** and **Hachette**, and titled "Red, Hot and Crowded: Ad Networks, Exchanges and the Media Business," began with a presentation from **Ted Lazarus**, Director of Legal and **Josh Cohen**, Senior Business Product Manager, who both work for Google in its advertising platforms department.

Ad networks originally grew as a way for small websites, which could not afford their own ad sales teams, to sell ads for their sites. This has evolved into a mechanism, called programmatic buying, in which online publishers, big and small, can sell ad inventory in an automated way to a multitude of potential advertisers through auctions conducted on online exchanges. These exchanges allow for the setting of price ceilings and floors and allow advertisers to target specific demographics and types of sites. Likewise, publishers, too, can restrict advertising to particular product-types and brands. Once these parameters are set, ads are bought and sold, often in real time, in milliseconds, much like automated trading on a stock exchange.

At the conclusion of the presentation, and after the presenters answered a number of questions from the audience, **Ted Lazarus** moderated a follow-up panel discussion on the legal and business issues that are impacted by this technology. The panel included, **Joshua Pila**, Senior Counsel, LIN Media, **Karole Morgan-Prager**, VP & General Counsel, The McClatchy Company, and **Matt Haies**, VP & General Counsel, 24/7 Media. One of the problems publishers face is that the third party networks can utilize the publisher's data and monetize it by targeting the same customers on other sites. And notwithstanding pre-programmed advertiser criteria, publishers often see ads on their site that violate standards and practices, e.g., medical marijuana ads, and have a hard time tracing the ads back to the advertiser.

There is often a backlash from customers when the ads served are based upon customer behavior, a "creepiness factor" that several members of the panel felt needed to be balanced with the desire to serve useful and relevant ads to each consumer. Businesswise, programmatic buying is a mixed bag for major publishers. On the one hand, it has driven down the price of advertising, but on the other, it has opened up new markets to regional publications that could ordinarily only attract advertisers targeting the publisher's local base audience. With this new technology, the exchange can match appropriate advertisers with an audience that resides anywhere and everywhere.

RETURN TO TABLE OF CONTENTS

Newspaper Awarded Summary Judgment Against Trial Lawyer Richard A. Sprague

Case Represents First Notable Loss for Legendary Lawyer as a Libel Litigant

By Amy B. Ginensky, Kaitlin M. Gurney, and Raphael Cunniff

Pennsylvania defamation decisions have been dominated by one name for 40 years: Richard A. Sprague. The formidable trial lawyer, 88, is known for representing Philadelphia's most prominent citizens in libel cases - and he has been even more successful in the cases he brought against news organizations on his own behalf.

Philadelphia Court of Common Pleas Judge Lisa M. Rau's 46-page November 1, 2013, opinion awarding summary judgment to the *Philadelphia Daily News* and a former columnist, Jill Porter, on five separate grounds marks the first notable loss for Sprague as libel plaintiff. *Sprague v. Porter*.

"Mr. Sprague did not challenge Ms. Porter's verbatim quotations of his words or account of his actions: they were the truth," Judge Rau held in her opinion, issued in response to Sprague's appeal of her one-sentence May 17, 2013 order granting summary judgment. "Instead, he disagreed with her opinion about the morality of his words and actions. Their public disagreement is permitted. Her opinion is not actionable any more than his is. People who are public figures or who speak about public issues may not always enjoy what they read about themselves. They are free to be unhappy. However, absent demonstrating evidence to overcome constitutional protections they cannot extract a penalty from the speaker or publisher."

The formidable trial lawyer, 88, is known for representing Philadelphia's most prominent citizens in libel cases.

Porter's February 20, 2009 column contrasted Sprague's testimony at the federal corruption trial of his former best friend and client, powerful Pennsylvania Senator Vincent J. Fumo, with statements he made two years earlier at a press conference after Fumo was indicted on 139 corruption-related charges, including deleting emails and wiping computer hard drives during a federal investigation.

At the 2007 press conference, Sprague told reporters that Fumo, then his client, had relied on advice of counsel when he destroyed documents. "Senator Fumo went and sought advice from a lawyer, not me, but a lawyer, on whether to change his policy" of routinely deleting e-mails, Sprague said. "And this has been told to the government. And that lawyer told Senator Fumo, 'No, you don't have to change your policy because you haven't been subpoenaed.'" Sprague went on to call the indictment a "fraud."

Porter attended the press conference, and, two years later, Fumo's trial, where Sprague, who no longer represented Fumo, testified that he never believed that Fumo had relied on advice of counsel: "Did I believe it? Of course not," he said on cross examination by Fumo's new counsel, Dennis Cogan. When confronted with his prior statements at the press conference and in a letter to a Congressional committee, Sprague testified that he was simply acting as his client's messenger: "My duty in terms of my client was to convey what my client was saying…. Whether I believed him or not was not the issue. "Mister Cogan," Sprague testified, "are you suggesting to this jury that I speak up for my client and at the same time tell the public that I don't believe my client? No lawyer would do that, and you know it.'"

Porter's column called Sprague "something of a liar" for making statements that he did not believe to be true at the time he made them. "So one of the most powerful attorneys in Philadelphia believes that it's acceptable to deliberately mislead the public on behalf of a client?

(Continued on page 8)

RETURN TO TABLE OF CONTENTS

(Continued from page 7)

That it's appropriate to vigorously perpetrate an untruth, as part of his legal obligation?" While Sprague's conduct might not have been "officially unethical under the code of legal conduct," Porter wrote, "it sure seems underhanded and immoral to me."

Shortly after noon on the day the column was published, Sprague faxed the *Daily News* a letter announcing his intention to sue.

Sprague has a long and storied history as a libel plaintiff. In 1990, he was awarded a $34 million judgment in a case against *The Philadelphia Inquirer*. The award, which at the time was the largest libel verdict in U.S. history, was reduced on appeal and later settled. In 2001, Sprague sued the American Bar Association after one of the organization's publications called him a "lawyer-cum-fixer." The case was settled in November 2003 for an undisclosed sum – but the ABA had to publish an apology and pay for the publication of Sprague's biography, *Fearless*, by *Daily News* reporter Joseph R. Daughen. Sprague's other cases as a defamation plaintiff included a slander suit against sports radio personality Howard Eskin, which he settled favorably in 2004, again with compensation and a public apology, and a 1981 case against the now-defunct *Philadelphia Evening Bulletin*. Sprague filed a case against *The Inquirer* in 1985 that he withdrew shortly after he brought it.

Judge Rau held that Sprague had failed to present clear and convincing evidence of falsity on his defamation claim.

The complaint in *Sprague v. Porter*, filed in January 2010, alleged that "permeated with the animus of past interactions with Mr. Sprague," Porter and the *Daily News* "falsely asserted Mr. Sprague admitted that his prior remarks to the public and to the Congressional subcommittee were lies." It asserted claims for defamation and false light invasion of privacy.

As a well-known litigator who investigated the assassination of JFK and secured the murder conviction of union boss Tony Boyle, Sprague did not dispute that he was a public figure for purposes of the lawsuit.

After discovery that in many respects paralleled the FBI's investigation of Fumo, who was convicted on all counts, including obstruction of justice, Defendants filed for summary judgment in March.

In her opinion, Judge Rau held that Sprague had failed to present clear and convincing evidence of falsity on his defamation claim, finding that "Mr. Sprague's testimony at Senator Fumo's trial shows that [the column contained] a true characterization of the facts." Further, she noted: "In addition to not producing evidence of falsity, Mr. Sprague takes a puzzling stance in arguing that the Appellees knew that criminal defense counsel often say things on behalf of their clients that they do not believe to be true. . . Whether or not it is typical for lawyers to present statements to the public that they do not believe to be true on behalf of their clients – an assertion that is apt to incite heated debate within the legal community – has nothing to do with whether Ms. Porter's reporting that this is what Mr. Sprague did was false."

Further, Judge Rau found, the column expressed Porter's opinion "based on disclosed facts about whether it is morally acceptable for a lawyer to publicly lie on behalf of a client. Ms. Porter fairly characterizes Mr. Sprague's behavior in a certain way that he dislikes. However, personal judgments about whether an act is moral or immoral cannot be proved true or false, and are not defamation."

Judge Rau also determined that Sprague had failed to demonstrate actual malice or evidence of damages, noting that "[h]e provided no evidence of reputational damage even from his own witnesses, one of whom described his reputation as being 'greater' after the article." Finally, Judge Rau dismissed Sprague's false light invasion of privacy claim for the same reasons.

Briefing is due next month in Sprague's Superior Court appeal.

Defendants were represented by Amy B. Ginensky, Michael E. Baughman, Kristin H. Jones, Kaitlin M. Gurney, and Raphael Cunniff of Pepper Hamilton LLP. Plaintiff was represented by James E. Beasley, Jr., and Maxwell S. Kennerly of The Beasley Firm, LLC.

RETURN TO TABLE OF CONTENTS

Divided Sixth Circuit Panel Affirms $100,000 Libel Damage Award to Police Officer

Actual Malice Based on Conflicting Evidence of Falsity; Deferential Appellate Review Standard

A divided Sixth Circuit panel affirmed a $100,000 libel damage award in favor of a police officer over a newspaper report stating that he had sex with a woman while on the job. *Young v. Gannett Satellite Information Network, Inc.*, No. 12-3999 (6th Cir. Oct. 31, 2013) (Rogers, Silers, Moore, JJ.).

Although there was conflicting evidence about the truth of the matter, the majority found sufficient evidence of actual malice where the editor had reviewed an arbitration decision that found the allegation unproven and the editor failed to contact plaintiff or investigate further. Moreover, in dicta, the majority went further and questioned whether the actual malice standard applies to libel claims by rank-and-file officers.

In a five-page dissent, Judge Karen Moore argued that the majority applied a constitutionally flawed standard of independent appellate review; and that there was no support under Ohio law to question the status of police officers as public officials. The newspaper plans to file a petition for rehearing en banc.

Although there was conflicting evidence about the truth of the matter, the majority found sufficient evidence of actual malice where the editor had reviewed an arbitration decision that found the allegation unproven and the editor failed to contact plaintiff or investigate further.

Background

At issue was a May 26, 2010 newspaper article in the *Milford-Miami Advertiser* that highlighted the perils cities face when arbitrating cases against police officers. The article quoted a local police chief who explained that an officer who admitted having sex on the job was suspended rather than terminated because of the uncertainties of going to arbitration. The newspaper illustrated this point by referencing an incident involving plaintiff dating back to 1997.

In that 1997 incident, a civilian dispatcher had accused plaintiff of sexual harassment, including forcing her to have oral sex. The police department fired plaintiff for "sexual harassment, immoral behavior, neglect of duty and gross misconduct." The arbitrator, however, converted the punishment to a 60 day suspension plus sexual harassment training.

The relevant passage in the newspaper article stated:

> In 1997, the Miami Township trustees terminated Sgt. James Young for a variety of charges including conduct unbecoming of a police officer, sexual harassment, immoral behavior, neglect of duty and gross misconduct. Young had sex with a woman while on the job.
>
> Young sued saying the trustees violated the collective bargaining contract between the township and the police union. An arbitrator agreed with Young, but the township fought the decision. Clermont County Court of Common Pleas Judge Robert Ringland ruled: "While this court is not indicating it agrees with the arbitrator or condones the conduct which has occurred," based on other similar cases he could not set aside the arbitrator's decision. Young is a current employee with the Miami Township Police Department.

Plaintiff sued the newspaper for libel, alleging that the statement that he "had sex with a woman while on the job" was false and defamatory. A motion for summary judgment was denied. The district court found, among other things, that the newspaper article was not a fair summary of the arbitration decision and a jury could find the reporter "purposefully avoided or deliberately ignored" the arbitration

(Continued on page 10)

RETURN TO TABLE OF CONTENTS

(Continued from page 9)

report. After a 3-day jury trial, the jury found for plaintiff and awarded $100,000 in compensatory damages, but no punitive damages.

Sixth Circuit Majority Decision

Affirming the judgment for plaintiff, the majority found that the arbitration report which an editor reviewed before publication raised numerous "red flags." For example, it found insufficient evidence to support a rape charge (DNA evidence did not match plaintiff) and prior physical touching observed by others may have been "flirtatious activity between consenting adults." According to the arbitrator, this was a "classic 'he said, she said' scenario" with a "lack of truthfulness by both parties ... prevent[ing] any reasonable assessment of what happened." The arbitrator also noted "the truth is somewhere in the middle." And in any event, he found that a sexual relationship would not merit termination under the circumstances.

According to the majority, since the editor reviewed this report before publication, the jury could have found reckless disregard of the truth and clear and convincing proof of actual malice:

> Armed with that knowledge, Herron nevertheless published the statement "Young had sex with a woman while on the job" as if it were fact. This is reckless disregard of the truth at best, and is sufficient for the jury to have found that Gannett published the statement with actual malice. A newspaper cannot publish an accusation that it knows has no evidence behind it as a fact to fit its desired storyline and then cloak itself in the First Amendment.... When Herron found no definitive statement in the arbitrator's report that Young had sex with Phillips at any time, she should have investigated further.

Writing in dissent, Judge Moore found that the key issue on appeal was whether the newspaper's statement that "Young had sex with a woman while on the job" was a rational interpretation of an ambiguous document.

The majority acknowledged the constitutional requirement to exercise independent appellate review of the evidence of actual malice, but then wrote that this case – involving a rank-and-file officer suing about conduct of more than a decade ago – "presents a stronger case for deferring to the jury's findings."

The majority then questioned whether the actual malice standard should have even applied to plaintiff's claim, noting that *New York Times v. Sullivan* and other leading cases involved police officers with "key public leadership positions" not rank-and-file officers.

Dissent

Writing in dissent, Judge Moore found that the key issue on appeal was whether the newspaper's statement that "Young had sex with a woman while on the job" was a rational interpretation of an ambiguous document. Citing to the arbitration report, she highlighted numerous indicia suggesting that plaintiff and complainant had a sexual relationship – or at least making that one rational interpretation of the report.

> "It is easy to infer from the report that Young and Phillips were engaged in a weeks-long relationship of a sexual nature and it was expressly found that Young had been at Phillips's house while on duty during that time period. Although it cannot be said for certain that they did have sex while he was on duty, it is not irrational to reach that conclusion based on the statements made in the arbitrator's report. In other words, I believe that Herron's statement "amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities."

The majority's deference to the jury's finding of actual malice "incorrectly relied on subsidiary facts implicitly established by the jury's verdict instead of drawing its own inferences from the evidence."

The newspaper was represented by John C. Greiner, Graydon Head & Ritchey LLP, Cincinnati, OH. Plaintiff was represented by Stephen E. Imm, of Katz, Greenberger & Norton LLP, Cincinnati, OH.

RETURN TO TABLE OF CONTENTS

Ohio Appeals Court Reinstates Libel Suit Over "Cleveland's Most Wanted" Broadcast

Fair Report, Common Law Privilege and Substantial Truth Defenses Rejected

The Ohio Court of Appeals reinstated a defamation lawsuit against two Cleveland television stations and a production company over the inclusion of plaintiff as one of "Cleveland's 25 Most Wanted Fugitives." *Sullins v. Raycom Media, Inc., et al.*, No. 99235 (Ohio App. Aug. 15, 2013), reconsideration denied, (Ohio App. Oct. 24, 2013) (Rocco, Boyle, Blackmon, JJ.).

The court held that a jury could find the broadcast false and defamatory by depicting plaintiff as a wanted fugitive when in fact he had already pled guilty and performed community service for the crime highlighted in the program. Under these circumstances, the broadcast was not protected by the fair report or common law privilege; nor was it substantially accurate as a matter of law.

The court held that a jury could find the broadcast false and defamatory by depicting plaintiff as a wanted fugitive when in fact he had already pled guilty and performed community service for the crime highlighted in the program.

Background

In March 2010, the plaintiff was featured on a local television program entitled *Warrant Unit* in a segment entitled "Fugitive File," which identifies "Cleveland's 25 Most Wanted Fugitives." For approximately seven or eight seconds, plaintiff's photograph was shown, along with his name, age, height, weight, and address above the charge, "PASSING BAD CHECKS." The program stated that plaintiff was "wanted for passing bad checks" and that a reward was available for information leading to plaintiff's arrest. The program also cautioned viewers not to apprehend plaintiff or other fugitives featured on the program, warning: "Do not attempt to apprehend these people. You leave that to the professionals."

A year earlier a warrant had been issued for plaintiff's arrest for passing a bad check, but at the time the broadcast aired plaintiff was not a fugitive because he had already pled guilty to the charge, made restitution and performed court ordered community service.

The information about plaintiff came from the Cuyahoga County Sheriff's Department which regularly provided information for use on the Warrant Unit television program. A Sheriff's Department official testified that her department always told the production company to double check the public docket about warrant information.

Plaintiff claimed that had defendants checked the Cuyahoga County public docket prior to airing the episode, as instructed by the sheriff's department, they would have discovered that the warrant for his arrest for passing a bad check had been withdrawn more than a year earlier. At the time of the broadcast, there was no outstanding warrants for plaintiff's arrest for passing bad checks, but there were five warrants for his arrest on unrelated misdemeanor traffic offenses. Defendants, however, were not aware of the existence of these other warrants at the time the program aired.

After the program aired in March 2010, plaintiff sued for defamation and false light, claiming he lost his job and access to his children as a result of the program. On November 27, 2012, the trial court granted summary judgment to defendants, holding that the broadcast was protected by the Ohio fair report privilege. Plaintiff appealed dismissal of his defamation claim only.

No Fair Report Privilege

Reinstating the defamation claim, the court noted that the depiction of plaintiff as a fugitive and one of "Cleveland's 25

(Continued on page 12)

RETURN TO TABLE OF CONTENTS

(Continued from page 11)

Most Wanted Fugitives" was defamatory per se and not protected by the fair report privilege.

Although the warrant information was obtained from the sheriff's department, it came with "an explicit caveat" to check the public docket prior to airing.

> "Although the sheriff's department represented that the warrant information it provided was accurate only as of the date the information was compiled for [defendants, they] did not reflect that limitation in publishing the information relating to plaintiff. Appellees did not include, as part of the broadcast, the date as of which the warrant information reported on the program was believed to be accurate. Appellees never properly updated the warrant information they received by checking the court's docket, as instructed by the sheriff's department."

Common Law Privilege

The court also held that no general common-law qualified privilege to protect defendants from liability. This privilege "applies in a variety of situations where society's interest in compensating a person for loss of reputation is outweighed by a competing interest that demands protection." While there was a public interest in apprehending fugitives, the court found that apprehending fugitives was not the only purpose of the broadcast – citing testimony from the production company's executive producer that the primary purpose of the program was to "entertain."

Substantial Truth and Incremental Harm

The court rejected defendants' argument that the report was substantially true given the outstanding traffic warrants against plaintiff, finding a "significant difference between a warrant for misdemeanor traffic offenses and a warrant for "passing bad checks,' a felony involving fraud, deceit, and dishonesty."

As for incremental harm, the court found the broadcast could harm plaintiff by causing people to believe he was a persistent "bad check artist" who was charged with new crimes. Moreover, based on the apparently random manner in which suspects were selected for the program, "reasonable minds could conclude that [plaintiff] was not, under any ordinary, plain-meaning definition of the term, a 'most wanted fugitive' at the time the Warrant Unit program aired."

Motion for Reconsideration

On October 24, 2013, the Court of Appeals denied a motion for reconsideration. The court noted that the fair report privilege might have applied had the media reported the information as a mere police blotter item. Here, however, the report that plaintiff was a wanted fugitive was false at the time of the broadcast and the Sheriff's Department had cautioned the production company that the information needed to be checked before broadcast.

The Court of Appeals denied a motion for reconsideration. The court noted that the fair report privilege might have applied had the media reported the information as a mere police blotter item.

Moreover, the report went beyond the facts provided by the Sheriff's Department and mischaracterized plaintiff as someone so dangerous as to be one of Cleveland's most wanted fugitives. Thus whether the report was fair or truthful and published with fault would need to be decided by a jury.

Plaintiff was represented by Joshua R. Cohen, Peter G. Pattakos, Cohen, Rosenthal & Kramer, Cleveland, OH. The media defendants were represented by Michael K. Farrell, Melissa A. Degaetano, Baker & Hostetler L.L.P., Cleveland, OH; and Daniel Thiel, Cleveland, OH. Cuyahoga County Crime Stoppers was represented by George S. Crisci, Jonathan D. Decker, Zashin & Rich Co., Cleveland, Ohio

RETURN TO TABLE OF CONTENTS

Milwaukee Television Station Wins Suit Over Consumer Report

The Wisconsin Court of Appeals affirmed summary judgment to Journal Broadcast Corporation and related defendants on defamation and related privacy claims over news broadcasts, related web postings, and a promo about consumer problems with a wedding videographer. *Terry v. Journal Broadcast Corp. et al.*, No. 2012-1682 (Wisc. App. Oct. 15, 2013).

A variety of statements in the news report such as "scam," "cheat," "rob," and "rip-off" were all non-actionable statements of opinion; and other statements at issue were demonstrably true.

Background

The plaintiff, Angela Terry, operates a part-time business called "Angies Wedding Videos." In 2006, Milwaukee area station WTMJ-4 aired two consumer news reports and a related promo about difficulties two couples had in obtaining their wedding videos from plaintiff. The reporter also posted related items on his station blog.

Among other things, the couples said they felt "ripped off" and "scammed." The report stated that plaintiff was "facing criminal charges" and a state consumer affairs official appeared as an on air source in the report stating "I think they absolutely got ripped off. They paid $1,000 for this product. They didn't receive the product they paid for. And that, we think, would be a violation of Wisconsin law."

The station's "I-Team" reporter also confronted the plaintiff at her home and accused her of "robbing" and "cheating" people. This lead to an altercation with plaintiff where she made a throat cutting gesture, covered the camera, and her son sought to push the cameraman and reporter out of the house. This was later included in a promo for the segment.

Plaintiff sued the station and related defendants for defamation and related privacy claims. The lawsuit also named one of the couples featured in the report, but they were dismissed from the case in a prior decision. *Terry v. Uebele*, No. 2009 AP 2381 (Wisc. App. 2011). The trial court granted summary judgment to defendants.

Appellate Court Decision

Affirming summary judgment, the court first held that the statement that plaintiff was "facing criminal charges" was substantially true even though plaintiff was never actually charged with a crime. It was consistent with the statement by a state consumer affairs official and meant she "could potentially be charged" for deceiving consumers.

The court then affirmed that the variety of terms used to characterize plaintiff's business – from "rip-off," "cheat" to "scam" – were protected opinions that all stemmed from undisputed and disclosed facts that plaintiff failed to deliver wedding videos on time.

The court also affirmed dismissal of plaintiff's complaint over the promo showing her making a throat cutting gesture. That promo and a related blog posting from the reporter entitled "When Angie Attacks" were both accurate portrayals of the incident that occurred at plaintiff's home.

The court also made short work of plaintiff's related privacy claims. Plaintiff claimed she was recorded at home without consent in violation of Wisconsin's wiretap statute and her image misappropriated in the broadcast. But the undisputed fact was that plaintiff allowed the news crew into her home and knew she was being recorded and thus she had no claim. This was so even after she told the reporter to "end the interview." Finally because the defamation and privacy claims failed, plaintiff had no viable action for either negligent or intentional infliction of emotional distress. Since the lynchpin of falsity was missing from the facts the media could not have engaged in extreme or outrageous conduct.

Also of note, the court affirmed denial of a motion to depose the news station's in-house counsel. Plaintiff argued that the prepublication review and approval of broadcast scripts vitiated attorney-client privilege under the crime fraud exception to the privilege. But there was no possible crime where the complained of statements were not defamatory.

RETURN TO TABLE OF CONTENTS

First Amendment Bars Privacy Suit Over TV News Report Exposing Criminal Conviction

A TV station's news report exposing a school bus driver's misdemeanor conviction for prostitution is protected by the First Amendment against tort causes of action, a Wisconsin intermediate appellate court ruled. *Dumas v. Koebel*, 2013 Wisc. App. LEXIS 920 (Wis. Ct. App. Nov. 5, 2013). Presiding Judge Patricia S. Curley, writing for the panel, applied the U.S. Supreme Court's recent decision in *Snyder v. Phelps*, 131 S. Ct. 1207 (U.S. 2011), in which the justices, 8-1, found First Amendment protection for religious picketers at the funeral of a Marine.

The Wisconsin appellate court held that plaintiff Melissa Dumas' tort claims as a private figure were pre-empted by the First Amendment. Exposure of Dumas' criminal history involved a matter of public importance—whether she should have been working as a school bus driver with her criminal history.

Background

Reporter Robert Koebel did a news story for Journal Communications Inc. about bus drivers for the Milwaukee Public School with criminal convictions. The report highlighted three bus drivers with criminal convictions, including the plaintiff's misdemeanor conviction for prostitution, an arrest for "'drugs and driving on a suspended license'" and having been in an accident when working for another bus company. The plaintiff was confronted about her misdemeanor prostitution conviction in a clip that was aired as part of the report. The plaintiff's manager also was confronted about Dumas' criminal history. The report also noted that Dumas was no longer employed as a bus driver.

Exposure of Dumas' criminal history involved a matter of public importance—whether she should have been working as a school bus driver with her criminal history.

The plaintiff sued for invasion of privacy, intentional infliction of emotional distress and intentional interference with a contractual relationship. The defendants argued in support of their motion to dismiss that the invasion of privacy claim must be dismissed because the information published about Dumas was a matter of public record. The defendants also argued that the intentional torts were barred by the First Amendment.

The trial judge converted the motion to dismiss into a motion for summary judgment. The trial court's first decision limited discovery only to whether the information publicized about Dumas was obtained through public records. The trial court's second decision granted summary judgment dismissing all of the plaintiff's claims.

Applying *Snyder v. Phelps*

The plaintiff's claims for intentional infliction of emotional distress and intentional interference with a contract were pre-empted by the First Amendment because the news report involved a matter of public concern, the panel said. "Undoubtedly, Dumas was embarrassed by the airing of the salacious details of her misdemeanor conviction, and certainly the way in which Koebel confronted Dumas and her manager at the bus company with Dumas' history was embarrassing," the panel said. The court added, "However, whether the information aired was 'controversial' or 'inappropriate' is not the standard we must apply."

The court then applied *Snyder* and its protection of speech, to reject plaintiff's other tort claims, examining the content of the speech involved, the context of the speech involved and the form of the speech involved.

One, the content of the speech about Dumas involved a matter of public concern. The details of Dumas' misdemeanor conviction and other arrests were aired as part of a story about school bus drivers with criminal records being entrusted with the safe transportation of children, which is a matter of public interest, Judge Curley opined.

Two, the context of the speech was an interaction between the plaintiff and the reporter in public. The plaintiff was asked questions about public information. Moreover, Dumas did not make any allegations that the TV station's speech on

(Continued on page 15)

RETURN TO TABLE OF CONTENTS

(Continued from page 14)

the public issue of school transportation safety was masking a private attack on Dumas. The plaintiff also did not allege that she had a preexisting relationship with the defendants.

Three, the form of the speech was not unruly. The U.S. Supreme Court in *Snyder* noted that the funeral protestors were not unruly and that any emotional distress caused to the marine's father was from the content of the protestors' message, not any interference with the funeral. The Wisconsin court also concluded that Dumas' "surprise, embarrassment, and indignation" arose from the content of the reporter's speech. The First Amendment pre-empts the plaintiffs' claims for intentional torts, so summary judgment was appropriately granted.

The plaintiff's claim for invasion of privacy was precluded by WIS. STAT. § 995.50(2)(c), which bars tort lawsuits for the invasion of privacy if the information that is communicated is a public record, the panel concluded.

Finally, the appellate court concluded the trial court's decision to preclude discovery into Koebel's editorial judgment was not an erroneous exercise of the court's discretion.

The plaintiff was represented by Richard H. Schulz of Milwaukee, WI and Peter Jon Schulz of San Diego, CA. The defendants were represented by Robert J. Dreps of Godfrey & Kahn, Madison, WI.

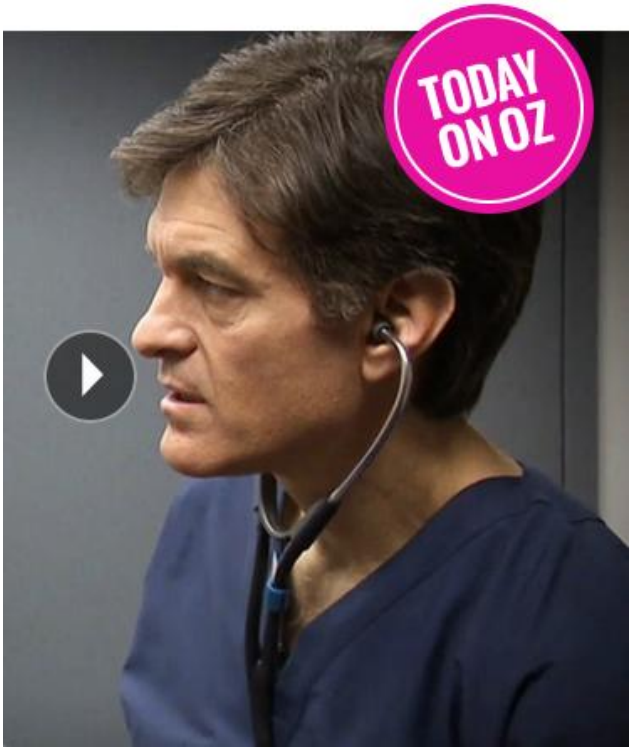
RETURN TO TABLE OF CONTENTS

Personal Injury Claim Against Dr. Oz and Show Producers Dismissed

No Duty of Care Owed to Television Viewers

A New York court dismissed a personal injury claim against Dr. Mehmet Oz and the producers of his television show brought by a viewer who claimed he was seriously injured after following a home remedy recommended on the show. *Dietl v. Dr. Oz, et al.*, No. 152423-13 (N.Y. Sup. Oct. 4, 2013)

The court dismissed the complaint, holding there was no direct or quasi physician-patient relationship to establish a duty of care between a talk show host and a member of his vast viewing audience.



Background

The plaintiff sued Dr. Oz and the producers of the Dr. Oz show in March 2013, claiming he was injured after following an at-home remedy to cure sleeplessness due to cold feet. This involved putting uncooked rice into a pair of socks, microwaving the socks, and then wearing them to bed.

Plaintiff alleged he tried this and suffered second and third degree burns on his feet. In his complaint, plaintiff argued that Dr. Oz and the producers breached a duty to warn viewers about the hazards of this remedy.

Moving to dismiss, the defendants argued that they owed no duty of care to a general television audience; second, that the show did warn viewers by stating that they should not let the rice get "too hot,"; and, third, that plaintiff's injury was due to his underlying medical condition. Plaintiff opposed the motion, arguing that "he and Dr. Oz had a quasi physician-patient relationship" which was breached by the provision of negligent medical advice and a failure to warn.

Motion to Dismiss Granted

Granting the motion to dismiss, the court found no factual basis for a duty of care. "There was no direct or quasi physician-patient relationship between Dr. Oz and Dietl, sufficient to establish a duty of care" and no authority to create one "between a television talk-show host and his vast home-viewing audience." Moreover, the court was not convinced that adopting such a duty "would be sound public policy."

Plaintiff was represented by Aidala & Bertuna, P.C., New York, NY. Defendants were represented by Berke-Weiss & Pechman LLP, New York, NY.

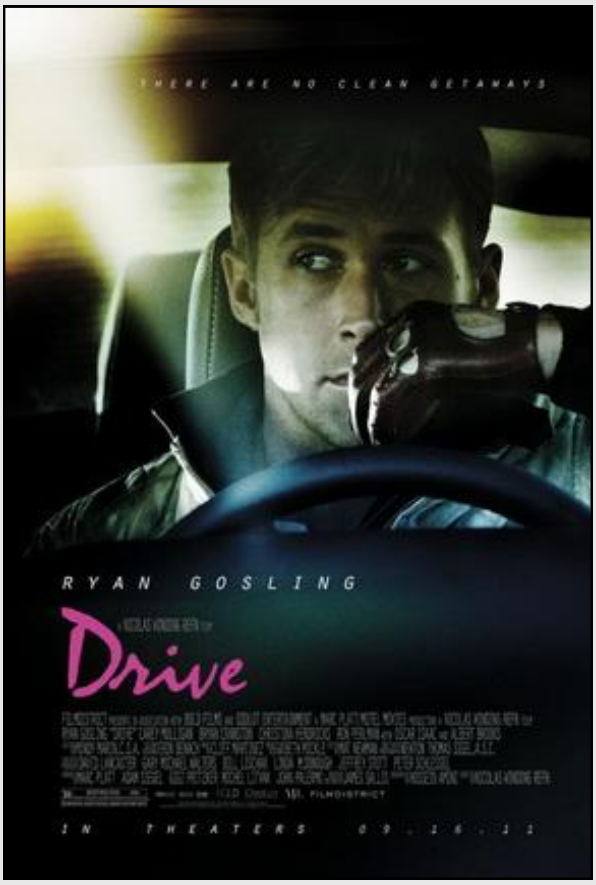
RETURN TO TABLE OF CONTENTS

Michigan Appeals Court Affirms Dismissal of Claims Against Producers of Movie "Drive"

Being Offended by a Film Is Not Grounds for a Lawsuit

The Michigan Court of Appeals affirmed dismissal of a lawsuit brought under the state's Consumer Protection Act alleging that defendants falsely advertised the movie Drive as "a chase, race, or high speed action driving film," and failed to reveal it was "an extremely graphically violent film." Deming v. Ch Novi, L.L.C., No. No. 309989 (Mich. App. Oct. 15, 2013) (unpublished) (Beckering, O'Connell, Shapiro, JJ.),

The court stated that "being offended by a film is not, in and of itself, grounds for a lawsuit." In addition, even assuming the Consumer Protection Act applied to movie previews, "plaintiff has failed, beyond the power of her own hyperbole, to support her claim."



Background

As explained in the court's short opinion, "Plaintiff was offended by the movie Drive." The critically acclaimed 2011 movie features actor Ryan Gosling as a Hollywood stuntman / get-away driver who gets involved in a robbery gone bad. Plaintiff sued under the false advertising provisions of the Michigan Consumer Protection Act Sec. 445.903(1) (MCPA). Among other things, she alleged that based on the preview she expected a "high speed action driving film" similar to The Fast and Furious franchise.

Decision

Affirming dismissal, the court noted there is no case law applying the MCPA to movie previews. But even entertaining the idea, plaintiff's claim would fail on the facts. The preview was entirely consistent with the movie. Every scene in the preview appeared in the movie, including fight scenes containing graphic violence. The preview noted the film was rated R. And the preview showed the movie was more than a "racing movie."

The true gravamen of the complaint, the court noted, was plaintiff's allegation that the movie was directly or subliminally anti-Semitic because the main "bad guys" were depicted as Jewish mobsters. The court rejected this interpretation of the movie, but assuming the MCPA applied, plaintiff failed to present "any evidence that the movie Drive does, in fact, express or promote anti-Semitism and, thus, has not shown that the film's trailer failed to reveal a material fact, as required under MCL 445.903(1)(s)."

RETURN TO TABLE OF CONTENTS

Court Dismisses Contract and Tort Claims Brought Against MTV, Producers

By Alia Smith

In a short opinion, a New York County court rejected the argument of a disgruntled reality show participant that his casual, unsigned email exchange with a producer amended the formal release he signed. *Watson v. MTV Network Enterprises, et al.*, No. 156523/2012, (Friedman, J.). Because the email did not constitute part of any contract, the court held that there could be no breach of contract claim, and, likewise, that the tort claims based upon the same email exchange were impermissibly duplicative.

Background

Plaintiff Tristan Watson appeared in the reality television program "True Life: I'm a Chubby Chaser," a show about individuals who like to date significantly overweight people. (The program was developed and produced by Defendant Day Old Teeth ("DOT") and cablecast on Defendant MTV.) In connection with the filming, Watson signed a "Location Agreement" that expressly permitted filming at his home and released defendants from any claims relating to the show.

Screen shot from MTV's "True Life: I'm a Chubby Chaser"

Specifically, the Location Agreement granted, among other things, "the right to record all structures and signs located on the property" and to "refer to the property by its correct name." It also contained an integration clause providing that the agreement "expresses the entire understanding between the parties with respect to the subject matter hereof and may not be changed, modified or terminated except in writing."

In addition to the Location Agreement, Watson also signed an "Appearance Release," in which he "irrevocably agree[d] that [DOT] may use … my name, voice, likeness and biographical facts which may have been provided to Company, in connection with the Programming."

After signing the Location Agreement and participating in a lengthy filming process, but before signing the Appearance Release, Watson exchanged a short email with the producer of the show. Watson wrote:

> "I just want to ensure that only 'Tee' is used for this show and not my government name. I know you said you would change it, but I know you're traveling a lot and things may slip through the crack [sic], so if you can you just ensure that it is just 'Tee' and not 'Tristan' also being used…. I just wanted to emphasize on that. Also if you're using the building shot can you guys block out the actual address."

The producer responded: "Absolutely my man. It is tee 100% and will be sure to blur address." When the show aired, it did use just the name "Tee," as plaintiff had requested, but also included a shot of plaintiff's building, without the address blurred out.

As a result, plaintiff sued DOT (and its producer) and MTV, alleging that the email exchange was a modification to the Location Agreement, and served as an inducement for him to sign the Appearance Release.

He thus asserted claims (1) for breach of the Location Agreement, as modified by the email exchange, (2) for fraud and promissory estoppel on the theory that defendants

(Continued on page 19)

RETURN TO TABLE OF CONTENTS

(Continued from page 18)

fraudulently induced him to sign the Appearance Release by falsely promising to blur his building address, and (3) for "tort," arguing that defendants violated some industry "custom and practice" by failing to blur the address. Defendants moved to dismiss.

The Court's Ruling

The Court first found that the breach of contract claim must be dismissed because the email exchange was not a valid modification of the Location Agreement, which required that any amendment be "in writing." Citing New York case law, the court held that an email could be a "writing" only "if the plaintiff's name is at the end of the email, signifying his intent to authenticate the contents." Here, there was no such e-signature on the email.

The Court explicitly rejected plaintiff's argument that "a writing which contains a pre-printed signature only in its heading is sufficient for purposes of the statute of frauds or for compliance with a no oral modification provision." Because the modification was invalid, no breach occurred.

The Court went on to dismiss the remaining causes of action in short order. It held that the promissory estoppel and fraud claims, which were also premised on the alleged promise to blur the address, were barred as duplicative of the breach of contract claim.

It dismissed plaintiff's tort claim – in which he argued that defendants violated the "industry practice" of blocking addresses in reality shows – because "the parties' rights and obligations were governed by contract," not industry practice. And it also found that defendant MTV could not be held liable for the independent reason that it had not been a party to any of the alleged contracts, and plaintiff had not validly pled any agency relationship between DOT and MTV.

Defendants Day Old Teeth and producer Mike Cahill were represented by Robert Penchina and Alia Smith at Levine Sullivan Koch & Schulz, LLP. Defendant MTV was represented by Marcia Paul and Joanna Summerscales at Davis Wright Tremaine LLP. Plaintiff was represented by Romeo Salta.

RETURN TO TABLE OF CONTENTS

Sixth Circuit Upholds Dismissal of All Claims Related to "Soul Men" Film and Soundtrack

By William F. Wilson and Laura P. Merritt

The Sixth Circuit recently affirmed summary judgment for the defendants on all claims asserted by Sam Moore, formerly of the soul music group "Sam & Dave," related to the 2008 feature film "Soul Men" which starred Samuel L. Jackson and the late Bernie Mac. *Moore v. The Weinstein Company, LLC, et al.*, No. 12-5715 (6th Cir. October 31, 2013).

Moore, best known for his 1960s versions of the songs "Soul Man" and "Hold On, I'm Comin'," challenged a 98-page summary judgment decision by District Judge Aleta Trauger (M.D. Tenn.), dismissing his claims that the film and soundtrack violated his trademark rights and appropriated his life story.

Moore, along with his wife and manager Joyce Moore and their purported Tennessee trust, originally filed the lawsuit in 2009, suing The Weinstein Company (the film studio that produced and released the film), Metro-Goldwyn-Mayer Studios, Inc. (the film's theatrical distributor), Genius Products, LLC (the distributor of the DVD), Concord Music Group, Inc. (the creator and distributor of the film's official soundtrack), and Harvey and Bob Weinstein (the film's executive producers and principals of the Weinstein Company).

Background

The movie "Soul Men" is a comedy centering on the reunion of two feuding former back-up soul singers. John Legend plays the lead singer Marcus Hooks and Jackson and Mac play back-up singers as part of the fictitious 1960s soul trio "Marcus Hooks and The Real Deal." Hooks leaves the group and the two remaining members, Louis Hinds, played by Jackson, and Floyd Henderson, played by Mac, go their separate ways. Years later, after Hooks dies, Hinds and Henderson reunite in California and travel together to perform a tribute to Marcus Hooks at the famed Apollo Theater.

The Plaintiffs claimed that Jackson and Mac depicted "Sam & Dave" and asserted a variety of statutory and common law claims. The Plaintiffs first argued under 15 U.S.C. § 1125 (a), that the title of the film "Soul Men" infringed Moore's purported common law trademarks in a variety of phrases including "Soul Men" and "Soul Man." They also contended that the film and soundtrack infringed upon the 1967 album "Sam & Dave Soul Men" featuring the single "Soul Man," and the 2008 Historic Films' documentary "The Original Soul Men Sam and Dave." Moore asserted violations of the Tennessee Consumer Protection Act (the "TCPA"), violation of a right of publicity, trademark dilution, common law unfair competition, false light invasion of privacy, unjust enrichment and civil conspiracy.

The Court of Appeals for the Sixth Circuit adopted the District Court's lengthy, well-reasoned decision for dismissing the Lanham Act and state unfair competition claims, and turned its attention to the right of publicity, state trademark dilution, and state consumer protection claims.

Right of Publicity Claim

Moore argued that his right to publicity was violated by the use of his "likeness" in the movie without his consent.

(Continued on page 21)

RETURN TO TABLE OF CONTENTS

(Continued from page 20)

The Court applied the "transformative elements" test which has been gaining ground in several right of publicity cases involving First Amendment issues. Specifically, the Court weighed Moore's allegedly appropriated likeness against the film's expressiveness to determine whether the film was so transformed that it became "primarily the defendants' own expression rather than . . . [Moore's] likeness."

In upholding the lower court's decision, the Sixth Circuit noted that not only does the Restatement (Third) of Unfair Competition not generally protect a person's likeness in a film, but also that the film "without a doubt" added enough creative components as to sufficiently transform it to the defendants' own creative expression rather than Moore's likeness.

The Sixth Circuit stated that it had previously adopted the "transformative elements" test in *ETW Corp. v. Jireh Publ'g*, 332 F.3d 915, 931 (6th Cir. 2003) (holding that an artistic depiction of Tiger Woods celebrating his first victory at the Masters Golf Tournament added "significant transformative elements that made it especially worthy of First Amendment protection").

In fact, the *ETW Corp*. court had applied multiple First Amendment tests in reaching its dismissal, including the *Rogers* test most favored by defense counsel. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2nd Cir. 1989) (previously adopted by the Sixth Circuit in *Parks v. LaFace Records*, 329 F.3d 437, 451-52 (6th Cir. 2003) (reversing summary judgment where the relevance of the title "Rosa Parks" to the content of a rap song created a fact issue)).

Moore also argued that the First Amendment protections applied to the film did not apply to advertising inserts featuring Moore's image that were included in packaging for the film and soundtrack. The Court of Appeals for the Sixth Circuit was quick to reject this argument by stating that the group "Sam & Dave" was just one of numerous groups/artists depicted in these advertising inserts. The Court noted that the plaintiffs had presented no evidence that the inserts caused anyone to mistake the "Soul Men" reference for "Sam & Dave," and determined that no reasonable juror would mistake the movie or soundtrack for the performing group "Sam & Dave."

Simply marketing the film and soundtrack to fans of soul music did not provide a basis to conclude that fans would mistake "Soul Men" for the group "Sam & Dave."

State Trademark Dilution Claim

After dispensing with Moore's publicity claim, the Court analyzed Moore's state trademark dilution claim under the Tennessee Trademark Act, Tenn. Code Ann. § 47-25-513. At the trial court, the Plaintiffs had pursued a Tennessee claim but in arguing against the Defendants' summary judgment had attempted to inject a claim under Arizona law.

In analyzing conflict of laws principles (with Tennessee, situs of the lawsuit, and Arizona, Plaintiffs' residence, as the options), the Court of Appeals concluded that both states have closely similar trademark dilution statutes. The Court held that the District Court erred when it dismissed the plaintiffs' state dilution claim upon a finding that Tennessee law was inapplicable. The appellate court still held that the plaintiffs' trademark dilution claim failed because Moore had not presented sufficient evidence that any of his purported marks were famous as required by either Tennessee or Arizona law.

Applying the factors for trademark famousness, including the nature and extent of use of the same or similar mark by third parties, the Court recognized that several dozen third-party musical albums utilized the phrase "soul men" or "soul man."

Moore's attempts to illustrate his own personal fame were insufficient to create a genuine factual dispute about whether any of his purported marks had achieved trademark fame. Simply put, the Court emphasized that "the famousness inquiry under state law requires courts to evaluate in-state famousness, it still turns on the marks' fame — not Moore's."

State Consumer Protection Claims

The Court also considered Moore's claims brought under the Tennessee Consumer Protection Act ("TCPA"). Moore claimed that the defendants, through marketing and advertising, willfully caused a likelihood of confusion as to whether Moore sponsored the soundtrack and film. Despite Moore's failure to specifically identify a particular subsection of the TCPA for his claim, the Court reviewed his claim under the provision that prohibits "causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services." Tenn. Code Ann. § 47-18-104(b)(2). The Court determined that Moore's failure to appeal the District Court's

(Continued on page 22)

(Continued from page 21)

determination that no likelihood of confusion existed and Moore's failure to cite to any evidence establish confusion foreclosed Moore's TCPA likelihood-of-confusion based claims.

For his second claim under the TCPA, Moore argued that the Concord Soundtrack and Genius DVDs constituted false and deceptive advertising to the public and contained misleading statements regarding Moore's connection with the film. The defendants challenged not only the plaintiffs' choice of Tennessee law, but the fact that Moore did not point to any admissible evidence to show that defendants' actions deceived or injured Tennessee consumers. The Sixth Circuit upheld the District Court's dismissal, noting that Moore compounded his error on appeal by failing respond to the defendants' merit-based attack to meet his burden to show that a genuine issue of material fact existed regarding his TCPA claim and instead offering only a choice-of-law footnote.

Circuit Judges John M. Rogers and Deborah L. Cook (author of opinion) and District Judge Gregory F. Van Tatenhove ruled unanimously. The Plaintiffs did not file a motion for rehearing or for *en banc* consideration.

Defendants are represented by Robb S. Harvey and Heather J. Hubbard of Waller, Lansden, Dortch & Davis, LLP, Nashville. The authors are Waller associates. The Weinstein Company, Bob Weinstein and Harvey Weinstein are also represented by Bertram Fields of Greenberg Glusker Fields Claman & Machtinger LLP, Los Angeles. The Plaintiffs are represented by Arnold P. Lutzker of Lutzker & Lutzker LLP, Washington, DC, and Sean Martin of Martin Heller Potempa and Sheppard, PLLC , Nashville.

Post-script by Robb Harvey

The lawsuit was filed in Nashville, supposedly because the plaintiffs had lived in our great city some years ago. Y'all come visit our cultural vistas such as the Country Music Hall of Fame and Museum. The movie "Soul Men" was partially filmed just down the road in Memphis, the birthplace of Stax music. We encourage you to visit the Stax Museum of American Soul Music in Memphis and have some Memphis barbecue.

RETURN TO TABLE OF CONTENTS

Third Circuit Affirms Dismissal of Copyright Lawsuit Arising from VH1 Reality Shows

By Shaina Jones Ward

The U.S. Court of Appeals for the Third Circuit recently affirmed the dismissal of a copyright case against Viacom Inc., which alleged that episodes of two VH1 shows were based on a treatment the plaintiff had submitted to the company. *Sims v. Viacom, Inc.*, No. 13-1567 (3d Cir. Nov. 14, 2013).

The plaintiff had sued Viacom twice before on various legal theories claiming that the reality show "Charm School" was based on his treatment for a reality show entitled "Ghetto Fabulous." After both suits were dismissed, the plaintiff sued Viacom again, this time alleging that certain episodes of that show and another VH1 show, "From G's to Gents," infringed his copyright, violated the Digital Millennium Copyright Act ("DMCA"), and constituted unjust enrichment.

In affirming the district court's dismissal of the complaint, the Court found that this third lawsuit arose out of the same facts and circumstances as the plaintiff's two prior actions and was therefore barred under the doctrine of res judicata.

Background

In 2004, Plaintiff Charles Sims and collaborator Allison Jordan registered a treatment for a proposed reality television show entitled "Ghetto Fabulous" with the Writers Guild of America. Jordan submitted the treatment to various television companies, including Viacom. As a precondition for reviewing the treatment, Viacom required Jordan to execute a standard submission release that required a submitter to file any claims for alleged misuse of the material within six months of learning of the use or intended use. Viacom never offered to buy the "Ghetto Fabulous" treatment.

In April 2007, the reality television show "Charm School" debuted on Viacom's VH1 network. It ultimately aired for three seasons. In January 2009, Sims and Jordan filed suit against Viacom in the Philadelphia County Court of Common Pleas, alleging that "'Charm School' is 'Ghetto Fabulous'" and asserting various contract, fraud, and "theft by conversion" claims.

Viacom removed the case to the U.S. District Court for the Eastern District of Pennsylvania. After dismissing some of the claims, the court granted summary judgment to Viacom on the remaining claims because, among other things, Sims and Jordan failed to file their claims within six months of learning that Viacom allegedly used their ideas as required by the contract governing the submission of the treatment.

In June 2011, Sims alone filed a second action against Viacom in the U.S. District Court for the Western District of Pennsylvania, this time alleging claims of copyright infringement, violation of the DMCA, and unjust enrichment based on Viacom's alleged use of his treatment in the 2007 season of "Charm School."

Sims again claimed that Viacom copied his "Ghetto Fabulous" treatment and pointed to various alleged similarities between his treatment and episodes of the show. The Court granted Viacom's motion to dismiss Sims' claims with prejudice, finding that Sims failed to comply with the Copyright Act's registration requirement; that his copyright and DMCA claims were barred by the Copyright Act's three-year statutory limitation period; and that his unjust enrichment claim was preempted under federal copyright law.

Ten days after dismissal of his second lawsuit, Sims filed a third action in the Western District of Pennsylvania against Viacom. As he did in the second suit, Sims alleged claims

(Continued on page 24)

RETURN TO TABLE OF CONTENTS

(Continued from page 23)

for copyright infringement, DMCA violations, and unjust enrichment, but this time sought to recover for Viacom's alleged use of his treatment during the 2009 season of "Charm School" and the 2009 season of another Viacom reality show airing on VH1, "From G's to Gents."

Sims again pointed to the same alleged similarities between his treatment and the two VH1 shows that he complained about in his two prior suits.

On January 29, 2013, Sims' third lawsuit was dismissed with prejudice, when the District Court adopted the report and recommendation of the Chief Magistrate Judge, who had concluded that Sims' claims were barred by the doctrine of res judicata. Sims appealed this judgment to the U.S. Court of Appeals for the Third Circuit.

The Court found that this third lawsuit arose out of the same facts and circumstances as the plaintiff's two prior actions and was therefore barred under the doctrine of res judicata.

Third Circuit Ruling

On November 14, 2013, the Court affirmed the district court's dismissal of Sims' complaint. Specifically, the Court found that the case met each of the three res judicata requirements.

First, the *Sims I* and *Sims II* courts entered final judgments on the merits against Sims. Second, Sims' third lawsuit involved the same parties as in *Sims I* and *Sims II*. Third, the lawsuit was based on the same cause of action as the two prior suits.

In assessing this third requirement, the Court rejected Sims' argument that the 2009 episodes of "Charm School" and "From G's to Gents" had not yet aired at the time of *Sims I* and were not at issue in either of the prior lawsuits. The Court explained that the gravamen of Sims' third complaint was the same as *Sims I* and *Sims II* – the contention that Viacom copied his concept for a reality television show from his "Ghetto Fabulous" treatment.

Despite the fact that the *Sims III* complaint focused only on the 2009 seasons of "Charm School" and "From G's to Gents," the Court found that an "essential similarity of the underlying events" formed the basis for all three of Sims' suits.

The Court also discounted Sims' contention that he should be permitted to file separate suits for each season of the shows because the essence of Sims' claims was that Viacom copied his concept for the show, not particular episodes.

In addition, the Court held that the claims in *Sims III* arose from the same series of transactions that gave rise to the earlier proceedings—beginning with Sims' allegation that Viacom stole his idea for a reality television show—and were therefore based on the same cause of action as *Sims I* and *Sims II*.

Finally, the Court noted that Sims could have included the 2009 seasons of both shows in *Sims I* or *Sims II*, as Sims filed an amended complaint in *Sims I* after the 2009 seasons had already aired, and he did not file his complaint in *Sims II* until 2011.

Viacom, Inc. was represented by Robert Penchina, Michael Berry, and Shaina Jones Ward of Levine Sullivan Koch & Schulz, LLP. Plaintiff was represented by Darrell E. Williams of Bridgeville, Pennsylvania.

RETURN TO TABLE OF CONTENTS

Controversial Teacher Data Is Subject To Florida's Public Records Law

By Jennifer A. Mansfield

On November 12, 2013, the Florida First District Court of Appeal ruled in favor of a Jacksonville newspaper, *The Florida Times-Union*, and held that standardized testing data used as part of a teacher's annual evaluation was a public record that should be produced. *Morris Publ'g Group, LLC d/b/a The Florida Times-Union v. Fla. Dept. of Ed. and the Fla. Ed. Assoc.*, Case No. 1D13-1376, 38 Fla. L. Weekly D2345a, 2013 WL 5988693 (Fla. 1st DCA Nov. 12, 2013). The data at issue is controversial for the Florida Department of Education, and emotional for teachers, who were represented by the state teachers' union, the Florida Education Association ("FEA).

Background

In 2012, the Florida Legislature mandated that student performance on the state's standardized testing, the Florida Comprehensive Assessment Test ("FCAT"), compose half of a teacher's annual performance review. The other half is comprised of personal observations made by principals and other supervisors.

The Court of Appeal held that standardized testing data used as part of a teacher's annual evaluation was a public record that should be produced.

The Department of Education is the agency which administers the FCAT scores of the state's public school students. In order to comply with the 2012 law, the Department uses statistical methods to predict a certain student's FCAT score based on past performance. The amount by which that predicted performance differs from that student's actual score is referred to as the "value added" by a given teacher. The value added measurement ("VAM") is determined and documented by the Department, and then sent to the various school districts for use in teacher evaluations.

The Legislature's teacher evaluation scheme has been the subject of contentious political debate. Proponents of using the VAM data in evaluations claim that it provides an objective measurement of teacher performance.

Opponents argue that too many factors beyond a teacher's control or influence go into students' performance to allow the VAM data to be accurate measures of teachers' abilities.

Newspaper's Public Records Requests

The Florida Times-Union made two public records requests, seeking the VAM data for the last three years. The Department declined to produce the records, citing an exception to Florida's Public Records law that exempts a teacher's annual performance evaluation for one year after the close of the school year in which it was made.

After negotiations with the Department and the Governor's office proved fruitless, the *Florida Times-Union* filed suit to enforce the public records law. The FEA was allowed to intervene.

During the lawsuit, the Department and FEA argued that the data itself, although identified in the statute as one criteria to use in the evaluation process, was an "evaluation" itself, and thus fell within the statutory exemption for teacher evaluations. The Department and FEA then argued that the one-year exemption for evaluations actually served to limit disclosure for *three* years after the school year in which the evaluation was made, because the three most-recent year's VAM data is averaged and thus a particular year's VAM data would be used in the evaluation process for three years.

The trial court agreed with the Department and FEA, and held that the VAM data itself was an "evaluation" under the exemption. It also agreed with the Department's and FEA's reading of the one-year exemption to actually provide a three-year exemption, because the VAM data would be used in making an evaluation for three years.

Appellate Litigation

The *Florida Times-Union* appealed the decision to Florida's First District Court of Appeal, and almost immediately afterwards the Department moved to stay the appellate proceedings because of pending legislation in the Florida Legislature.

(Continued on page 26)

RETURN TO TABLE OF CONTENTS

(Continued from page 25)

After the appeal was filed, the Department and FEA supported legislation in the State's House of Representatives that would have specifically exempted the VAM data from disclosure. The appellate court denied the stay but granted an extension of time to file its response with the court until after the end of the legislative session. Nonetheless, the bill never obtained a Senate sponsor and died in a House committee.

After the legislative session closed, the Department and FEA submitted their responsive briefs, which the appellate court had ordered on an expedited basis.

Appellate Court Ruling

On November 12, 2013, the appellate court issued an opinion reversing the trial court. It held that the state had failed to show that the requested materials met the statutory definition under the exemption for evaluations. First, the court held that "it does not follow that any information or data used to prepare the evaluation is likewise exempt from disclosure." To so hold would be to expand the public records exemption, which a court is not permitted to do. "The VAM data is thus only one part of a larger spectrum of criteria by which a public school teacher is evaluated; it is not, by itself, the 'employee evaluation.'"

The court noted that the VAM data is collected and maintained by the Department, and is not a part of a teacher's evaluation until the data is sent to the teacher's school system, which by statute is the agency which prepares the evaluation. This holding conforms to a long line of Florida cases which hold that otherwise public information that is later incorporated within an exempt document does not convert the original public record into an exempt one.

In summary, the appellate court's analysis of this complex issue was relatively simple: Exemptions to the public records law can only be created by the Legislature and exemptions must be read narrowly. Because the requested VAM data did not fit within the statutory language of the exemption for evaluations, it was not exempt. Therefore, the VAM data should have been disclosed.

In an article reporting on the decision, The *Florida Times-Union* quoted its Editor, Frank Denton, as saying "The appeal court agreed with us on the heart of the case -- that these records belong to the public and are open for inspection. . . . We are gratified, on behalf of our readers." Now that the VAM data will be made public, citizens can compare the VAM data to known teacher performance. For example, will a "Teacher of the Year" get a positive or negative VAM score? By ensuring the VAM data is public, voters will be able to judge for themselves whether the VAM data provides an accurate way to measure teacher performance.

George D. Gabel, Jr. and Jennifer A. Mansfield of Holland & Knight LLP in Jacksonville, Florida represented the Florida Times-Union. Steven S. Ferst, Deputy General Counsel, represented the Florida Department of Education in Tallahassee. Pamela L. Cooper of the Florida Education Association in Tallahassee and Ronald G. Meyer, Jennifer S. Blohm, and Lynn C. Hearn of Meyer, Brooks, Demma and Blohm, P.A. in Tallahassee represented the Florida Education Association.

RETURN TO TABLE OF CONTENTS

VA Supreme Court Rules Trial Judges Are Sole Decision-Makers on Cameras in Court

Virginia trial judges have sole discretion to decide whether cameras will be allowed in their courtrooms under Virginia Code § 19.2-266, the state's statutory provision for cameras in court. *Virginia Broadcasting Corporation v. Commonwealth of Virginia*, 2013 Va. LEXIS 133 (Va. Oct. 31, 2013). The court rejected the Virginia Broadcasting Corporation's (VBC) argument that good cause must be shown to prohibit electronic media or still camera coverage of court proceedings.

Background

VBC sought to have cameras at the sentencing of ex-University of Virginia student George W. Huguely, who was convicted of murdering his ex-girlfriend, Yeardley Love. The trial judge had earlier denied VBC's request to have cameras at the high profile murder trial.

VBC, which owns a television station in Charlottesville, argued that any concerns about the impact of cameras on jurors or prejudice to defendant was "almost de minimus" at the sentencing stage.

The prosecution and defendant both opposed VBC's request. The trial judge denied VBC's request, finding cameras could impact witnesses at the sentencing hearing, as well as prospective witnesses at a related civil case pending against Huguely. The trial court also denied a motion to reconsider.

The justices determined that the good cause standard does not apply to a judge's initial decision on whether to permit cameras in a courtroom.

The Virginia Supreme Court granted an appeal to consider whether the trial court erred in failing to apply a good cause standard in denying the cameras request.

Supreme Court Decision

The Virginia Supreme Court first held that the trial court's decision is subject to judicial review, albeit under a highly deferential abuse of discretion standard. The Court also found that even though the defendant had already been sentenced the controversy about the application of the statute was not moot.

The Court noted that Virginia Code § 19.2-266 is "not a model of clarity" because it contains two different standards that arguably apply when a trial court decides to prohibit cameras in a courtroom.

The statute states in relevant part:

> A court may solely in its discretion permit the taking of photographs in the courtroom during the progress of judicial proceedings and the broadcasting of judicial proceedings by radio or television and the use of electronic or photographic means for the perpetuation of the record or parts thereof in criminal and in civil cases, but only in accordance with the rules set forth hereunder....
>
> Coverage Allowed.
>
> 1.The presiding judge shall at all times have authority to prohibit, interrupt or terminate electronic media and still photography coverage of public judicial proceedings. The presiding judge shall advise the parties of such coverage in advance of the proceedings and allow the parties to object thereto. For good cause shown, the presiding judge may prohibit coverage in any case and may restrict coverage as he deems appropriate to meet the ends of justice. (emphasis added).

VBC argued that the statute requires that requests for cameras in courtrooms be reviewed under the good cause shown standard, while prosecutors said the decision is solely within the trial court's discretion.

Legislative History

Prior to 1987, Virginia law barred still photography and radio or television broadcasts of judicial proceedings. But the

(Continued on page 28)

RETURN TO TABLE OF CONTENTS

(Continued from page 27)

law first was amended to allow for an experimental program in six courts and then amended a second time to its present form to allow for cameras in all Virginia courtrooms.

Looking at the statute's legislative history, the Court concluded that Code § 19.2-266 in its current form gives trial courts the sole discretion to determine whether to permit cameras in court. "It is only after a trial court has made a decision to permit electronic media in the courtroom that the guidelines ... under the heading 'Coverage Allowed' are implicated," the Court found.

The "good cause" standard mentioned in the statute only applies when a party objects to a trial judge's decision to permit cameras. In that case "the objecting party must demonstrate good cause why the trial judge's initial decision to permit coverage should be reversed, and coverage prohibited or restricted in some manner."

Thus here where coverage was not permitted, the "good cause" standard mentioned in the statute was never implicated.

Moreover, the Court explained there is no requirement that evidence be presented to the trial court to support the initial decision, and the trial court is not required to explain its reasons for denying a request.

On appeal only the limited abuse of discretion applies. And the trial court's reason's for denying VBC's request were not an abuse of discretion.

Gregory S. Duncan represented Virginia Broadcasting Corporation. The commonwealth of Virginia was represented by Solicitor General E. Duncan Getchell, Jr.; Attorney General Kenneth T. Cuccinelli II; Chief Deputy Attorney General Patricia L. West; Deputy Attorney General Wesley G. Russell Jr; and Assistant Solicitor General Michael H. Brady.

UPCOMING MLRC EVENTS

MLRC/Southwestern Entertainment and Media Law Conference
January 16, 2014 | Los Angeles, CA

Legal Issues Concerning Hispanic and Latin American Media
March 10, 2014 | Miami, FL

Legal Frontiers in Digital Media
May 15-16, 2014 | Mountain View, CA

MLRC/NAA/NAB Media Law Conference
September 17-19, 2014 | Reston, VA

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

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

More information at medialaw.org or medialaw@medialaw.org.

RETURN TO TABLE OF CONTENTS

D.C. Court Holds Lower-Level Employees Can Establish Agency's FOIA Exemptions

But Not With "Cryptic" Descriptions

By Adrianna C. Rodriguez

In a recent decision, the District of Columbia's highest court held that an affidavit or declaration of a department head or other high-level official was not necessary in order to claim the deliberative process privilege under the D.C. Freedom of Information Act. ("D.C. FOIA"). *Fraternal Order of Police, Metropolitan Police Labor Committee v. The District of Columbia*, Case No. 12-CV-1476 (D.C. App. Nov. 7, 2013).

Background

The suit stemmed from a 2010 records request from the Fraternal Order of Police ("FOP") for records related to the Metropolitan Police Department's ("MPD") involvement with the Peaceoholics, a controversial gang-intervention group. The request sought documents related to grant money and police services the Peaceoholics received from MPD, as well as MPD's communications with the group and evaluations of their work.

An affidavit or declaration of a department head or other high-level official was not necessary in order to claim the deliberative process privilege under the D.C. Freedom of Information Act.

The FOP's lawsuit, brought in 2011, challenged the District's withholding of documents under the deliberative process privilege, the adequacy of the District's search for records, and the timeliness of the District's response to the FOP's request. In 2012, the trial court granted partial summary judgment in the District's favor on these issues, and the FOP appealed.

Issues on Appeal

Specifically, the FOP argued that the District's *Vaughn* Index contained insufficient information to demonstrate the applicability of the deliberative process privilege to the withheld documents. The FOP further challenged a declaration of an MPD employee in support of withholding six documents, arguing that, as with the rules governing privilege in civil discovery, "only a department head with control over the information in question may invoke the deliberative process privilege" under the D.C. FOIA.

Adopting the U.S. District Court for the District of Columbia's ruling interpreting the federal FOIA in *Lardner v. United States*, Case No. 03-180, 2005 U.S Dist. LEXIS 5465 (D.D.C. Mar. 31, 2005), the D.C. Court of Appeals rejected the FOP's argument, and held that "the District did not need to submit the affidavit or declaration of a department head or other high-level official in order to claim the deliberative process privilege against disclosure."

The court found the MPD employee's declaration stating that the emails constituted "a discussion among District employees … pertaining to the allocation of grant money" and "whether MPD should approve the grant" established that the emails were predecisional—in that no decision to give grant had been made—and deliberative—in that MPD employees were consulting about whether to approve proposal.

The court reaffirmed, however, that "cryptic and unenlightening" justifications will not meet the government's burden and agreed with the FOP concerning the District's invocation of privilege with respect to 62 other documents.

Those documents were all described in the District's *Vaughn* Index in the same way—as "pre-decisional discussion re potential response to reporter's inquiry concerning Peaceoholics."

On remand the District must support its non-disclosure adequately or disclose the withheld material

The court also agreed with the FOP's challenge to the adequacy of the District's search, holding that the District had

(Continued on page 30)

RETURN TO TABLE OF CONTENTS

(Continued from page 29)

failed to establish "through reasonably detailed affidavits that its search was reasonable."

Specifically, the court found the declaration of the MPD's FOIA Specialist who stated that she selected the seventeen individuals whose electronic communications were searched based on her determination that they were most likely to possess electronic communications responsive to FOP's request insufficient.

The declaration did not justify the choices made and limitations imposed on the search, or provide sufficient information to allow for meaningful review. On remand, the District may supplement the declaration to provide sufficient detail, or conduct further searches.

Finally, the court rejected the FOP's challenge to the timeliness of the District's response based on the second and third production of documents being made after the 15 day response time allowed by the law expired.

The court rejected the argument and upheld the trial court's ruling the District complied with the time set in the D.C. FOIA. Specifically, the court held "that the District later discloses more responsive documents, either voluntarily or pursuant to court order, does not mean it has disregarded the Act's time provisions."

Adrianna C. Rodriguez is an associate in the Washington, D.C., office of Holland & Knight LLP. Holland & Knight, LLP did not represent the parties in this lawsuit. Barbara E. Duvall and Paul A. Fenn represented the Fraternal Order of Police, Metropolitan Police Labor Committee. Jason Lederstein, Irvin B. Nathan, Attorney General for the District of Columbia, Todd S. Kim, Solicitor General, and Donna M. Murasky, Deputy Solicitor General, represented The District of Columbia.

RETURN TO TABLE OF CONTENTS

Setbacks and Tension in the Inter-American Court of Human Rights

By Eduardo Bertoni

Just a few weeks ago, at the MLRC London Conference I was conversing with European and American colleagues about the advances and setbacks of international jurisprudence regarding freedom of press and freedom of expression. Some delegates were worried about the European Court of Human Rights' recent free expression jurisprudence and noted that, in contrast, the Inter-American Court of Human Rights seemed to be making better decisions. They asked whether the IACHR was, in fact, the stronger protector of freedom of expression.

In that moment, I told them I was not that optimistic, because the Inter-American Court has been making statements suggesting a possible change of course, especially in regard to criminal defamation.

Unfortunately, the Court's recent ruling in the case of *Mémoli v. Argentina* has confirmed my lack of optimism: for the first time, the Court ruled that a criminal defamation conviction does not violate freedom of expression, as protected by Article 13 of the American Convention of Human Rights. This ruling marks a serious and notable setback.

For the first time, the Inter-American Court of Human Rights determined that a criminal conviction for the crime of slander and libel does not affect freedom of expression.

Background

The case is quite simple. In San Andrés of Giles, a city in the Province of Buenos Aires, Argentina, the municipal cemetery gave a cooperative control over the leases and titles of graves that had been public property. This coop set up contracts with third parties for the purchase and sale of these previously public sites.

The defendants, publisher Carlos Mémoli and Pablo Mémoli, a journalist, publicly denounced the taking of this property. They used strong language against the directors of the coop and were prosecuted and convicted of criminal defamation for doing so. In 1994, they received suspended prison sentences under Argentinian law for the crime of slander and libel. Following their conviction, there was a civil trial for the payment of indemnities, a process which has been taking place for more than 16 years.

In all the Inter-American Court's prior cases, criminal defamation convictions were considered a violation of freedom of expression. For example, in the *Herrera Ulloa v. Costa Rica* case in 2004, the Court ruled that the conviction of journalist Mauricio Herrera Ulloa be annulled. The Court made similar requests in other cases as well. For example, in the *Canese v. Paraguay* case in 2004, the Court considered the process of convicting Ricardo Canese, in itself a violation of his freedom of expression.

However, more recently in the *Kimel vs. Argentina* case in 2008, Court watchers began to see a change, due to what many suspect are tensions created by diverging views within the Court. Reading the individual decisions of the judges in that case showed that the judges were no longer unanimous that criminal defamation convictions are incompatible with freedom of expression. Yet, even in the *Kimel* case, and others that followed, it was understood by the majority of the Court that criminal defamation convictions violated freedom of expression.

In *Kimel* the Court said the crime of slander and libel under the Argentine Penal Code was contrary to the American Convention, but in the case of *Mémoli*, where the conviction was for precisely the same crime, the Court found no violation of the American Convention. Furthermore, the Court gave no reasonable explanation for the change in criteria.

It should be emphasized that even with this worrisome decision, the Court continues to give maximum protection to speech about public officials on matters of public interest. In other words, the Court's principles set in the past, are still applicable: "desacato" (insult laws) or statements about public officials' affairs should not be penalized.

While that is positive, what is problematic in the Court's *Mémoli* ruling is the narrow interpretation of what is or is not in the public interest, as compared to previous cases.

(Continued on page 32)

RETURN TO TABLE OF CONTENTS

(Continued from page 31)

The *Mémoli* case has deepened the tensions within the Court, first seen in the *Kimel* decision. In *Memoli*, four of the Court's seven judges found the conviction to be compatible with freedom of expression. Only three found the conviction to be a violation of that fundamental right.

The *Mémoli* decision is undoubtedly a setback and a wake up call about the divisions within the Court. It also shows the need of the Court to regain its legitimacy and reputation as a protector of freedom of expression, so necessary in our region today.

Eduardo Bertoni is Global Clinical Professor at New York University School of Law and Director of the CELE, the Center for Studies on Freedom of Expression at University of Palermo School of Law in Argentina.

RETURN TO TABLE OF CONTENTS

California Appellate Court Rejects Restraint on Attorney Website To Protect Jury

The best way to have protected the jury in an asbestos case from bias would have been to admonish the jury to stay off the Internet, not to order a plaintiff's attorney to remove from her website references to her success in two other asbestos cases, the California Court of Appeal ruled. **Steiner v. Superior Court**, 220 Cal. App. 4th 1479 (Cal. App. 2d Dist. 2013) (Perren, Gilbert and Yegan JJ.).

The case pitted two constitutional interests against each other: the defendant Volkswagen Group of America's right to a fair trial versus the plaintiff lawyer's right to free speech. The intermediate appellate court said that the trial court was laying an unlawful prior restraint on the lawyer's constitutional right to free speech in the pursuit of ensuring a fair trial.

Background

Plaintiff lawyer Simona A. Farrise advertised her success in two asbestos cases against Ford Motor Company on her website. In one case, Farrise stated that a jury had awarded a $1.6 million verdict against Ford and other defendants after managing to "'successfully navigate defendants' courtroom confusion.'" In another case, Farrise reported a $4.36 million jury verdict against Ford.

Ordering her to remove two of her site's pages did violate her free speech rights – even though it was for the salutary purpose of preventing juror bias, according to the Court of Appeal.

Farrise prosecuted a third case in which her clients alleged that Richard Steiner's cancer was caused by exposure to asbestos in automobile parts manufactured by Volkswagen, Ford and others. During this case, Volkswagen, joined by Ford, requested that the trial judge order that the information about the asbestos cases involving Ford be taken off-line during the trial in order to avoid the jury being prejudiced.

Despite Farrise arguing that the request would impinge her constitutional right to free speech, the trial court granted the motion with the clarification that Farrise did not have to take down her entire website but just the two web pages involving asbestos wins against Ford. The trial court also admonished the jury not to do web searches about the attorneys.

On appeal, only Volkswagen prosecuted its position. The intermediate appellate court summarily denied the petition. Then the petitioners argued in the California Supreme Court that the entire firm's website had been ordered to be taken down. The Supreme Court ordered the Court of Appeal to issue an order to show cause. The Court of Appeal also asked the petitioners to explain the discrepancy in representing to the Court of Appeal that part of the website was ordered to be taken down and representing to the Supreme Court that all of the website was ordered to be taken down.

In a footnote, the Court of Appeal said that the appellate counsel appeared to have violated her duty as an attorney never to seek to "'mislead the judge or any judicial officer by any artifice or false statement of fact or law.'"

On Appeal

Even though Farrise was not ordered to taken down all of her website, ordering her to remove two of her site's pages did violate her free speech rights – even though it was for the salutary purpose of preventing juror bias, according to the Court of Appeal.

While the appellate court said it was not deciding whether *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557 (U.S. 1980), extends to judicial restraints on commercial speech, the court proceeded to apply the test to decide that ordering Farrise to remove the two webpages failed under both intermediate scrutiny for commercial speech and strict scrutiny for non-commercial speech.

Under *Central Hudson*, restrictions on commercial speech are subject to a four-prong intermediate scrutiny standard: one, whether the speech concerns lawful activity and is not misleading; two, whether the asserted governmental interest is substantial; three, whether the restraint of speech directly advances the governmental interest; and, four; whether the restraint is "'more extensive than is necessary to serve that

(Continued on page 34)

RETURN TO TABLE OF CONTENTS

(Continued from page 33)

interest.'" The fit between the means to meet the government's ends must be narrowly tailored.

First *Central Hudson* Prong: The appellate court reasoned that Farrise's reports on past trial wins against Ford were not deceptive or misleading. Second *Central Hudson* Prong: Both sides agreed that the case involved the substantial governmental interest in ensuring a fair trial. Third *Central Hudson* prong: The court skipped over analyzing this prong after finding that the trial judge's order violated the fourth *Central Hudson* prong.

Fourth *Central Hudson* prong: The restraint on Farrise's speech was more extensive than necessary to serve the government's interest in ensuring a fair trial, the Court of Appeal ruled.

Volkswagen did not demonstrate that a prior restraint on speech is the "appropriate means of handling the threat of jury contamination," the court reasoned. While Volkswagen argued that admonishing jurors not to pursue information about cases on-line is no longer effective in "today's world of 24-hour news, Google, Twitter and the Internet," the legal literature shows that the methods used to deal with jurors include banning technology in courthouses, threatening jurors with contempt, conducting extensive voir dire with jurors and fashioning jury instructions that reflect the realities of the electronic age, the court said.

For example, California's civil procedural law was amended to require juries be admonished that they are prohibited from researching their cases, disseminating information about their cases and conversing about their cases, including through all electronic and wireless means of communication. Jurors also can be guilty of a misdemeanor under California law if they disobey the prohibition on conducting any communication or research about their cases. Those instructions were given in this case, the court said.

"Admonitions are the presumptively reasonable alternative to restricting free speech rights … We accept that jurors will obey such admonitions. It is a belief necessary to maintain some balance with the greater mandate that speech shall be free and unfettered," the Court of Appeal said.

The intermediate appellate court also rejected Volkswagen's argument that the case was moot because a pretrial order restraining speech ahead of a trial would evade review because of the short duration of trials.

The petitioner was represented by Simona A. Farrise and Carla V. Minnard of the Farrise Firm and Sharon J. Arkin of the Arkin Law Firm. Volkswagen Group of America Inc. was represented by Craig L. Winterman and Tara-Jane Flynn of Herzfeld & Rubin and Laurie J. Hepler and Nathaniel K. Fisher of Carroll, Burdick & McDonough LLP. No counsel entered an appearance for the Superior Court of Santa Barbara County.

RETURN TO TABLE OF CONTENTS

2013 State Legislative Highlights

Prepared by the MLRC State Legislative Committee

The Media Libel Resource Center's State Legislative Committee tracks and helps advocate for positive First Amendment and Open Government legislation and fight against legislation that would impair First Amendment and Open Government rights. The following are some of the most significant pieces of legislation (good and bad) passed in 2013 in various state legislatures.

CALIFORNIA LEGISLATION

Senate Constitutional Amendment 3 (SCA 3) — (Public Records/Open Meetings) — This law was introduced after the California Legislature suspended critical provisions of their Public Records Act. If passed by voters in June 2014, it will amend the Constitution to provide that California open meetings and open records laws are fundamental rights, that local agencies have a constitutional duty to comply with both Acts and that any costs incurred as a result of that compliance must be borne by the agency receiving the request.

Senate Bill 558 (SB 558) — (Reporter's Privilege Expansion) — This law strengthens the reporter's privilege in California and was introduced in response to the seizure of AP phone records. It mirrors the language negotiated and adopted in the federal DOJ Guidelines with respect to notice to a journalist or publisher if a journalist's information is sought by a third party. It amended an existing code section that requires 5 days' notice to a journalist if the journalists' information is subpoenaed from the journalist, and it adds a requirement that any party issuing the subpoena shall include in the notice, at a minimum, an explanation of why the requested records will be of material assistance to the party seeking them and why alternate sources of information are not sufficient.

COLORADO LEGISLATION

House Bill 13-1041 (HB 13-1041) — (Public Records) — This law concerns procedures governing the transmission of public records that are copied in response to a request for inspection of such records under the "Colorado Open Records Act". In essence, it allows "custodians" of records to produce records under the Act, and to charge fees for any and all types of delivery other than electronic, or e-mail, delivery. The measure would prohibit records custodians — including county clerks — from requiring that people requesting documents have to show up in person to collect their documents. The law mandates, however, that records should not be delivered until payment is received.

CONNECTICUT LEGISLATION

Subst. Senate Bill No. 1149 — (Public Records) — This law restricts access to crime scene photos, information concerning child victims, and audio recordings describing conditions of homicide victims. It was introduced in response to the Sandy Hook Elementary School tragedy. It exempts photographs, film, video, digital or other images depicting a homicide victim from being part of the public record "to the extent that such record could reasonably be expected to constitute an unwarranted invasion of the personal privacy of the victim or the victim's surviving family members." The law particularly protects child victims, exempting from disclosure the names of victims and witnesses under 18 years old. It also limits disclosure of audio recordings describing the condition of homicide victims, except for 911 calls or other calls by members of the public for assistance from law enforcement. This provision applies to requests made on or before May 7, 2014. The measure will be re-evaluated by a 17-member task force established by the bill. The task force

(Continued on page 36)

RETURN TO TABLE OF CONTENTS

(Continued from page 35)

is to consider and make recommendations regarding the balance between victim privacy under the Freedom of Information Act and the public's right to know.

FLORIDA LEGISLATION

CS/SB 50 — (Open Meetings) — This law solidified the public's right to speak at open meetings in Florida. It was passed by the Florida Legislature in response to an appellate court ruling stating that the right to address a public body at public meetings was not legally required (even though many bodies allowed it). As amended, CS/SB 50 defines "board or commission" as a board or commission of any state agency or authority of a county, municipality, or political subdivision. The law requires boards and commissions to provide members of the public with a reasonable opportunity to speak before a board or commission makes a final decision, subject to reasonable rules of the board or commission to ensure reasonable conduct. The right to speak would not apply to certain situations including an official act related to an emergency situation, a ministerial act, any meeting that is exempt from the open meetings law, and quasi-judicial meetings with respect to the rights or interests of a person. The law requires the assessment of reasonable attorney fees if a court finds that an agency violated the right to speak, but stipulates that any action taken will not be void as a result of the violation.

GEORGIA LEGISLATION

O.C.G.A. § 24-5-508 – (Reporter's Privilege Expansion) - As of January 1, 2013, the reporter's privilege has been expanded to internet publishers.

House Bill 150 (HB 150) – (Mug shots) - Effective May 6, 2013, the Georgia General Assembly amended the state fair business practices act to include within its prohibited internet activities a commercial website's failure to timely remove, upon written request, and without fee or compensation, the mug shot of a person against whom charges were dismissed or otherwise resolved in a manner intended to leave the person without an ordinary criminal conviction. Traditional news and commentary are exempted from the legislation.

ILLINOIS LEGISLATION

House Bill 3038 (HB 3038) – (Wiretap) – This law provides new civil remedies to parties to an electronic communication intercepted contrary to the Eavesdropping Article of the Code. The law exempts civil claims by a minor against a parent exercising his parental rights, but does not exempt a report for actions taken during the newsgathering process.

KENTUCKY LEGISLATION

House Bill 290 (HB 290) – (Open Meetings/Public Records) – This law establishes an independent review panel to investigate cases of child deaths and near-fatal injuries. The review panel is expected to recommended changes in the way Kentucky investigates and prosecutes child abuse deaths. The law provides that the review panel only has possession of copies of records, and that all original records are maintained by the appropriate state or federal agency. Public records requests would have to be made to those state and federal agencies, rather than the review panel. The review panel's meetings will be open to the public, but the panel may go into closed session to preserve the privacy of individuals whose names are included in case files. The law requires the panel to meet in open session following the closed session and give a summary of what occurred during the closed session.

(Continued on page 37)

(Continued from page 36)

MICHIGAN LEGISLATION

House Bill (HB 4096) — (Public Records) — This law creates and funds a searchable database listing all state expenditures and requires Michigan state agencies to provide disclosure regarding expenditures of state funds.

MINNESOTA LEGISLATION

Senate Bill (SB 1143) — (Public Records) — This law modifies Minnesota's Government Data Practices Act regarding employment settlement agreements and expands the group of managerial government employees whose data becomes public if they resign while a complaint or disciplinary proceeding against them is still pending.

MISSOURI LEGISLATION

House Bill (HB 436) — (Gun Nullification) — This gun nullification bill passed by the Missouri legislature contained the following language: "No person or entity shall publish the name, address or other identifying information of any individual who owns a firearm...." The Missouri Governor vetoed it. Then, the Missouri legislature, heavily weighted with conservative Republicans who sought to prevent federal gun control measures from taking hold in this state, took this measure up in its veto session. The House of Representatives voted to overturn the veto. At the last minute, the vote of one Senator tipped the balance and prevented it from becoming law.

NEVADA LEGISLATION

Senate Bill 286 (SB 286) — (Anti-SLAPP expansion) — As of October 1, 2013, Nevada's anti-SLAPP law is substantially stronger. It now includes: 1) protection for "the right to free speech in direct connection with an issue of public concern," and not merely communications intended to procure or influence government action; 2) the right to an immediate appeal of a denied anti-SLAPP motion; 3) expedited consideration of anti-SLAPP motions; and 4) discretionary awards of up to $10,000 (on top of attorneys' fees) to a successful anti-SLAPP movant. The new version of the statute balances these enhanced protections with the creation of a "SLAPP-back" remedy for plaintiffs targeted with anti-SLAPP motions that are themselves "frivolous or vexatious."

NORTH CAROLINA LEGISLATION

House Bill 142 (HB 142) – **(Public Records)** – This law was written in response to the court of appeals decision in *Ochsner v. Elon*, 725 S.E.2d 914 (N.C. 2012), and opens up public records of campus police at private colleges and universities.

In addition, to this positive piece of legislation, the North Carolina legislature chose not to adopt an agriculture gag bill (SB 648) and a bill moving public notices to certain municipalities' websites (SB 287).

OHIO LEGISLATION

House Bill 59 (HB 59) — (Open Meetings) — This was an item dropped into the state budget at the last minute allowing local governments to go into executive session to discuss economic development projects. There is a requirement that the body must vote unanimously to go into executive session, but this still removes another piece of

(Continued on page 38)

(Continued from page 37)

public business from public scrutiny. This exception was similar to earlier exceptions placed into the Open Meetings Law in connection with the governor's "Jobs Ohio" initiative, which allows much of that development initiative to be conducted behind closed doors on the theory that you cannot woo a business to relocate out in the open.

SOUTH DAKOTA LEGISLATION

Senate Bill 119 (SB 119) – (Live streaming) – This law guarantees media outlets the right to live stream high school athletic events. The measure was brought in response to an adverse federal court ruling out of Wisconsin and ends exclusive arrangements around the state where a school district had contracted with a broadcast outlet, shutting out anyone else who sought to stream the events.

TENNESSEE LEGISLATION

Senate Bill 461/House Bill 1001 — (Public Notice) — This legislation takes effect in April 2014 and requires newspapers to make public notices more visible on their local websites, requiring every publication that carries public notices to also run those notices simultaneously (and at no extra cost) on the publication's website and on a statewide website operated by a majority of Tennessee newspapers. An initiative of the Tennessee Press Association, this bill was advanced in response to various bills to remove public notices from newspapers and place them exclusively on government websites.

The significance of this bill is in the context of government transparency being a three-legged stool — open records, open meetings and public notice. Public notice requires government to proactively notify the public about their actions. Those who wanted migration to government websites argued that newspaper readership had declined and that everyone was getting their information from the Internet. They were referring to readership of printed products, but ignoring the fact that those readers were migrating mostly to newspaper websites. Reader surveys show that 70% of adults read newspapers or newspaper websites while Tennessee surveys show that 45% of households subscribe to newspapers. Conversely, statewide Internet connectivity surveys show that only 27% of households surveyed had ever looked at a state or local government website. That means notices would effectively be hidden.

TEXAS LEGISLATION

House Bill (HB 1759) — (Retraction) — The Texas Retraction Statute, which became law on June 14, 2013, encourages one to come forward in a timely manner if a mistake has been made in a publication and give the publisher the opportunity to correct the mistake. In order to be considered timely, one must make a retraction request during the period of limitations; however, to be able to request exemplary damages, the request must be made within 90 days of learning about the publication. There are specific parameters that must be followed in requesting a retraction, including who to notify, how to notify, the request must state, with particularity, what is alleged to be false, and when and where the publication was made (if known).

The statute gives the publisher the option of correcting the mistake by publishing a correction, an apology or the requester's own statement of facts or summary thereof. To comply with the statute, the publisher must correct the mistake within 30 days of receiving the request and in the same manner and medium as the original publication or, if that is not possible, in a prominent manner and medium intended to reach the same audience as the original mistaken

(Continued on page 39)

(Continued from page 38)

publication reached. If the original publication was over the internet, the retraction has to be permanently attached to the original article.

One can still sue after a retraction is run; however, the damages will be mitigated by the retraction, and if the publisher complies with the statute by running a retraction, one cannot get exemplary damages without a showing of actual malice. If a lawsuit is filed without requesting a retraction, the case can be abated for 60 days in order to have an opportunity to cure the mistake, and all deadlines in the case are stayed during the abatement period.

UTAH LEGISLATION

House Bill 408 (HB 408) — (Mug shots) — Utah Code section 17-22-30(3) limits the ability to obtain a booking photograph (*i.e.*, "mug shot") to only those people submitting a signed statement "affirming that the booking photograph will not be placed in a publication or posted to a website that requires the payment of a fee or other consideration" to have the photograph removed. Anyone submitting a false statement is subject to criminal prosecution for a class B misdemeanor. Separately but similarly, section 17-22-30(2) forbids a sheriff from providing a booking photograph to a person "if . . . [the] photograph *will be placed*" in or on such publications or websites where there is a removal fee.

WASHINGTON LEGISLATION

ESB 5236 — (Retraction) — On July 28, 2013, Washington's retraction statute went into effect. Washington previously had no retraction law, and publishers attempting to correct had to rely on a 1911 decision allowing defendants to plead and prove retractions to mitigate damages.

The law is a modified version of the Uniform Correction or Clarification of Defamation Act, and is designed to give incentives to publishers and prospective libel plaintiffs to settle their disputes before litigation. The statute creates a framework that requires a plaintiff to request a correction or clarification before (or at the time of) filing a lawsuit. One who fails to do so cannot recover reputational or presumed damages at trial. The statute applies not just to defamation lawsuits, but to any claim targeted at an allegedly false statement. And perhaps most notably — unlike most state retraction laws — it expressly applies to all electronic publications, and applies to any claim based on an allegedly false statement.

After receiving a request for a retraction, the publisher has thirty days to do one of the following: (1) issue a correction or clarification or (2) ask the complaining party for evidence of or information supporting his or her claim that the statement is false. If evidence of falsity is requested and there is a response, an adequate correction must be issued within thirty days to take advantage of the statute's protections. If there is no response, he or she cannot recover reputational or presumed damages. Under the statute, an adequate correction must (1) be published with a prominence and in a manner and medium likely to reach the same audience as the complained of statement (as further defined in the statute); (2) correct the statement (with special rules that apply to allegedly false implications and statements attributed to third parties); (3) be provided in advance of publication to the person who made the request (although the person need not approve it beforehand); and (4) accompany and be an equally prominent part of the publisher's electronic publication (if any). If more than thirty days have passed and thus the deadline to issue a correction, the statute may be invoked by offering to publish a correction and pay the person's legal expenses, then if the person accepts your offer, he or she may not file a lawsuit about it. But if the person rejects your offer, he or she may not recover reputational or presumed damages.

RETURN TO TABLE OF CONTENTS

2013 DCS Committee Reports

The MLRC Defense Counsel Section held its annual meeting November 14th at Proskauer Rose in New York City. The following reports were distributed and discussed by committee chairs and members.

If you're interested in joining an MLRC Committee, click here or visit medialaw.org.

ADVERTISING & COMMERCIAL SPEECH

Co-Chairs: Steven L. Baron and Jill P. Meyer
Vice-Chair: Brendan Healey

In 2013, the committee leadership (Jill Meyer, Steven Baron and Brendan Healey) continued to focus on developing the committee as a practice resource and forum for exchanging knowledge among MLRC members who advise clients on advertising and commercial speech issues. We used committee meetings in 2013 to host substantive presentations by members and outside speakers on current developments and issues of concern to advertising law practitioners. Presenters and topics included: Sophia Cope, Director of Government and Legal Affairs and Legal Counsel at the NAA, discussing recent and ongoing developments in privacy regulations and laws; Sharon Schneier of Davis Wright Tremaine, counsel to Hearst, discussing a class action lawsuit currently pending in federal court in the Eastern District of Michigan that accuses Hearst and other publishers of violating Michigan's Video Rental Privacy Act ("VRPA") by selling mailing lists that allegedly contain personal reading information of its subscribers. On December 4, 2013, Peder Magee, a senior attorney in the FTC's Division of Privacy and Identity Protection, will speak on recent changes to the Children's Online Privacy Protection Act ("COPPA") that went into effect in July 2013.

In 2014, we intend to keep our members abreast of new legal and regulatory developments relating to social media and behavioral advertising. In the upcoming year, we will focus at least some of our attention on retail tracking (i.e. the gathering of Wi-Fi and Bluetooth signals emitted from smartphones to monitor shoppers' movements around stores) and the implications of the Supreme Court's denial of certiorari in *Marek v. Lane*, which leaves in place a class action settlement of $9.5 million arising out of Facebook's now defunct "Beacon" program. Our committee continues to stay nimble and, as quickly as technology is changing and creating new legal issues, our committee follows topics as they develop and attempts to find speakers at the core of these issues to talk about them.

ALI TASK FORCE

Chair: Thomas S. Leatherbury

The purpose of the ALI Task Force is to monitor the ongoing projects of the American Law Institute in which we have an interest and to which we can contribute our work and our scholarship. Two examples of ALI projects in which our members have participated are various phases of The Restatement (Third) of Torts and the project on Recognition and Enforcement of Foreign Judgments. The ALI has now begun its work on The Restatement (Third) of Torts: Intentional Torts to Persons. Professor and Associate Dean of Academic Affairs at the University of North Texas Dallas School of Law Ellen S. Pryor and Professor Kenneth W. Simons of Boston University School of Law serve as the Reporters. The ALI has also launched its project on The Restatement (Third) of the Law of Information Privacy Principles. Professors Paul M. Schwartz of the University of California, Berkeley−Boalt Hall School of Law, and Daniel J. Solove of the George Washington University School of Law are the reporters. Several MLRC DCS members have joined the Members Consultative Group for each project.

(Continued on page 41)

RETURN TO TABLE OF CONTENTS

DCS President Bob Latham leads the Annual Meeting

(Continued from page 40)

CALIFORNIA CHAPTER

Co-Chairs: Robyn Aronson, Rachel E. Matteo-Boehm and Allison S. Brehm

The California Chapter has continued its practice, begun in 2012, of rotating its quarterly lunch meetings among several Century City locations, a practice that has contributed to strong in-person attendance among network and studio lawyers. In addition to the in-person attendees, we have had strong participation via telephone conference, with numerous participants from Northern California and elsewhere in the state.

Our March meeting was called "Risky Business: Best Practices for Reality TV, Promotional Stunts, and Advertising." Kelley Drye & Warren hosted the meeting. Dan Helberg, VP of Business and Legal Affairs at Shed Media US; Erica Silverstein, diligence counsel for NBCUniversal; and David Fink, partner at Kelley Drye, discussed the legal risks associated with unscripted programming and marketing stunts, ranging from casting issues to putting participants at risk of harm, as well as issues that arise in the online environment, such as marketing campaigns involving social media. The discussion was moderated by Allison Brehm, also a partner at Kelley Drye.

In June, we covered "Recent Developments in Copyright Law: What is 'Safe' and 'Fair'? The discussion focused on what constitutes fair use in the context of appropriation art and content aggregation, as discussed in the *Cariou v. Prince* and *AP v. Meltwater* cases, as well as the scope of the DMCA's safe harbor, as discussed in the *Viacom v. YouTube* and *UMG v. Veoh* cases. Josh Schiller, counsel for Richard Prince; Glen Kulik, counsel for Veoh's investors; and UCLA Professor Neil Netanel led the lively discussion.

Our September meeting, hosted by Katten Muchin, was called "Your Money for My Life: The Shifting Boundaries of Right of Publicity and Commercial Misappropriation." Panelists Al Wickers, counsel for Electronic Arts in the *Keller*, *Brown*, and *Hart* cases; David Halberstadter, counsel for Summit Entertainment in the "Hurt Locker" case; and Anatole Klebanow, VP of Legal Affairs at Fox, engaged in an informative discussion moderated by Robyn Aronson of NBCUniversal (and Co-Chair of the California Chapter), about the intersection of the right of publicity and First Amendment defenses, and the practical implications of the recent rulings for content creators.

Our final quarterly meeting will be on December 18, topic TBA.

EMPLOYMENT LAW COMMITTEE

Co-Chairs: Tanya Menton and Tom Wilson

In 2013, the committee leadership continued to focus on developing the committee as a practice resource and forum for exchanging information and best practices among MLRC members who provide employment law advice to media organizations. During the year, we have added new active members from in-house legal departments and law firms.

The committee remains engaged in an ongoing discussion of current developments in employment law of specific concern to media companies. Committee members have hosted presentations on a variety of topics including (1) the

(Continued on page 42)

RETURN TO TABLE OF CONTENTS

(Continued from page 41)

NLRB and social media; (2) current state of the law on non-competes in the broadcasting industry and recent legislative efforts; (3) unpaid internships in media organizations, and (4) current trends at the EEOC and U.S. Department of Labor.

Currently the committee is working on a white paper regarding the use of interns by media organizations. The Committee will complete and publish before the end of the year a white paper titled "Non-Competes in the Broadcast Industry." This paper addresses current state legislation and case law that limits the ability of broadcast employers to enforce non-compete agreements with their employees, what alternatives broadcast employers have in those states with such restrictions, and future legislative action that may occur.

ENTERTAINMENT LAW COMMITTEE

Co-Chairs: David Cohen and Brad Ellis

The mission of the Entertainment Law Committee is to keep its members apprised of key cases and the latest legal developments in areas of interest to our members. To that end, the Committee meets telephonically for an hour the first Wednesday of every month. In preparation for each meeting, the Committee co-chairs review a variety of publications, assembling approximately 12 items of interest to present to the Committee for discussion. An agenda of potential topics is circulated about a week ahead of each meeting; a final meeting agenda with links and attachments is distributed 3-5 days before the call. Agenda items are selected with an eye toward currency, significance, balance, and entertainment value.

Often, we revisit particular cases as developments warrant. Some of the specific topics and cases discussed this past year include: the multiple litigations brought in connection with the Aereo service, the right of publicity as it relates to college athletes and the use of identifiable persons in video games, contract disputes in the entertainment sphere and timely instances of anti-SLAPP litigation. The monthly meetings provide a forum for our members to keep abreast of current developments, share insights and debate potential arguments that best advance the interests of our clients.

The Committee is comprised of approximately 65 lawyers, both in-house and outside counsel, from around the country, and includes many of the leading lawyers in the entertainment and media arenas.

Approximately 15-20 Committee members actively participate on each month's call. Recently, we implemented a change in format, in which we call for volunteers to suggest topics/cases for discussion and to prepare to present them to the group, creating an opportunity for greater participation by committee members and fostering more in depth analysis and discussion.

In addition, an Entertainment Law subcommittee, headed by AJ Thomas, is presently drafting a white paper on the use of trademarks in expressive works. Our Committee hopes to publish a draft within the coming months.

ETHICS COMMITTEE

Co-Chairs: Leonard M. Niehoff and Nicole Hyland

The MLCR Ethics Committee has two principal functions: (1) it assists with ethics-related programming for MLRC conferences and (2) it recruits from its membership and elsewhere authors for the Ethics Corner column. This year, the Committee continued its usual responsibilities with respect to the former. With respect to the latter, the Committee sought to increase significantly the number of Ethics Corner columns published. That goal was achieved. By the end of 2013, the Ethics Committee will have published at least six Ethics Corner columns—twice the number published in 2012—and is likely to have published seven or eight. In addition, this year the Committee has benefited from the additional leadership of Nicole Hyland, who Co-Chairs the Committee along with Len Niehoff.

(Continued on page 43)

(Continued from page 42)

INTERNATIONAL MEDIA LAW COMMITTEE

Co-Chairs: Brian MacLeod Rogers and Robert D. Balin
Vice-Chair: Gillian Phillips

For the coming year, our Committee plans to continue our bi-monthly conference calls that enable our members to keep on top of emerging media law developments around the world. While we take advantage of our own international membership and their insights into issues and cases close to home, we have also benefited from outside experts on international subjects. These sessions are invaluable for exploring laws affecting the media in parts of the world that are off the beaten track and providing in-depth expertise on important developing issues. Over the past year, we have had insightful discussions about media law in Turkey, Ukraine and Australia, as well as the potential impact of the World Conference on Information Technology.

We have also kept abreast of ongoing developments in the United Kingdom, including defamation law reform and responses to the Leveson Inquiry, and will continue to do so. In addition, we expect to reprise a very successful in-depth session on practical approaches to international issues affecting U.S.-based online publishers.

We assisted with this year's first-ever MLRC conference on Latin American-Hispanic Media Law held in Miami and will support next year's conference to be held March 10, 2014, as well as continuing its support for the MLRC's International Media Lawyers Program. The assistance of Dave Heller has been invaluable, and we will miss Brian MacLeod Rogers, who retires as Co-Chair at the end of the year after five years. However, we welcome the addition of Julie Ford as our new Vice-Chair. And we look forward to a productive 2014.

INTERNET LAW COMMITTEE

Co-Chairs: John C. Greiner and Katherine Surprenant

The Internet Committee continued to conduct quarterly conference call meetings this year to discuss recent developments relating to the "Practically Pocket-Sized Guide to Internet Law" topics. We have used these meetings as an opportunity to explore certain Treatise topics in greater depth, commencing with a short presentation by the Committee member who authored the relevant chapter, followed by open discussion.

Throughout the year, Committee members circulated summaries of new court decisions and other notable developments, which provide the twofold benefit of timely updates to the group and a ready source of information for the next update to the Guide.

The Committee also successfully published an updated version of the Treatise in July of this year. The online publication resulted in an unusually high number of clicks in its first day – nearly 300. The Committee intends to update the Treatise annually. Annual updates will include new topics as appropriate.

Finally, Jack Greiner is stepping down as co-chair after a six year tenure. Katherine Surprenant will remain as co-chair and Jeremy Mishkin will assume Jack's role effective immediately.

LEGISLATIVE AFFAIRS COMMITTEE

Co-Chairs: Laurie A. Babinski and James A. McLaughlin

The Legislative Affairs Committee has been tracking pending legislation including the Free Flow of Information Act of 2013 (S. 987/H.R. 1962); the Cyber Intelligence Sharing and Protection Act ("CISPA") (H.R. 624); the PETITION Act (federal anti-SLAPP statute); the Electronic Communications Privacy Act ("ECPA") Amendments Act of 2013 (S. 607);

(Continued on page 44)

(Continued from page 43)

and the FOIA Act (H.R. 1211). We have issued a white paper on potential amendments to the Espionage Act and anticipate articles about the shield and anti-SLAPP bills in the next MLRC MediaLawLetter.

The Committee has focused and will continue to focus on tracking legislation while increasing the number of updates to MLRC members. Our plan is to make those updates more frequent in the form of MLRC MediaLawLetter articles. In order to achieve this goal, we will be assigning particular areas of law (shield, FOIA, SLAPP, etc.) to individual members of the committee to ensure greater focus and attention on each piece of legislation. We will also be searching for a vice chair for the committee with the ultimate goal of taking over Jim McLaughlin's role as co-chair.

LITIGATION COMMITTEE

Co-Chairs: Robert C. Clothier and James A. Hemphill

The Litigation Committee – successor to the Pre-Trial and Trial Committees – released in early 2013 an updated Discovery Roadmap to include analysis regarding the now ubiquitous electronically stored information (ESI).

The Litigation Committee is near completion of its efforts to update the Issue Checklist for Motions to Dismiss and Summary Judgment in a Defamation Action, which was last updated in 2004, to include issues relating to publications in an online world. We expect it to be finalized and distributed to the MLRC membership shortly.

Lastly, the Litigation Committee is focusing its efforts on two substantial white papers that we anticipate will require two years to complete. One white paper will create a national roster of experts used in libel cases involving the media. An Expert Witness Subcommittee – led by Doug Pierce – recently circulated a request to the MLRC membership for the names of experts who should be included in this roster.

The other white paper is focusing on settlement agreements in libel cases including practical tips and suggested template provisions. A Settlement Agreement Subcommittee led by Lizzie Seidlin-Bernstein and Brian Sher is spearheading this effort. They have recently reached out to the full Committee membership and will be circulating a plea to general MLRC membership for suggestions and sample agreements.

For both of these efforts, the Litigation Committee and its two subcommittees need the help of every MLRC member and hope for great responses to our outreach efforts. We welcome any suggestions from others as to white papers, roadmaps, checklists or other projects that might be of interest to the MLRC membership.

MEDIA COPYRIGHT AND TRADEMARK COMMITTEE

Co-Chairs: Maya Windholz and Rebecca Sanhueza

The Copyright and Trademark Committee was established in 2013 to keep the MLRC membership current on cases and trends in the areas of copyright and trademark law, particularly for those who do not practice in these specialties on a day-to-day basis. In addition to two Co-Chairs (Maya Windholz and Rebecca Sanhueza, who replaced Tim Jucovy in October), the Committee has a Steering Committee to assist with meetings and with other responsibilities of the Committee (Pat Carome, Mike Huget, Bruce Keller, Yoko Miyashita, Lou Petrich, Liz Ritvo, Regina Thomas). The full Committee holds one-hour meetings every other month, by phone, open to MLRC members. A typical meeting agenda includes two or three brief presentations, followed by Q&A and discussion, regarding recent key cases in the field or other legal developments of interest to news and entertainment lawyers. Discussion topics in 2013 have covered a wide range of areas, including topics as diverse as: the Meltwater v. AP case, the Aereo litigation, the Oprah "Own Your Power" slogan case and the football videogame cases (Brown, Keller and Hart), plus others. We have also set time in certain meetings for discussion of "hypotheticals," to encourage participation among members and to hear varying perspectives on business and legal challenges shared by members. In addition, those who are on the Committee

(Continued on page 45)

(Continued from page 44)

receive an email prior to each bi-monthly meeting, outlining other "recent developments" – in the form of cites to recent cases of interest or relevant articles. The Committee scheduled 5 meetings in 2013 (April, June, July, September and November). The plan for 2014 is to hold 6 meetings, which will follow the same format. By year-end, we will also do a self-assessment, to ensure that the Committee is providing value to MLRC.

MEDIALAWLETTER COMMITTEE

Co-Chairs: Russell Hickey and Michael Berry

The MediaLawLetter Committee this year continued its principal work – assisting Dave Heller and the MLRC staff with identifying and preparing content for the monthly MediaLawLetter and providing advice as needed about the MediaLawDaily. The Committee is working on developing a quarterly column written by in-house counsel called "A View From The Inside." The column will offer in-house attorneys' insights on a wide range of topics, from practical tips on budgeting to emerging trends in their areas of practice. Several in-house attorneys have volunteered to assist with this project, and we are hoping to publish the first column in the coming months. In the coming year, the Committee will be continuing to work on improving the MediaLawLetter and MediaLawDaily, both of which serve as important resources to MLRC members.

MEMBERSHIP COMMITTEE

Co-Chairs: Robert D. Lystad and Thomas Burke

The Membership Committee continued its recruiting efforts. Primarily through the efforts of the MLRC staff, the committee greatly expanded the list of both potential media nominees (from approximately 50 in 2012 to 103 in 2013) and potential law firms (from approximately 15 in 2012 to 33 in 2013). The nominees were culled in part from attendance lists at prior MLRC conferences. Committee members were assigned as the primary recruiter to contact the nominees. Some members volunteered to help recruit certain nominees for which they had contacts. Success rates have not yet been determined.

MODEL SHIELD LAW COMMITTEE

Chair: Leita Walker

The Model Shield Law Committee has been working on building its membership and responding to a renewed interest in a federal shield law. It expects to issue updates to two reports this year: a 2011 report titled "Resource Materials for Defining 'Journalist' and 'Media' in Litigation and Legislation" and a 2010 "Catalog of Subpoena Decisions by Category of Material and Reasons Sought." The task force also met within the past month to discuss updating the MLRC's Model Shield Law, which was last updated in 2007.

NEW LEGAL DEVELOPMENTS COMMITTEE

Co-Chairs: David J. Bodney and David M. Giles

The mandate of the New Developments Committee is to identify developments and emerging trends that MLRC and its committees should monitor, explore, or report on to the membership. The New Developments Committee convenes

(Continued on page 46)

(Continued from page 45)

four times each year by phone to discuss recent developments in litigation, legislation, and technology; to identify topics of interest to the membership; and to attempt to spot trends that may impact journalists and media companies.

The topics we addressed during our 2013 meetings included: how to deal with corrections/clarifications/retractions on multiple platforms; writing and updating social media guidelines; FTC and Privacy issues, the latest on the NSA subpoenas and related data collection issues; updates on efforts to pass a federal anti-SLAPP statute and the federal shield law; right of publicity and misappropriation and the challenges of live streaming in courts.

NEWSGATHERING COMMITTEE

Co-Chairs: William L. Chapman and Cynthia L. Counts

In 2013, the Committee continued its practice of holding telephone conference calls on the fourth Thursday of January, March, May, July, and September. Although there are about 40 MLRC members on the Committee, only about seven to ten members were regular participants on the calls.

The Committee has completed two projects that it carried over from 2012. Tom Julin and Mark Flores prepared an article titled "Online Access to Trial Exhibits: A Simple Solution." The article discusses several high-profile cases in which courts have posted trial exhibits on their websites and proposes a model rule to make online access the norm not the exception. Tom Williams prepared an article titled "Access to Public Employee Pension Records." It discusses the split in jurisdictions between those that permit access to such records and those that do not, offering suggestions to afford access either through legislation or litigation. The Committee anticipates that both articles will be available to MLRC members by the end of November.

Eric Robinson, joined by Elizabeth Schilken and Cynthia Counts, has made substantial progress on a 50-state survey of expungement/annulment laws. Members from most of the fifty states and several of the territories have agreed to research and summarize important aspects of the expungement laws in their state, and they will be recognized as participants on the survey. Their hope is to complete and make the survey available to MLRC members by the end of the year.

In 2012, Mickey Osterreicher undertook a project on press credentialing but was not able to gather much information from MLRC members. In 2013, he learned that the National Press Photographer's Association is doing an online media credentialing practices survey. At the September conference call, Mickey reported that there had been about 800 responses to the survey. Mickey will provide the results of the survey to the Committee when it is completed.

PRE-PUBLICATION / PRE-BROADCAST COMMITTEE

Co-Chairs: Ashley Messenger and Shannon Zmud Teicher

In 2013 the MLRC Pre-Publication/Pre-Broadcast Committee was co-chaired by Ashley Messenger, Associate General Counsel for NPR, and Shannon Zmud Teicher, a Partner at Jackson Walker LLP. In its monthly conference calls, the committee had speakers who led discussions on current cases, such as *Young v. Gannett Satellite Information Network, Inc.*, a Sixth Circuit decision involving a police officer who won a libel case, *Stepanov v. Journalism Development Network, Inc.*, a libel case arising out of four articles discussing organized crime and money laundering, and *Slate v. ABC*, a copyright case arising over a clip that appeared on the ABC news program 20/20.

The committee also had speakers and led group discussions on a variety of legal issues, including the complexities of handling international cases, broadcast rules that implicate the First Amendment, and opinion decisions throughout the country.

(Continued on page 47)

(Continued from page 46)

The committee completed a paper on *Risks and Tips for Digital Images*, training materials on *Publishing Photos Images, or Other Illustrations*, and training materials on *Can I Use This Clip? A Guide to Audio/Video Use*. The committee has two pending projects regarding *Occupations and Public Figure Status* and the *Fair Report Privilege*.

Also, we are pleased to announce that Jennifer Peterson, Media Counsel and Deputy General Counsel of Journal Communications, will succeed Ashley Messenger, as the committee's new co-chair in 2014 and that Dana Rosen, General Counsel of Werner Media, will be our new vice-chair. Last, but not least, the committee would like to thank Ashley Messenger for all the many projects and new initiatives she has led during her tenure as co-chair of the committee.

STATE LEGISLATIVE AFFAIRS COMMITTEE

Co-Chairs: Laura Lee Prather and Elizabeth Allen

The MLRC State Legislative Committee is now starting its third year of existence. This year has been a tremendous year of growth for our committee. We have added co-chair, Elizabeth Allen, and have added representation from Connecticut (Eric Kemmler), Minnesota (John Borger), Nevada and Hawaii (Mark Hinueber), Oregon (Duane Bosworth) and the National Association of Broadcasters (Jerianne Timmerman). We also have new representation from Arizona (Chris Moeser), North Carolina (Marc Prak), and Tennessee (Robb Harvey). This brings our total representation to 31 states, D.C. and several national organizations. Throughout 2013, our committee has identified, tracked and impacted legislative measures impacting the media. We exchange information about trends in legislative efforts, such as crime scene photos, mug shots, right of publicity and papparazi legislation – so that we can brainstorm about ways to combat those initiatives that are adverse to First Amendment interests. And, we help to create and build momentum in efforts to get positive open government and First Amendment legislation passed, such as retraction statutes, anti-slapp measures, and reporter's privilege laws. This year, we have worked closely with other national organizations to roll out model anti-slapp legislation to be considered in those states that do not have anti-slapp laws or that need theirs expanded. We also are increasing the utility of our webpage with legislative developments and literature concerning legislative efforts to help all MLRC members. We meet once a month during the legislative session and, like state legislatures, recess for the summer. Our meetings typically consist of reports on what is going on in various states and brainstorming about issues at hand, such as effective ways to combat public notice challenges, increased costs for public records, and closing off access to records and meetings of governmental agencies. We have compiled a list of state legislative highlights for the membership including the most significant pieces of open government and First Amendment legislation (good and bad) to pass the various state legislative bodies. In addition to combatting countless efforts to close off access and move public notices to government websites, some of the successes over the last year include expansion of reporter's privilege (in California and Georgia), passage of retraction statutes (in Washington and Texas), and expansion of anti-slapp statutes (in Nevada). In addition, there has been some headway made in overturning poor judicial precedent through legislation in South Dakota (adopting legislation to expressly provide the right to live streaming of high school athletics) and providing the public with the right to speak at open meetings in Florida.

Robin Luce Hermann of Butzel Long has agreed to succeed Laura Prather as committee co-chair when her term expires at the end of the year.

RETURN TO TABLE OF CONTENTS

MLRC's 2013 Annual Meeting

MLRC's Annual Meeting was held on November 13, 2013 at the Grand Hyatt Hotel in New York.

Board of Directors Election

The Chair of the Board of Directors, Susan E. Weiner, of NBCUniversal, Inc., called the meeting to order.

The first order of business was the election of Directors for 2014. Two new Directors were proposed: Denise Leary of NPR and Regina Thomas of AOL. And four Directors were nominated to be reelected to two-year terms: Marc Lawrence-Apfelbaum, Time Warner Cable; Gillian Phillips, The Guardian; Kenneth Richieri, The New York Times Company; and Kurt Wimmer, for the Newspaper Association of America.

All six nominees were unanimously approved by those present at the meeting together with the 44 member proxies submitted to MLRC.

Four other Directors who were elected last year are entering the second year of their two-year terms. They are: Karole Morgan-Prager, The McClatchy Company; Lynn B. Oberlander, The New Yorker; Mary Snapp, Microsoft Corporation; and Susan Weiner, NBCUniveral.

Susan reported that there are 120 media members in MLRC and 206 members in the MLRC's Defense Counsel Section as of August 31, 2013. She said those numbers were "very impressive," and she thanked all the members for their continued support.

Finance Committee's Report

Karole Morgan-Prager, chair of the MLRC's Finance Committee, referred members to MLRC's financial statements and the compilation report from MLRC's accountants. For the 12-month period ending August 31, 2013, MLRC had $1.57 million in total revenue, $1.40 million in total expenses and $184,268 increase in net assets, according to the statement of activities.

The Finance Committee meets quarterly to review the financial statements as well as to hear from Executive Director Sandy Baron and MLRC Administrator Debra Danis Seiden, Ms. Morgan-Prager reported. The committee then makes quarterly reports to the Board of Directors, she said.

Executive Director's Report

Sandy Baron thanked the Board of Directors for giving so much time to MLRC as well as ensuring so much "quality to our activities by virtue of their experience and their intelligence and common sense and wisdom." She noted that Bob Latham will be rotating off the Board Directors as his service as president of the Defense Counsel Section is ending. Sandy thanked Bob for his service. Lou Petrich will serve as DSC president in 2014.

MLRC's highlights of 2013 included the 10th annual MLRC/Southwestern Entertainment and Media Law Conference, held at Southwestern Law School in January. The conference will be held again in Los Angeles January 2014.

The sixth annual Legal Frontiers in Digital Media set of sessions was held in Silicon Valley in May 2013. This will be the last year in which MLRC will partner with Stanford Law School's Center for Internet and Society on this conference as the result of new rules implemented by the university, Sandy reported. The new partner for the conference is the Berkeley Center for Law and Technology. Sandy expressed gratitude for Robert Barr, executive director of BCLT, and Barr's colleague, Peter S. Menell, as enthusiastic partners. A better transition could not be asked from Stanford to Berkeley, Sandy said.

(Continued on page 49)

(Continued from page 48)

Another "extraordinary" event in 2013 was MLRC's London Conference. Sandy thanked Hiscox and Bloomberg for their reception sponsorships and all the other supporters of the conference. The conference is strong due to its substance as well as the opportunity for lawyers from around the world to meet with each other. The Supreme Court of Victoria, Australia, sent a jurist to attend the conference. Australian justice Chris Maxwell was paired with Sir Michael Tugendhat, who is a High Court judge and the senior media judge for England and Wales. The jurists made for an interesting point-counterpoint on how common law jurisdictions deal with free press fair trial issues.

A grant from Google allowed for 16 lawyers from countries where online speech is under pressure to attend the London Conference. In addition, a special set of sessions was created for the Google-sponsored attendees so they could discuss the creation of a global network of lawyers to share ideas on how to use international norms, as well as local norms, to defend speech. Hopefully, another grant will be possible to bring the same group of lawyers to MLRC's Virginia Conference in September 2014. The In-house Counsel Breakfast Meeting was another key event at the London Conference.

MLRC added a new conference in 2013 on Legal Issues Concerning Hispanic and Latin American Media. The conference was held in partnership with the University of Miami Schoolof Communication and School of Law. Sponsorship was provided by the McClatchy Foundation as well as assistance from Holland & Knight. Many in the Hispanic media field are located in Coral Gables, Florida-area, but do not necessarily get many opportunities, especially at the more junior levels, to meet and discuss common issues and this event was a good opportunity for both. The conference's co-chairs were Lynn Carrillo of NBCUniversal and Adolfo Jimenez of Holland & Knight with the assistance of Chuck Tobin of Holland & Knight. This conference will be held again next March with more emphasis on bringing lawyers from Latin America proper to the conference. Sandy encouraged members who know lawyers from Latin America to invite them to the conference.

MLRC put out many publications in 2013, including the MLRC 50-State Surveys. After four years, Oxford University Press no longer is the publisher of those volumes. MLRC will publish, market and distribute its books in-house. The Media Libel Survey has been printed and shipped. MLRC is reaching out to its members, and all subscribers to the 50-State Surveys, to let them know of the change-over to MLRC distribution and get them re-signed up for the Surveys.

MLRC's other signature publications include the MLRC MediaLawLetter, which is sent monthly, and the MLRC MediaLawDaily, which is sent every business day. The MLRC MediaDaily is designed to go to non-legal colleagues inside the corporate members, and that is also sent every business day. Even more publications result from the efforts of MLRC's committees.

Participation in the MLRC committees is a great way to contribute to the organization and to meet and work with media lawyers from all over the U.S. and even around the world. Maya Windholz and Timothy Jucovy particularly deserve kudos for creating the new Media Copyright and Trademark Committee at the behest of DCS President Emeritus Liz Rivto and President Bob Latham. As of October, Rebecca Sanhueza has stepped in as co-chair of the committee.

MLRC was active in many international efforts in 2013 in addition to its conferences. MLRC commented on the UK Defamation Act. MLRC also filed comments with the UK Law Commission in opposition to extending the reach of contempt of court to online archives. MLRC also commented on a proposal from the European Commission's High Level Group on Media Freedom and Pluralism to have each member nation set up media councils that, among other things, would have the right to sanction media.

MLRC also joined other organizations in intervening in proceedings pending in the High Court in London involving Glenn Greenwald's partner, David Miranda, and whether procedures used by law enforcement authorities in the United Kingdom to confiscate the electronics Miranda was carrying were consistent with UK law and the European Convention on Human Rights.

(Continued on page 50)

RETURN TO TABLE OF CONTENTS

Sandy thanked all of the companies and law firms that had sponsored its conferences and events, as well as purchased seats at the MLRC Dinner. These sponsorships allow MLRC maintain lower rates for its events, as well as support the staff that produces them. For example, this year's MLRC Forum on programmatic ad buying and ad networks was sponsored by Microsoft and Hachette Book Group.

Sandy thanked the staff of the MLRC for their work. Sandy particularly praised Debra Danis Seiden for her work as MLRC's all-purpose administrator, including for handling the project of moving the books in-house. Staff Attorney Dave Heller edits the MediaLawLetter; edits the MLRC Bulletins published three times a year; manages the London Conference; manages the International Media Lawyers Project; and has a seemingly boundless knowledge of media law. Staff Attorney Michael Norwick follows digital medial legal developments for MLRC; manages the annual Legal Frontiers in Digital Media sessions; edits the 50-State Surveys; puts out the damages survey, which benefits from his background as a litigator; and organized this year's annual forum on programmatic ad buying. Staff attorney Katie Hirce is the newest staff attorney; she is a past 2006-2007 MLRC fellow and she practiced at McCusker, Anselmi, Rosen & Carvelli in New Jersey; Katie will manage the Virginia Conference and support the federal and state Legislative Affairs Committees. The annual dinner would not have happened without her. Jacob Wunsch, the MLRC production manager, puts together all of the publications and manages the MLRC web site; Jake also just finished overseeing the archival of the MediaLawDaily. Dorianne Van Dyke, the WSJ-MLRC Institute Free Speech Fellow, manages the First Amendment Speakers Bureau, which provides educational lectures at schools, libraries, and independent book stores, as well as a new student video protect. Sandy also expressed gratitude for the funding from the Dow Jones Foundation for underwriting the MLRC Institute allowing it to employ Dorianne. Amaris Elliott-Engel is the 2013-2014 MLRC Fellow, whose work is informed from spending a decade as a working journalist.

London Conference and International Media Lawyers Project

Dave Heller reported that the London conference this year was the largest ever with close to 230 attendees. The diversity of attendees included lawyers from South Korea, Brazil, Malaysia, and Thailand. Due to the International Media Lawyers Project, seven lawyers from jurisdictions where "free press rights are under stress" have been brought together to attend the conference. Face-to-face meetings are very important, especially for lawyers who are not familiar with MLRC. Dave hopes to see the International Media Lawyers Project grow with participation of lawyers at the Virginia Conference in 2014.

Defense Counsel Section Report

DCS President Bob Latham said the section's 18 committees have been very active in 2013. Thirteen papers have been generated as a result of the committees. A few more are to be finished by the end of 2013. Thirty-seven MLRC members participate as chairs or vice-chairs of the committees.

The Media Copyright and Trademark Committee is a new committee and is an additional way to bring in new members. One of the ways to grow the MLRC membership is the expansion of the scope of subject matter covered by the MLRC. The MLRC also is trying to increase members internationally and to make sure the next generation of lawyers in law firms become members too. Some committee leaders are younger lawyers, which ensures "we don't become some doomed anthropological species," Bob said to a round of laughter. Rotating the committee chairs also ensures new leadership.

Liz Ritvo will rotate off the DCS Executive Committee after spending 2013 as president emeritus. Laura Prather will start her five-year leadership cycle on the DCS Executive Committee as treasurer.

RETURN TO TABLE OF CONTENTS

Report on MLRC Institute

Dorianne Van Dyke thanked the Dow Jones Foundation and The Wall Street Journal for their support. Without them, the Institute's activities would come to a halt. Dorianne also thanked the MLRC Institute Trustees for giving their resources and time.

The MLRC Speaker's Bureau has reached 213 presentations. In late September, the Institute partnered with the American Booksellers Foundation for Free Expression on speaking events for Banned Booked Weeks. Jim McLaughlin of The Washington Post spoke at the University of Maryland as part of the Speakers Bureau. Carolyn Foley of Davis Wright Tremaine and Lynn Oberlander of The New Yorker gave a talk at the City University of New York as part of the Speakers Bureau. CUNY is interested in a partnership with the MLRC Institute in creating podcasts that could be used as an educational resource.

The MLRC Institute also held its first video contest for high school students to speak out about cyberbullying. The judges include Dale Cohen, special counsel for Frontline and an MLRC Institute Trustee; Kaitlin Monte, an antibullying activist and host of NBC New York's "Weekend Today in New York" trivia game; Jon Rubin, senior director of state and local education services for WNET New York Public Media; and Tracy Smith, a correspondent for "CBS News Sunday Morning." Microsoft has provided the prizes for contest winners.

The Institute's Actions Against Online Speech Blog is going to be merging with the Berkman Center For Internet & Society at Harvard University's legal threats database cataloging legal challenges faced by those engaging in online speech.

The Institute also was a sponsor of Sunshine Week, Free Speech Week and the Free to Tweet scholarship competition.

Jacob Goldstein, one of the MLRC Trustees, and Dorianne had the opportunity to meet Mary Beth Tinker, one of the Iowan students who wore a black armband to school to protest deaths of soldiers in Vietnam and won a landmark case in favor of student speech.

Dorianne asked for members to 'like' the Institute on Facebook and to follow the Institute on Twitter.

New Business

Susan Weiner thanked Sandy for her drive and passion. She also joined Bob Latham in emphasizing MLRC's efforts to involve new members, including younger lawyers and lawyers new to the practice. Ms. Weiner also was pleased that six new media members joined in 2013 considering that the media industry has contracted.

As for new business, it was suggested that aspects of the London Conference format be used at the Virginia Conference and/or have links between plenary sessions and breakouts so that conference attendees can discuss issues raised at the plenary sessions. Another suggestion raised for the Virginia Conference was to hold a session involving the government, such as with officials like Attorney General Eric Holder.

There being no other new business, Ms. Weiner thanked everyone for attending and adjourned the meeting.

RETURN TO TABLE OF CONTENTS