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MLRC Annual Dinner 2014 Privacy and the Press: Hugh Grant and Katie Couric



On Wednesday, November 12, 2014, over 650 MLRC members and friends gathered for MLRC's Annual Dinner at the Grand Hyatt in New York where Katie Couric interviewed famed English actor Hugh Grant about his recent campaign to regulate the UK tabloid press.

Hugh Grant achieved international recognition after his performance in *Four Weddings and a Funeral*. Other successful films include *Notting Hill, Bridget Jones Diary* and *About A Boy*. His films have earned more than \$3 billion from theatrical releases worldwide. His awards include a Golden Globe, a BAFTA, The Peter Sellers Award for Comedy, Best Actor at The Venice Film Festival and an Honorary César.

Over the past three years, Grant has devoted much of his time to the Hacked Off campaign. Hacked Off was formed in the wake of the phone-hacking scandal in the UK and advocates on behalf of victims of press abuse and in favor of new regulations for newspapers to achieve "a free and accountable press" in the UK.

Grant testified before the Leveson Inquiry which investigated the role of the press and police in the UK phone-hacking scandal. While lauding England's rich history of investigative journalism, he has forcefully condemned the aggressive UK tabloid press for "bribing police, emasculating Parliament, and enjoying the competitive sycophancy of five successive governments."

Katie Couric is Global Anchor of Yahoo News. She joined Yahoo News in November 2013 and reports on live world events, anchors groundbreaking interviews with major newsmakers and is the host of the digital series World 3.0 and Now I Get It.

To many she is best known as the co-anchor of NBC News' Today show from 1991 to 2006. In 2006 she became the first solo female anchor of a national nightly news broadcast, as Anchor and Managing Editor of the CBS Evening News with Katie Couric (2006-2011). From 2012-13 Katie was the host of the eponymous syndicated daytime talk show, Katie and she also served as a special correspondent for ABC News. Over the past two decades, she has covered the most important news stories around the world. Her 2008 interview with Republican vice presidential candidate Sarah Palin is considered one of the most impactful political interviews in recent memory.

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Interview Highlights

Katie Couric: You've been an outspoken advocate for examining the role of the press, its impact on society, and I'm wondering, did your interest in this whole arena pre-date the News of the World hacking scandal? When did you become so passionate about this topic?

Hugh Grant: I started getting ugly about this issue before the News of the World went out of business....



... The newspapers, particularly

the tabloid newspapers in Britain, are so powerful in terms of getting politicians elected that no one dare--has ever dared, particularly in the last 40, 50 years, to take them on, so as a result, the normal things that keep a newspaper behaving decently, the criminal law, civil law, and a code of practice, were all routinely ignored.

* * *

Hugh Grant: I do laugh when my opponents in the British tabloid press sometimes say, "Well, you're just doing this cause we uncovered you with that hooker." Well, I mean, that took about as much investigative journalism as finding out that someone had landed on the moon. [Laughter] It was disagreeable, the press storm, but I totally understood that. The only place I would take issue in that whole thing was when they go after your family who really were innocent. But things that happened to me, I've never complained about that, except maybe I think breaking into my flat was perhaps pushing it.

Katie Couric: And that in fact happened after this incident, right?

Hugh Grant: Yeah, and it was a common tactic then of some of the tabloids.

* * *

Katie Couric: How is the British and the U.S. press different, other than the fact that maybe there's not this degree of competition? But just in terms of sensibility, practices, what have been your observations?

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Hugh Grant: People go to journalism school here. It's a profession, like being a doctor or a dentist, or even a lawyer, and they take their job really seriously. They actually want to get things right. That's unheard of in a British newspaper. [Laughter] ... Now, your tabloids, generally speaking – and again correct me if I'm wrong – seem to me more like the National Inquirer level, where people know it's a bit of a joke, probably Elvis is probably not on the moon, but [Laughter] the danger of the British ones is that they purport to be, in the news section, serious, objective news, when they're very clearly not, so I think that's the big difference.



Katie Couric: A child of a U.S. vice president is arrested or seen at a party doing drugs. Is that a legitimate story in your view?

Hugh Grant: No, I would say not. I would say not. How does that make the president a worse president? And I think if you subject your top politicians and your leaders to that kind of scrutiny really, let's face it, because it's selling a story rather than it's in the public interest, you're just going to get a smaller and smaller pool of people who are going to put their hand up and say, "I want to do public service. I want to go into politics."

* * *

Katie Couric: What was your reaction when you heard about the nude photos scandal? Jennifer Lawrence talked about it in a Vanity Fair cover story recently and said hacking of her nude pictures was a sex crime. What was your reaction to that? And I'm also curious, Hugh, to know how you feel that the digital space has contributed to this kind of journalism, in your view. Because now everyone with an iPhone and a computer can write about anything and it's basically there for everyone to see online.

Hugh Grant: Well, I think a sort of tabloid obsession with celebrity has created a world in which the poor old celebrity, which I still think is a diminishing term – the poor old actor or singer – suddenly is no longer a human being, but they're someone it's perfectly fine to just take pictures of across a restaurant or bar and smash all over the Internet to make you look good or get some tragic thumbs up from your followers, and so I think that's sort of the progression of that. I think it begins with a tabloid culture, celebrity obsession, and then spreads. You know, the Internet must do what it wants.

From the Executive Director's Desk By George Freeman



George Freeman

Our Annual Dinner was quite a success. Hugh Grant and Katie Couric were delightful, certainly the most attractive duo we've had on the stage, and remarkably substantive on the rather provocative issue of privacy and the press, particularly in the tabloid culture of the UK.

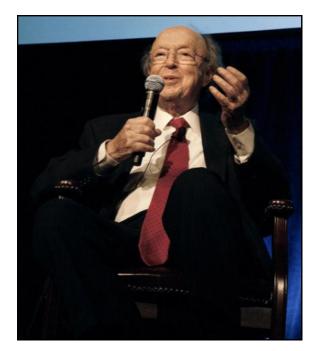
But this column is not about this year's dinner. Rather, it is about MLRC Dinners in years past. They have ranged the gamut from the great – Andrew Young's stirring speech about Justice Brennan and the effect of Times v. Sullivan on civil rights fights all over the world – to the not-so-great – Peter Yarrow's rather foolhardy attempt to have 600 media lawyers sing "Puff the Magic Dragon." More on those further below. But the real purpose of this piece is to recount one of the great moments in Media Bar history – certainly the funniest – which occurred

at an MLRC Dinner sometime between 1986 and 1991.

It happened at the Starlight Room of the Waldorf Astoria in New York (where the dinner was held a number of times before we outgrew its space). In MLRC style, we had not one, but two, guest speakers. They were Anthony Lewis, former Supreme Court correspondent of The New York Times and then op-ed columnist for The Times, and venerable syndicated Washington columnist ("Washington Merry Go Round") and investigative journalist Jack Anderson, whose Liberty Lobby libel case had recently been decided by the US Supreme Court. Our archives only

go back to 1992 and we have no records of this event, so it must have been between the 1986 decision and 1991.

Anderson was to give his speech first. Only one problem: notwithstanding the November date (which has held steady for over 25 years), a snowfall hit DC, rendering him unable to travel to New York. So Henry Kaufman, General Counsel of then the LDRC and its first de facto Director, devised an ingenious solution. Even without the skyping and technology we have today, Henry came up with a phone hook-up which enabled Anderson to speak from his Washington home and be piped in one-way to the ballroom. There would be no Q&A since he couldn't hear us, but at least we could get the benefit of his wisdom and experience.



Tony Lewis holds forth at the 2011 Dinner

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So Anderson began. The 250 attendees listened attentively for the first 10-15 minutes. But 20 minutes in people started talking to each other at their tables. Oblivious, Anderson continued.

About 25 minutes in, people got up from their tables and started chatting with folks at other tables. Soon, with Anderson continuing to speak, it was a cocktail party scene: everyone milling around energetically talking while Anderson, in what was by now background noise, carried forth on his career and experiences.

At this point Henry did what probably was the bravest thing in his life. He hit a switch and cut Anderson off. Immediately there was a roar of laughter from the gathered throng, then applause and cheering: in effect, Power to the People, we had won.

It took a few minutes for order to be restored; then Tony Lewis was introduced. (I should note I had a special relationship with Tony: he was my Media Law teacher in law school; I was a frequent guest lecturer at his class at the Columbia Journalism School where I now teach his course; and I was his lawyer at The Times. Tony was the recipient of the MLRC's Brennan Defense of Freedom Award at our 2011 Dinner, where, though an octogenarian, he was our featured speaker, answering questions deliberatively and elegantly. Sadly, Tony passed away last year.) Tony took the stage, with a grin noted the awkwardness of the situation, and began his talk.

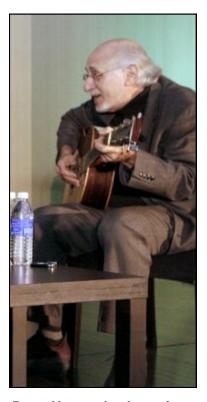
Then about 5 minutes in, it happened. Somehow a switch was hit - - and there was Jack Anderson being piped in, continuing his speech, waxing rhapsodic about the glories of the First

Amendment and the power of investigative journalism, blissfully unaware that he had long ago been cut off. Pandemonium. I remember envisioning him in a leather armchair in his den, bourbon in one hand, the phone he was speaking on in the other, as the snow gently fell outside his window.

This time the audience truly went crazy. People were literally rolling in the aisles. Even Tony, usually serious and wry, couldn't help but laugh. Somehow, mid-sentence, Anderson was again cut off; the audience, after more thunderous applause and laughter, calmed; Tony continued his speech; and the history of our Dinner would never be the same.

There have been other doozies. In 2009 Peter Yarrow, of Peter, Paul and Mary fame, was on a panel on the Power of Creativity. That he brought his guitar on stage was a sign. That he then tried to enlist the media lawyers in attendance in singing folk songs from the 60's can only be considered an error in having a feel for your audience. That he tried to hit on some of our female attendees didn't make things better.

That dinner also highlighted giving the MLRC's Brennan Award to Vaclav Havel, former President of the Czech Republic



Peter Yarrow leads a singalong at the 2009 Dinner.

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and a noted playwright as well. Havel couldn't make the dinner, but sent a film about his work instead. Only problem was that the movie was in Czech.

In 2004 Ted Turner, founder of CNN, received the Brennan Award at the Annual Dinner which that year, somehow aptly, was at the Copacabana Nightclub. The program, a conversation between Turner and Tom Brokaw, was somewhere between bizarre and stream of consciousness, but



Ted Turner, right, and Tom Brokaw at the 2004 Dinner.

certainly entertaining and in line with the site.

The next year the Dinner, at the Grand Hyatt, where (save one year) it has remained since, featured a panel on the Reporter's Privilege. It starred Judy Miller, who had just served 85 days in jail for not identifying her source. More fortuitously (or not), it occurred on the very day Judy left her longtime job at The New York Times.

There were some great moments too. My favorite program was in 2001 when there was a Conversation with Ben Bradlee, Don Hewitt (longtime producer of "60 Minutes") and Diane Sawyer, moderated by Walter Isaacson. The program was akin to four friends swapping yarns at a bar. But to say Bradlee stole the show would be an understatement. As his recent obituaries attest, he was a larger than life figure, used lots of salty language befitting the Navy vet he was, often spoke out of school, and, in general, was a marvelously engaging and entertaining reconteur. (As I recall, he took the stage holding a glass of scotch.)

The theme of the 1998 Dinner was journalism in the civil rights movement. The keynote speaker was Rep. John Lewis (D-Ga) who gave a quite moving speech about his upbringing



Washington Post editor Ben Bradlee

and career in the South, and his role as chairman of the SNCC, a Freedom Rider and veteran of countless civil rights sitins and battles. A sentimental moment of a different sort was struck a year later when Floyd Abrams received the Brennan Award. It was presented by his son Dan, who told the story of how, as children, he and his sister Ronnie (now a federal judge) would extend their bedtimes by asking their dad to tell them stories – of his First Amendment cases – a request Floyd could never refuse.

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Andrew Young, second from right, marching with Martin Luther King under watchful eyes of Mississippi state troopers during civil rights demonstration in 1966.

I also recall the historic Dinner in 1996 when Arthur Ochs Sulzberger and Katherine Graham received the Brennan Award on occasion of the 25th anniversary of the Pentagon Papers case. That dinner took place at a club on the top floor of the Pan Am Building (any self- respecting New Yorker of a certain age still calls it that regardless of what it's named now). The renowned author David Halberstam gave the keynote

address honoring the two publishers, giving them great and appropriate praise, until the last sentence when Halberstam complained of not having been invited to the Times 100th anniversary gala which had just taken place at the Met.

But the greatest Dinner of all came in 1992 when Justice Brennan was honored with the award that bears his name. There were seven tributes to the author of Times v. Sullivan, but the most stirring and memorable was that of Andrew Young, a close personal assistant to Dr. Martin Luther King and civil rights activist, and later U.S. Ambassador to the U.N. and Mayor of Atlanta. In a touching and spirited oration, Young said that there wouldn't have been a New York Times case had there not been a civil rights movement – but that the civil rights movement might not have been successful without Sullivan. Comparing it to other freedom fights, such as the media reporting on Polish citizens and Lech Welesa singing "We Shall Overcome", and televisions around the world showing a young man standing in front of a tank in Beijing, Young said, "If [our voices of freedom and justice] had been silent, if it had not been for a free press, our voices might never have been heard around the world...And none of [the successes of these civil rights movements] would be possible had it not been for the kind of opinion that Justice Brennan wrote in Sullivan v. The New York Times."

A copy of <u>that speech</u> and other tributes can be found on the <u>Events section of our website</u> at <u>medialaw.org</u>.

In response to my column last month on the usefulness of court spokesmen and court press releases on important decisions, both commonplace in Europe, but not in the U.S., Peter Canfield of Jones Day submitted the following letter:

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Dear George,

I enjoyed your letter from Budapest in the October issue of the MLRC MediaLawLetter.

I write because you may be interested to know that the European notion of court spokespersons about which you wrote is already alive and well in some parts of this country, notably Georgia.

Since 2007, the Georgia Supreme Court has employed as its Public Information Officer Jane Hansen. Jane joined the Court following a 25 year career at The Atlanta Journal-Constitution as an award-winning investigative reporter, columnist and member of the editorial board. Prior to becoming a reporter, she was a member of the White House staff under President Jimmy Carter.

At the Court, Jane serves as spokesperson and liaison with the media and a large portion of her job involves, a la what you found in Europe, writing summaries for the lay public of noteworthy opinions and all cases coming up for oral argument.

Indeed, three years ago, when Georgia hosted the annual conference of state court chief justices and their administrators, Jane organized for the group a panel discussion entitled, appropriately enough in light of your comment from Europe, "The Opinion Speaks for Itself...Not." Jane's position then and now was that these words should be eliminated from court officials' vocabulary because, while opinions may speak for themselves to judges and lawyers, they obviously don't to lay people. Otherwise, why would a reporter be calling and asking, what does this mean? By way of example, Jane cited a Georgia Supreme Court opinion in which it wasn't until the last page that the justice wrote that the defendant, who had already served seven years of a life prison sentence for murder, should be released from prison immediately. That, she said, was a prime example of "burying the lede." Her lay write-up did not suffer that defect. It began, "Under a ruling today by the Supreme Court of Georgia, a man who has served more than seven years of a life sentence for the murder of his brother is about to walk out of prison."

Once Jane joined the Court, it began posting on its website each Friday afternoon the names of any and all cases in which the Court planned to issue an opinion the following Monday. On Monday, the day the Court typically issues opinions, the Court posts not only the opinions themselves but also a lay summary prepared by Jane. A recent example of one such summary, from October 6, may be found at: <u>http://www.gasupreme.us/sc-op/op_summaries/Oct6_2014.pdf</u>

The Court has been following this practice for years now without incident with solid support from, and benefit to, judges, the media and the public.

Many thanks,

Peter Canfield

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NTSB Rules for FAA in *Huerta v. Pirker*: What's Next for News Drones?

By Charles D. Tobin and Christine N. Walz

The National Transportation Safety Board (NTSB) has overturned an administrative ruling in favor of an aerial photographer, upholding the Federal Aviation Administration's (FAA) determination that unmanned aerial systems (UAS), commonly referred to as drones, are "aircraft" subject to federal regulation. <u>Huerta v.</u> <u>Pirker</u>, NTSB Docket CP-217 (November 18, 2014).

In remanding the case to an administrative law judge for further proceedings, the NTSB sidestepped all other issues, including First Amendment considerations.

Background

The agency's decision came in the case *Huerta v*. *Pirker*, in which photographer Raphael Pirker challenged a \$10,000 fine levied for his 2011 flights of a camera-equipped model aircraft around the University of Virginia. Mr. Pirker had



The *Huerta v. Pirker* decision is troubling for news media companies hoping to use drones for newsgathering, and it underscores the need for the FAA to enact new, sensible regulations.

successfully challenged this fine before the administrative law judge, who ruled this past March that Pirker's Zephyr fixed-wing aircraft was a "model aircraft" and that models were not subject to general aviation regulations.

NTSB Decision

In its decision released on November 18, 2014, the full NTSB reversed the administrative law judge and held that the FAA could apply its generally applicable federal aviation regulations to small UAS because they fit within the regulations' broad definition of "aircraft." The regulations define aircraft as "a device that is used or intended to be used for flight in the air."

The NTSB, in sweeping deference to the FAA, said:

[T]he plain language of the statutory and regulatory definitions is clear: an "aircraft" is any device used for flight in the air The [FAA] Administrator's interpretation of this text – that it applies to respondent's operation of his Zephyr to prohibit careless

> or reckless operations – is reasonable, given the broad language of the section.

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The NTSB remanded the decision to the administrative law judge to review evidence and determine whether Pirker's October 2011 flights around the University of Virginia campus were "careless or reckless" under FAA regulations.

The *Huerta v. Pirker* decision is troubling for news media companies hoping to use drones for newsgathering, and it underscores the need for the FAA to enact new, sensible regulations specifically applicable to small UAS. A coalition of news media had submitted an amicus brief before the NTSB urging that the board, however it ruled, take into account the First Amendment interest in lawful newsgathering. The NTSB, however, declined to reach the issue in its decision.

The FAA is expected to release proposed regulations for small UAS for comment in late December. These

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regulations are expected to focus on UAS safety, UAS pilot training and UAS airworthiness. They are not expected to address privacy concerns.

The Obama Administration has also indicated that President Obama plans to issue an executive order to develop privacy guidelines for using commercial UAS. Specifically, the executive order is expected to charge the National Telecommunications and Information Administration ("NTIA"), a component of the Department of Commerce, with developing voluntary guidelines to address privacy concerns.

The NTIA is expected to convene a multistakeholder process to provide a forum for discussion and consensus -building among stakeholders to develop voluntary privacy guidelines for UAS operators. News of this executive order was leaked in July of this year, but the order has not been issued. It is currently anticipated that the order will be issued shortly before or concurrently with the FAA's Notice of Proposed Rulemaking.

Media companies and lawyers should keep an eye on the anticipated proposed regulations and the NTIA executive order to make sure that the First Amendment interest in safely gathering news is protected as the law develops.

Charles D. Tobin and Christine N. Walz are with the Washington D.C. office of Holland & Knight. Along with Gary Halbert of the firm, they represented the coalition of news media amici in Huerta v. Pirker and continue to advise the coalition on emerging issues. The coalition includes: Advance Publications, Inc., A. H. Belo Corporation, the Associated Press, Cox Media Group, LLC, Gannett Co., Inc., Getty Images, Gray Television, Inc., Hearst Corporation, The McClatchy the National Press Photographers Company, Association, the National Press Club, The New York Times Company, Reporters Committee for Freedom of the Press, the Radio-Television Digital News Association, Scripps Media, Inc., Sinclair Broadcast Group, Inc., Tribune Company, WP Company LLC/The Washington Post).



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Directed Verdict for Television Station and Reporter on Libel and False Light Claims

News Investigation Into Child Pornography on Teacher's Computer

Just a few months into his

employment as a full-time

teacher, two of Mr.

Sabino's female students

complained to school

officials that they had

found adult and child

pornography on the

laptop Mr. Sabino had

allowed them to use .

By Stephen J. Rosenfeld

WOIO, LLC broadcast a news report on two of its television stations in the Cleveland metropolitan area concerning an on-going investigation into a high school photography teacher who was accused of giving his students access to a personal laptop that contained adult and child pornography.

After two female students claimed to have seen pornographic images on the computer, the school placed the teacher on administrative leave, and the police commenced an investigation. The news

broadcast at issue focused on a search warrant issued weeks after the initial incident that permitted the forensic investigation of the teacher's personal laptop.

Although the reporter emphasized during the broadcast that the investigation was ongoing and that no charges were pending (and that for that reason the teacher was not even named), WOIO placed a graphic banner across the screen that read "TEACHER UNDER FIRE – Child porn found on

teacher's laptop." The teacher's claims against WOIO and the reporter focused on the banner and the fact that police had not found (nor did police ever find) child pornography on the teacher's computer.

Background

Georgio Sabino was a 44-year-old professional photographer who Cleveland Heights University Heights High School (the "High School") hired as a full -time teacher for the Fall term of 2011. Mr. Sabino had never previously taught full time, did not have the requisite license, and was hired on the condition that he pass the test to obtain a full-time teaching license. Despite taking the exam four times, Mr. Sabino never passed the test.

Just a few months into his employment as a full-time teacher, two of Mr. Sabino's female students complained to school officials that they had found adult and child pornography on the laptop Mr. Sabino had allowed them to use for their school assignments. The

> High School immediately placed Mr. Sabino on administrative leave pending the results of an ensuing investigation, called the police, and sent a message to all parents advising that "a teacher has been placed on leave pending an investigation [into] allegations as to inappropriate materials on his personal computer. . . ."

The Cleveland Heights police removed Mr. Sabino from the school a day after the girls' complaints and seized his computers. Later that day,

WOIO ran a short story on its website that named Mr. Sabino and stated that he was placed on leave pending a criminal investigation into "inappropriate material found on [his] personal computer." Although that article initially named Mr. Sabino as the teacher, his name was removed from the article one day later. The article was not in contention at trial as it was admittedly 100% true and because the statute of limitations ran on

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any claim concerning the article before Mr. Sabino filed his lawsuit in February 2013.

On February 20, 2012, two months after the initial incident, WOIO broadcast a report on the continuing criminal investigation. Ed Gallek, WOIO's crime and courts reporter, found search warrant documents that the county prosecutor had filed with the Court detailing the complaints Mr. Sabino's students had made in their police statements and stating that the affiant had probable cause to believe that evidence of a crime would be located on Mr. Sabino's seized computers.

Mr. Gallek prepared a 1 minute and 10 second-long news broadcast that reported on the status of the investigation as stated in the search warrant documents and Mr. Gallek's brief conversation with plaintiff's criminal lawyer. Mr. Gallek closed his report by making clear that no charges had been filed and therefore he was not naming the teacher and that everyone was "still waiting for findings."

However, after Mr. Gallek had written the script and filmed his report, a graphic banner was prepared without his knowledge or involvement that appeared at the bottom of the screen, which read: "19 News Investigation – TEACHER UNDER FIRE – Child porn found on computer." It is this banner, and not any fact that Mr. Gallek actually reported, upon which Mr. Sabino primarily based his claims.

On April 4, 2012, months after the report aired, the police issued a report of their forensic investigation of Mr. Sabino's computer, finding adult pornography but not finding child pornography. No charges have been filed against Mr. Sabino as of the time of this article.

The Lawsuit

On February 21, 2013, Mr. Sabino filed a seven count complaint against WOIO and Mr. Gallek seeking relief based on claims of: defamation, defamation per se (asserting that the initial article permitted the public to identify Mr. Sabino on the February news broadcast), negligence, false light, and intentional infliction of emotional distress. The complaint sought compensatory and punitive damages.

After limited discovery, WOIO and Mr. Gallek filed a motion for summary judgment asserting, *inter alia*, the fair report privilege, substantial truth, and the innocent construction rule. Judge Burnside denied the motion for summary judgment on the basis that the defendants failed to prove substantial truth and that certain allegedly-defamatory statements were not based on public records.

After Judge Burnside denied the motion for summary judgment, WOIO aggressively pursued additional discovery. Among other things, WOIO was able to secure: (i) favorable testimony from the former students who made the initial allegations and (ii) a forensic image of the teacher's hard drive from law enforcement. For reasons beyond the scope of this article, WOIO's forensic expert's evaluation of the teacher's hard drive (that found far more than the initial law enforcement investigation) was not admitted at trial, but it was crucial for preparation of the crossexamination of Mr. Sabino.

The Trial

Plaintiff's trial strategy was clear from the beginning of the trial: (i) show that Mr. Sabino was a good guy who was ruined by the allegations of child pornography; (ii) stress that law enforcement never found child pornography on his laptop; and (iii) paint WOIO as a greedy media company that sought to sensationalize a story at the expense of Mr. Sabino.

WOIO's trial strategy was to emphasize the personal responsibility of Mr. Sabino for his alleged damages; that the story was true (*i.e.*, the girls did claim to find child pornography on the laptop); and that plaintiff could not show any causation on the part of WOIO for his damages.

At trial, plaintiff called numerous character witnesses, an accountant to establish his \$3 million plus economic damages claim, and plaintiff himself. (Plaintiff necessitated a trial in this case because he

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never seriously considered settlement. Two weeks before trial, plaintiff was still demanding seven figures. He lowered that demand after discovering what WOIO found on his hard drive, but he never approached reasonable settlement territory.)

In fact, Mr. Sabino was impeached numerous times at trial with his video deposition testimony when he tried to walk away from testimony about his responsibility for his own conduct. (We used a bar code scanning gun to call up the video impeachment during trial. The gun affectionately became known as the "gun of truth" because it would cause a Pavlovian response in the plaintiff whenever it was raised after the first couple of impeachments.)

He ultimately admitted at trial that: (a) as a teacher he had a duty to protect his students; (b) that giving them a computer with pornography on it breached that duty; (c) that he would not hire a teacher who had such poor judgment as to give a student a computer that contained pornography; (d) he has no evidence that anyone refused to give him a job because of the WOIO report; (e) that he has never had the credentials to be a teacher; (f) no one told him they thought less of him because of the WOIO report; and (g) he was unaware of anyone who told him that they saw the WOIO report and identified it as referring to him.

In addition, he admitted to having (unintentionally he claimed) some very graphic pornographic images – including images and videos involving plaintiff and his former girlfriend – on the computer that he gave to the students. Plaintiff also admitted that everything in the broadcast was either true or opinion with the exception of the banner. With regard to the banner, plaintiff admitted that the gist or sting of the report had to do with the girls' allegations and that, if the banner referred to the girls' allegations, it too would be true. (After trial, during discussions with the jury, jurors expressed that they disliked plaintiff because he did not appear credible and was overly emotional.)

Although the case ended after plaintiff rested his case, WOIO did put on one fact witness out of order

because of scheduling issues. WOIO called one of the girls who made the initial complaint against Mr. Sabino. Her testimony was compelling, and she described in graphic detail the adult and child pornography she viewed on plaintiff's computer.

After trial, on defendants' motions for directed verdict, Judge Burnside systematically took argument on the claims one at a time. Plaintiff agreed that the negligence and intentional infliction of emotional distress claims were subsumed within the defamation/ false light claims and did not seek to pursue them separately.

Judge Burnside then dismissed the defamation per se claims on the basis that the alleged defamation could not be defamatory per se because extrinsic evidence was needed to identify the plaintiff. (*See, e.g., Schwab v. Reflector-Herald, Inc.*, Huron App. No. H-94-44, 1997 Ohio App. LEXIS 2377). The Court next dismissed Mr. Gallek from the case because no evidence existed that any of his statements – which did not include the banner – were false.

With regard to the remaining defamation per quod claims against WOIO, Judge Burnside dismissed them based primarily on: (1) plaintiff's admission that the banner – if read pursuant to the innocent construction rule as meaning that the girls had found child pornography on the computer – was true; (2) that the fair report privilege protected the statements if construed under the innocent construction rule to mean that the girls had found child pornography on the computer; and (3) that plaintiff failed to prove causation as to any damages related to WOIO's conduct (as apart from the initial allegations of the girls, etc.).

Thus, Judge Burnside granted a directed verdict as to plaintiff's entire case and awarded WOIO and Mr. Gallek costs. No appeal has been filed at this time.

WOIO and Mr. Gallek were represented at trial by Stephen J. Rosenfeld of Mandell Menkes LLC and Melissa DeGaetano of Baker & Hostetler LLP. Mr. Sabino was represented at trial by John A. Huettner and David B. Waxman and Michael R. Blumenthal of Waxman Blumenthal LLC.

California Court Finds Use of Likeness of Manuel Noriega in Video Game Transformative

Court Applies Prior California Case Law and Rejects Keller as Inconsistent

By Kathryn J. Fritz and Ciara N. Mittan

In recent years, federal and state courts have wrestled with how to assess right of publicity claims in the video game context— when a real person's likeness is used in a game without their consent, to what extent is the use creative expression that is protected by the First Amendment? Is the overall context and nature of the game of any relevance to the analysis?

The Ninth Circuit opinion in *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013), seemed to suggest that courts should focus only on the degree to which the likeness



Noriega's 1990 mug shot, left, and video game avatar.

itself had been "transformed," and ignore the game as a whole; however, a recent California Superior Court decision has dispelled the certainty of that assessment. <u>Manuel Noriega v. Activision Blizzard,</u> <u>Inc.</u>, No. BC 551747 (Cal Super. Oct. 27, 2014).

Dismissing with prejudice a complaint filed by former Panamanian military dictator Manuel Noriega concerning use of his likeness in the popular video game "Call of Duty: Black Ops II," that court found the use transformative and protected under the First Amendment. In reaching this decision, the *Noriega* Court expressly rejected the Ninth Circuit's reasoning, finding it in conflict with controlling California authority, and making clear that the overall context can be key.

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Noriega Case Background

Noriega sued game publisher Activision, asserting that it had violated his right of publicity under California law by making him a character in "Call of Duty: Black Ops II," without his consent. California's statutory right of publicity, Cal. Civ. Code § 3344, provides a cause of action for knowing use of a person's image or likeness on or in, or in connection with advertising or selling of, products, without that person's consent. In the game, "players assume the role of a foot soldier placed in simulated infantry and warfare scenarios," set both during the Cold War and in a fictional future.

The Noriega character appears in two of eleven game "'missions" and is one of dozens of other characters, including other historical figures, featured in the game. Noriega claimed that Activision's portrayal of him as an antagonist and criminal harmed his reputation.

Activision filed a special motion to strike under California's anti-SLAPP statute, Cal. Civ. Code § 425.16, asserting that the video game concerned matters of public interest and was thus protected speech.

Noriega sued game publisher Activision, asserting that it had violated his right of publicity under California law by making him a character in "Call of Duty: Black Ops II," without his consent. The *Noriega* Court focused on the second prong of the anti-SLAPP analysis— whether Noriega met his burden of establishing a probability of success of prevailing on his claims, particularly his right of publicity cause of action —and considered whether Activision's use of Noriega's likeness was sufficiently "transformative" to defeat his right of publicity claim.

Transformative Use Defense in California: The Early Cases

The California Supreme Court established the transformative use defense in *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001), which held that whether a use is transformative involves "a balancing test between the First Amendment and the right of

publicity." The "inquiry is whether [a] celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question." *Id.* at 391, 406.

In *Winter v. DC Comics*, the California Supreme Court applied the transformative use test in the context of comic books "featur[ing] brothers Johnny and Edgar Autumn, depicted as villainous half-worm, half-human offspring," allegedly based on musician brothers Johnny and Edgar Winter. 30 Cal.4th 881 (2003). The Court found that, although the Autumn brothers were "less-than-subtle evocations of Johnny and Edgar Winter," the comic books were "not just conventional depictions of plaintiffs but contain[ed] significant expressive content other than plaintiffs' mere likenesses," and were thus transformative and protected expression. *Id.* at 890-91.

A few years later, the California Court of Appeals applied the transformative use test in two video game cases, with different results. *Kirby v. Sega of Am., Inc.,* 144 Cal. App. 4th 47 (2006), involved the use in the game "Space Channel 5" of a "fictional elongated and extremely thin female reporter named

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'Ulala,'" allegedly fashioned after Keirin Kirby, the former lead singer of musical group Deee-Lite. *Id.* at 50-52. The *Kirby* Court held that Ulala was "more than a mere likeness or literal depiction of Kirby," rather she was a "fanciful, creative character' who exist[ed] in the context of a unique and expressive video game." The use was thus transformative and did not violate Kirby's right of publicity. *Id.* at 59, 61.

In contrast, in *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018 (2011), the Court of Appeals concluded that Activision's use of the likenesses of the band No Doubt's members in the game "Band Hero," which permits players to use avatars of real or fictional rock stars to perform songs, was not transformative. No Doubt sued Activision for breach of a licensing agreement in which No Doubt had licensed use of the band members' likenesses specifically for use in playing No Doubt songs. But "Band Hero" allowed users to "unlock" the No Doubt avatars and use them to perform songs by other artists, with members of other groups, with different voices or in contexts not authorized under the agreement. Activision argued that its use of the No Doubt avatars was permitted as transformative and protected

"To the extent that Keller suggests that the entirety of the disputed work should not be considered under the second prong of the anti-SLAPP analysis, such reasoning is in conflict with the controlling California authorities cited herein and relied upon by this Court." speech.

The *No Doubt* Court disagreed, affirming denial of Activision's anti-SLAPP motion and allowing the lawsuit to proceed. *Id.* at 1044. The court reasoned that "although context may create protected expression in the use of a celebrity's literal likeness, the context in which Activision uses the literal likenesses of No Doubt's members does not qualify the use of the likenesses for First Amendment protection." The court noted that although the avatars could be manipulated by users, in essence they were used to perform songs "as literal recreations of the band members" and that the context and features of the game did not "transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities." Additionally, the Court emphasized Activision's commercial motivations for using the No Doubt likenesses, seeking to capitalize on the band's fame to market the

game and encourage the band's "sizeable fan base to purchase the game so as to perform as, or alongside, the members of No Doubt." *Id*.at 1034-35.

The *Keller* Decisions: Minimizing the Relevance of the Work as a Whole

The *No Doubt* decision featured prominently in a series of federal court opinions addressing college football players' claims under the California statutory right of publicity over use of their likenesses in Electronic Arts' "NCAA Football" game series. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) (*Keller II*), *aff*"g sub nom. *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010) (*Keller I*).

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In affirming the district court's decision, the Ninth Circuit held that the games' realistic depiction of the college athletes playing the game for which they were known, despite other creative aspects of the games, was not sufficiently transformative to bar Keller's claim. The district court had reasoned that prior California cases had focused on the degree to which the *specific depictions of claimants*, rather than the elements of the work as a whole, were transformative.

The Ninth Circuit held that the district court did not err in "focusing primarily on Keller's likeness and ignoring the transformative elements of the game as a whole," against the urging of the dissent. *See Keller II*, 724 F.3d at 1276. Concluding that the likeness itself was not sufficiently transformative to bar Keller's right of publicity claims, the Ninth Circuit affirmed denial of Electronic Arts' anti-SLAPP motion. *See id.*; *also Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir.2013) (applying similar reasoning to a challenge to the "NCAA Football" game series under New Jersey's right of publicity law).

The *Keller* decisions left the state of the transformative use defense under California law at best unclear, suggesting that only the alleged depiction of the claimant, and not the overall creative work in which the claimant was featured, was relevant to the analysis. What impact would this ruling have on depictions of real people in creative works? Would this mean that they could maintain right of publicity claims irrespective of the context of the creative work?

The *Noriega* Opinion: Applying Prior California Case Law and Rejecting *Keller* As Inconsistent

Not long after the *Keller II* decision, former dictator Noriega took issue with Activision's depiction of him in its very popular "Call of Duty: Black Ops II" game, relying heavily on the *Keller II* Court's reasoning. However, the California Court quickly dispelled, in a footnote, any notion that California courts should disregard the context and elements of a work and instead focus solely on the depiction of a plaintiff in that work. *Nariang* Order at Concentrating instead on California case law, including the Comedy III, Winter, and No Doubt decisions, the Court held that Activision's use of Noriega's likeness was transformative.

solely on the depiction of a plaintiff in that work. Noriega Order, at 6, n.4.

Noting Noriega's express reliance on the *Keller* cases, the *Noriega* Court observed that the case was not binding on it, and concluded succinctly that, "to the extent that *Keller* suggests that the entirety of the disputed work should not be considered under the second prong of the anti-SLAPP analysis, such reasoning *is in conflict with the controlling California authorities cited herein and relied upon by this Court." Id.* (emphasis added).

Concentrating instead on California case law, including the *Comedy III, Winter*, and *No Doubt* decisions, the Court held that Activision's use of Noriega's likeness was transformative. "Noriega's depiction was not the 'very sum and substance' of the work," but, instead, "[t]he complex and multi-faceted game is a product of defendants' own expression, with *de minimis* use of Noriega's likeness." *Id.* at 6.

The Court cited to several game features to support this conclusion, including: the game comprises an entirely fictional narrative, in which a player assumes the role of a fictional soldier moving through

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various missions; Noriega's character is a small fraction of the game's narrative, appearing in only two of the missions among many other characters, including other historical figures; and players cannot assume the role of Noriega or manipulate the Noriega avatar in any manner. *Id.* at 5.

Finally, the Court noted in dicta that, unlike in *No Doubt* where the commercial advertising and marketing of the "Band Hero" game prominently featured the No Doubt band member likenesses, the Noriega character appeared nowhere in marketing for "Call of Duty." Accordingly, "the marketability and economic value of the challenged work in this case comes not from Noriega, but from the creativity, skill and reputation of defendants." *Id.* at 5 & n.3.

Implications

This opinion, while expressly departing from the *Keller* line of reasoning, stays true to prior California transformative use cases. Indeed, the *Winter*, *Kirby*, and *No Doubt* decisions do not stand for the proposition that the entirety of a work may be ignored, as *Keller I* and *II* seem to suggest. To the contrary, the *Kirby* Court, noting similarities to *Winter*, held that use of the likeness in that case was

The Noriega decision could signal a shift in transformative use cases, bringing back into play the context and elements of the work as a whole. transformative, not only because the character was creative, but also because the character appeared in "the context of a unique and expressive video game." 144 Cal. App. 4th at 61.

Moreover, the *No Doubt* Court did not hold that the context and the work as a whole was irrelevant but instead concluded that the context and creative elements of the *Band Hero* game were insufficient to render use of the No Doubt avatars in that game transformative.

The *Noriega* decision could signal a shift in transformative use cases, bringing back into play the context and elements of the work as a whole, in the effort to balance "the tension between a public figure's right of publicity and the First Amendment right of free expression." *See Noriega* Order, at 3.

Acknowledging the difficulty of striking this balance, the *Noriega* Court noted California Supreme Court Justice Bird's "thoughtful analysis" on the issue when analyzing a more traditional form of creative work, books: "Contemporary events, symbols and people are regularly used in fictional works. Fiction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers... No author should be forced into creating mythological worlds or characters wholly divorced from reality." *Id.* (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal.3d 860 (1979)).

In pointing to this language, the *Noriega* Court suggests that it has never been California law that infusing a creative work with realistic or even literal depictions of well-known individuals will automatically render a work non-transformative. The extent to which a work's creative context can tip the balance in favor of protected expression in any given case remains to be seen.

Kathryn J. Fritz is a partner and Ciara N. Mittan, an associate at Fenwick & West in San Francisco, CA. Noriega was represented by William T. Gibbs, Chicago. Actavision was represented by former New York Mayor Rudolf Guiliani of Bracewell & Guiliani, New York.

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New York Court of Appeals Reinstates Libel Claim Against Coach Jim Boeheim

Statements About Sex Abuse Allegations Not Pure Opinion as a Matter of Law

The New York Court of Appeals, the state's highest court, last month reinstated a libel suit against famed college basketball coach Jim Boeheim and Syracuse University over statements Boeheim made defending a long-time assistant coach accused of sexual abuse by plaintiffs. *Davis v. Boeheim*, No. 145 (N.Y. Oct. 21, 2014).

Looking at the statements in context, the Court concluded that Boeheim's allegations that plaintiffs were lying for financial gain appeared to be based on undisclosed facts and could therefore be actionable.

Background

Plaintiffs Robert Davis and his stepbrother Michael Lang, former Syracuse ball-boys in the 1980's, claim they were sexually molested for years by Bernie Fine, Boeheim's long-time friend and the team's associate coach. In 2002, Syracuse police declined to investigate the allegations on statute of limitations

grounds. In 2005, Syracuse University investigated the allegations and found them unfounded.

In 2011, the allegations resurfaced and gained public attention in the wake of the Jerry Sandusky—Penn State scandal. Boeheim gave press interviews to ESPN, the Post-Standard, and the New York Times defending Fine and questioning plaintiffs' motives.

Plaintiffs sued over the following statements:

(1) "This is alleged to have occurred ... what? Twenty years ago? Am I in the right neighborhood? ... So we are supposed to do what? Stop the presses 26 years later? For a false allegation? For what I absolutely believe is a false allegation? I know [Davis is] lying about me seeing him in his hotel room. That's a lie. If he's going to tell one lie, I'm sure there's a few more of them."

(2) "The Penn State thing came out and the kid behind this is trying to get money. He's tried before. And now he's trying again That's

what this is about. Money."

(3) "It is a bunch of a thousand lies that [Davis] has told He supplied four names to the university that would corroborate his story. None of them did ... there is only one side to this story. He is lying." Boeheim continued, "I believe they saw what happened at Penn State, and they are using ESPN to get money. That is what I believe."

(4) "You don't think it is a little funny that his cousin (relative) is coming forward?"

(5) Boeheim stated that the timing of Lang's decision to speak out about his abuse seemed "a little suspicious."

The trial granted a motion to dismiss, holding that a reasonable reader would conclude the statements were "a biased and personal opinion on the accusations

Looking at the statements in context, the Court concluded that Boeheim's allegations that plaintiffs were lying for financial gain appeared to be based on undisclosed facts and could therefore be actionable.

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against Bernie Fine, not fact." In a 3-2 decision, the intermediate appellate court affirmed, finding that based on "the context of the communication as a whole, as well as its tone and apparent purpose," and "the over-all context in which the assertions were made," a reasonable reader would understand the statements as opinion and not facts. *See Davis v Boeheim*, 110 AD3d 1431, 1433 (N.Y. App. Div. 4th Dep't 2013).

Court of Appeals Ruling

Reversing, the Court of Appeals held that plaintiffs' complaint could survive a motion to dismiss because the challenged statements were reasonably susceptible of a defamatory meaning and were not "pure opinion" as a matter of law.

The Court explained that New York applies a three factor test to distinguish between fact and non-actionable

opinion: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact." *Davis quoting Mann v. Abel*, 10 NY3d 271, 276 (2012). The third factor, which "considers the content of the communication as a whole, its tone and apparent purpose" is often the key factor in determining fact versus opinion.

Here the first and second factors suggested the statements were factual assertions since they involved "easily understood language" that is "capable of being proven true or false." The third factor likewise suggested the statements were factual: "Boeheim spoke

> with authority," "was a well respected, exalted member of the University," and "as head coach of the team appeared well placed to have information about the charges" that were unavailable to the public.

> Moreover, the statements appeared in news articles discussing the Penn State case – and were not featured in sections devoted to opinion journalism.

"Although the placement of the articles is but one factor to be considered,

because the articles cited by plaintiffs cannot be categorized as op-eds or letters to the editor, the common expectations that apply to those more opinionated journalistic endeavors were inapplicable here."

Plaintiffs are represented by Mariann Meier Wang, Cuti Hecker & Wang, New York. Defendants are represented by Helen V. Cantwell, Debevoise &

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The statements appeared in news articles comparing plaintiffs' allegations to the Penn State case – and were not featured in sections devoted to opinion journalism.

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Successful Anti-SLAPP Defense Prompts Voluntary Libel Dismissal

Judge Rules Whistleblower's Emails Protected

The ruling may have

application to media

defendants as it focused

on the misuse of public

funds as a matter of

By Cynthia Counts

Successful use of an anti-SLAPP defense in a libel case involving a whistleblower's emails led plaintiffs to voluntarily dismiss their defamation claim. The ruling may have application to media defendants as it focused on the misuse of public funds as a matter of public concern.

A Fulton County Georgia judge ruled that the whistleblower's emails, which contended that a former employer's contracting activities might constitute fraud, were protected speech under Georgia's anti-SLAPP

statute. <u>Torres Advanced Enterprise</u> <u>Solutions, LLC v. Christopher G.</u> <u>Herman</u> (Fulton County, Ga. Oct. 22, 2014).

Background

Plaintiff Torres is a consulting and
language-services company providing
services to agencies of the United States
government as well as to private companies. Hermanpublic concern.worked for Torres for several years until hisTemployment was terminated in January 2012.undis

The next month, Torres began negotiations for a possible joint-venture with Pinnacle Group (Pinnacle), a labor supplier in Kampala, Uganda. Torres-Pinnacle competed for and won a \$25 million Department of State contract to provide guard services for the U.S. Embassy in Kampala, Uganda. Torres subsequently began performing on the contract, but the company never finalized its joint venture with Pinnacle.

Mr. Herman maintained that Torres had made a practice of illegally cutting out their joint venture

partners. After his termination, he was deposed in another case in which the plaintiff, Sabre International Security, claimed that Torres froze the company out of remuneration in their joint venture.

Mr. Herman also sent emails regarding his concerns to the attorney in Uganda serving as Torres' local counsel. Moreover, he had an ongoing email correspondence with U.S. Department of Defense officials and investigators regarding his concerns.

Anti-SLAPP Statute

Herman's emails to Torres' local counsel prompted Torres' libel claims against Herman. Defense counsel asserted that these emails were protected speech under Georgia's Anti-SLAPP Act, made "in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding

authorized by law."

The court agreed, concluding, "The evidence is undisputed that Herman contacted an official before sending the disputed emails in an effort to instigate a governmental investigation of Torres' purported business practices. That the government showed some interest in pursuing the matter is demonstrated by the April 2014 email exchange between Herman and (federal Industrial Security Specialist Brian) Linnane. Further, Torres is a governmental contractor vying for government security contracts in sensitive foreign

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arenas funded by public funds, thus making the content of the communications of public concern."

In noting the breadth of the anti-SLAPP statute, the trial judge explained: "The intended or actual recipient of the subject speech is not dispositive [on whether the anti-SLAPP statute applies]; neither is the medium of communicating the speech."

Several reported decisions find protected speech where the recipient was a government official. *See, e.g., Hindu Temple*, 311 Ga. App. at 114 (speech was directed "to police or . . . made in furtherance of an ongoing investigation regarding appellants' alleged criminal activity"); *Settle Bridges Farm v. Masino*, 318 Ga. App. 576, 579-580 (2012) (statements to a city manager concerning a zoning matter); *Hawks v. Hinely*, 252 Ga. App. 510 (2001) (finding statements made in recall petitions against public officials to be protected).

Likewise, speech has been found to be protected when made to the public at large. *See, e.g., Adventure Outdoors,* 307 Ga. App. at 360 (statements made at a press conference concerning issues under consideration in a pending lawsuit); *Harkins v. Atlanta Humane Soc'y,* 273 Ga. App. 489, 490-91 (2005) (holding statements made in a televised interview privileged); *Browns Mill Dev. Co. v. Denton,* 247 Ga. App. 232, 234 (2000) (dissemination of an environmental report to the media and to governmental officials protected), *aff'd,* 275 Ga. 2 (2002). Even communications made to private individuals have been held to be privileged. *See, e.g., Metzler v. Rowell,* 248 Ga. App. 596, 599 (2001) (attorney's letter threatening filing a suit to enjoy development of property protected).

A day after the ruling favoring Mr. Herman, Torres voluntarily dismissed its libel claim.

Plaintiff was represented by Benjamin Fink of Berman Fink Van Horn, PC. Cynthia Counts of Counts Law Group represented the Defendant, Mr. Herman.

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Albuquerque Journal Wins Summary Judgment on Libel and False Light Claims Plaintiff Failed to Show Actual Malice

By Gregory P. Williams

A New Mexico state district judge granted summary judgment to Journal Publishing Co., publisher of the *Albuquerque Journal*, on defamation and false light claims brought by an Albuquerque Police Department employee, David Young. *Young v. Wilham and Journal Publishing Co.* (N.M. Dist. Nov. 17, 2014).

The claims arose out of a series of articles in the *Albuquerque Journal* stating that Young had improperly sought and received overtime pay for his work as a reserve officer for APD. The court ruled that Young was both a public official and limited purpose public figure, and that he had not presented

sufficient evidence of actual malice to survive summary judgment.

Background

The Albuquerque Journal articles, published mostly in 2009, focused on Young's activities as a member of APD's reserve officer corps. Reserve officers undergo police training and, by city ordinance, have the status of sworn police officers and the same power and authority as police officers as long as they are supervised. The articles, written primarily by *Albuquerque Journal* reporter T.J. Wilham, addressed whether Young had acted outside of the permissible authority of a reserve officer in participating in undercover police operations, including prostitution stings.

The articles also questioned whether Young, who was also a civilian employee of APD, had improperly received overtime pay for his work as a reserve officer in violation of the ordinance that required reserve work

Judge Huling first ruled that Young was a public official, following New Mexico case law holding that any police officer, from the lowest rank to the highest, is a public official for purposes of defamation law.

to be unpaid. Following the *Albuquerque Journal* articles, APD conducted an investigation which resulted in discipline of Young and his supervisors and removal of Young from the reserve officer program. The local district attorney dismissed numerous criminal charges arising out of arrests made by Young, and APD also settled civil lawsuits brought by persons Young had arrested.

Young filed suit against Wilham and the *Albuquerque Journal* in 2012 on the eve of his deadline to do so under New Mexico's three-year statute of limitations for defamation claims. He later amended his

> complaint to add a claim for false light invasion of privacy. Young claimed that the articles falsely labeled him as a "wannabe cop" and also falsely stated that he fraudulently collected pay for reserve officer activities, lacked proper training to perform police functions, was not a police officer, and that he had violated APD procedures and New Mexico law in his actions as a reserve officer.

In 2013, the court dismissed all of Young's claims except those arising

from defendants' statements concerning Young's collection of overtime pay. Among the claims dismissed were those arising out of the *Albuquerque Journal*'s use of the term "wannabe cop" in headlines, which the Court determined to be statements of opinion.

Summary Judgment Ruling

In regard to the remaining claim, Young contended that although he had received overtime pay for his work (Continued on page 26)

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with APD's vice squad, such overtime pay was for his work in his civilian capacity as a fleet maintenance specialist for APD, and not in his capacity as a reserve officer.

Young alleged that his work on the undercover operations consisted of setting up surveillance equipment and providing other technical assistance, which he claimed was not part of his reserve officer duties.

Young admitted that he did some work as a reserve officer during these operations, including making arrests, but claimed that he did not seek or recover overtime pay for these actions. In their summary judgment briefing, defendants offered evidence showing that Young and his supervisors had admitted at the time of APD's investigation that Young had been paid for reserve officer work, as well as payroll and arrest records showing that Young had made arrests during the exact time periods for which he sought and received overtime pay.

Judge Valerie A. Huling first ruled that Young was a public official, following New Mexico case law holding that any police officer, from the lowest rank to the highest, is a public official for purposes of defamation law. Judge Huling further found that Young was a limited purpose public figure. As a result, to survive summary judgment, Plaintiff was required to demonstrate a genuine issue of material fact on the issue of whether the defendants acted with actual malice, i.e., that they knew the statements about Young's overtime were false at the time they were made, or acted with reckless disregard for the truth.

Judge Huling ruled that Plaintiff had not submitted sufficient evidence on this issue. It was uncontested that Young's time sheets and arrest records, on their face, indicated that Young had in fact received overtime for his reserve officer work. It was further undisputed that neither Young nor anyone else had advised the defendants of his allegation that the overtime he received was actually for his civilian work. The Court thus granted summary judgment on both the defamation and false light counts.

Charles R. Peifer and Gregory P. Williams of Peifer, Hanson & Mullins, P.A., in Albuquerque represent the defendants, T.J. Wilham and Journal Publishing Co. Stephen Lane and Rosario Vega-Lynn of Albuquerque represent the plaintiff, David Young.

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Legal Issues Concerning Hispanic and Latin America Media March 9, 2014 | Miami, FL

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

November 2014



Left to right: Mark Stephens, Joaquin Muñoz, David Price, Matthew Leish and Adam Holland.

MLRC Forum Panel Examines Right to Be Forgotten

This year MLRC's pre-dinner Forum focused on the troublesome issue of the EU's Right to Be Forgotten, which has taken center stage since the European Court of Justice's landmark decision in <u>Google Spain v. AEPD</u>. That decision requires search engines to remove namebased search results where the information appears "to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue."

The well-attended program, titled "Controlling Data, Forgetting Data: What U.S. Lawyers Need to Know About the Right to Be Forgotten," was generously underwritten by Sheppard Mullin and Prince Lobel.

Brought together, for the two-hour discussion, was a distinguished panel of experts, including: internationally renowned privacy and free expression law expert, Mark Stephens; the Spanish lawyer who represented Mario Costeja González in the *Google Spain* case, Joaquín Muñoz; Google attorney and search engine specialist closely involved with Google's response to the decision, David Price; Assistant General Counsel of the *New York Daily News*, Matt Leish; and Internet watchdog from the Berkman Center's Chilling Effects Project, Adam Holland. The session was moderated by Pat Carome of WilmerHale.

Although the reasoning behind the decision is something of an enigma to American lawyers, who are used to the principle that true information in the public domain is public forever, Mr. Muñoz conveyed a common sentiment among Europeans – that people want control over what is said about them and the visibility of that information.

He acknowledged that the decision was vague and that clearer rules should be promulgated. The vagueness of the C.J.E.U. decision that Google must now comply with was underscored by Google's David Price, "It's like being dropped into a pasture with an electric fence at night – without knowing where the fence is."

Mark Stephens, looking ahead to new proposals pending in the European Parliament, was very critical of the EU's apparent desire to impose its privacy rules on the rest of the world, dubbing it an "unseemly race to the bottom."

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Forum moderator Pat Carome

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Matt Leish voiced concerns shared by many U.S. media outlets, including problems with a rule that would allow the subject of news coverage to control how they are presented.

Adam Holland called attention to the difficulty in evaluating the impact of the CJEU's decision absent transparent data about how the decision is being invoked and implemented, while recognizing that the nature of the decision poses challenges in how to gather such data without undermining the ruling.

Mr. Muñoz expressed his belief that the *Google Spain* decision required search engines to erase search results world-wide, and not just on versions of their services directed at the EU (as Google is currently doing). As the panel observed, in the United States, the First Amendment serves as a strict bar against laws

that would demand the erasure of information or links to information on the Internet; moreover, laws such as the SPEECH Act may prevent enforcement of foreign judgments in the United States. But it remains to be seen whether companies like Google, which have assets, personnel, and business interests within remote jurisdictions, will be subject to penalties for providing uncensored search results on U.S.-oriented websites accessible in the EU.

The panel ended with a discussion of echoes of a right to be forgotten in the United States, including California's new "Eraser" law and a case pending before the Second Circuit where a plaintiff claimed that the media's truthful report of her arrest became defamatory when her arrest record was expunged under Connecticut state law.

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California Superior Court Dismisses Complaint Over Google Search Rankings

Antitrust and Unfair Business Claims Against Google Dismissed

By Brachah Goykadosh

Earlier this month, a California trial court dismissed antitrust and related claims against Google for its search engine rankings, finding the search results were constitutionally-protected activity under the state anti-SLAPP statute. *Martin v. Google, Inc.*, No. CGC-14-539972 (Cal. Sup. Nov. 13, 2014) (Goldsmith, J.). The case follows a trend of recent American cases upholding search engines' free speech rights in search results – and stands in stark contrast to recent European case law.

coastnews.com								
Web	Videos	News	Images	Shopping	More *	Search tools		
About 4,710,000 results (0.27 seconds)								
CoastNews.com: Portraits of three sister cities: San www.coastnews.com/ - CoastNews.com provides features, photos, and portraits of three sister cities, San Francisco, Paris, and Shanghai: art, entertainment, people, restaurants, bars								
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Background

The plaintiff owns and operates CoastNews.com, a website that publishes information about San Francisco. Plaintiff filed a pro se complaint against Google for antitrust and unfair business practices. Plaintiff claimed that compared to websites such as Bing and Yahoo!, where links to CoastNews pages appear high among results, Google suppresses links to his site. Plaintiff alleged Google favored companies with advertising partnerships and unfairly stopped delivering third party ads to its site

because it had a page containing nudity.

Google filed an <u>anti-SLAPP motion to strike</u> arguing that its search results were protected activity under the First Amendment. The California Superior Court granted the motion in a <u>one paragraph order</u>, holding that Google was engaging in constitutionally-protected activity and that plaintiff failed to demonstrate any probability that he could succeed on his claims.

Analysis

Although the Superior Court did not explain its reasoning, Google had emphasized in its <u>memorandum</u> in support of the motion to strike that other courts have treated search results as protected by the First Amendment. *See Zhang v. Baidu.com, Inc.* 10 F. Supp. 3d 433, 2014 U.S. Dist. LEXIS 41439 (S.D.N.Y. 2014); *Langdon v. Google, Inc.,* 474 F.Supp. 2d 622 (D.Del. 2007); *Search King, Inc. v. Google Tech, Inc.,* No.CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193 (W.D.Okla. May 27, 2003).

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In *Baidu*, the court held that it does not matter whether a search engine articulates a clear message of its own, finding that the exercise of discretion in the formulation of search results is comparable to other forms of editorial discretion protected by the First Amendment:

A search engine's editorial judgment is much like ... the newspaper editor's judgment of which wire-service stories to run and where to place them in the newspaper, the guidebook writer's judgments about which attractions to mention and how to display them, and Matt Drudge's judgments about which stories to link and how prominently to feature them.

2014 U.S. Dist. LEXIS 41439 at *12 (internal quotation marks omitted). The court also rejected the suggestion that the automated nature of search results would deprive those results of constitutional protection: "After all, the algorithms themselves were written by human beings, and they inherently incorporate the search

engine company engineers' judgments about what material users are most likely to find responsive to their queries." *Id.* at *13 (internal quotation marks omitted).

Conclusion

As the Supreme Court stated in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston,* 515 U.S. 557, 573 (1995), all speech "inherently involves choices of what to say and what to leave unsaid" and one "important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."

Recent decisions have demonstrated that principle applies to search engine rankings even though search engines are not at first glance the quintessential speaker. However, even when created by algorithms, search rankings reflect editorial judgments protected by the First Amendment.

Scott A. Sher and David H. Reichenberg of Wilson Sosini Goodrich & Rosati P.C. represented Google. Plaintiff acted pro se. Brachah Goykadosh is a volunteer legal fellow at MLRC.

Recent MLRC Publications

Catalog of Subpoena Decisions by Category of Material and Reasons Sought

An update of the 2010 catalog summarizing subpoena decisions, including those from the last few years, arising in no fewer than 10 scenarios – from accident and crime scenes to reporters as eyewitnesses to using subpoenas to impeach witnesses.

MLRC Model Shield Law

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

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

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Ninth Circuit to Decide Artist Royalty Case En **Banc (and Possibly the Future of the Internet)**

By Jeff Hermes

On October 30, 2014, the U.S. Court of Appeals for the Ninth Circuit ordered that Sam Francis Foundation v. Christie's, Inc., No. 12-56067 and two other consolidated cases be reheard en banc. In deciding these cases, the Court is likely to resolve a split in its decisions that could have an important impact on the ability of California and the other states of the Ninth Circuit to promulgate laws with effects on Internet publication and commerce.

Background

The appeal arose out of a 2012 decision of the U.S. District Court for the Central District of California concerning the California Resale Royalties Act, Cal. Civ. Code § 986 ("CRRA"), which compels the seller of a work of fine art or the seller's agent to pay to the artist a royalty of 5% of the amount of the sale. The benefits of the CRRA are not limited to California artists, however; instead, the law

applies to any transaction where "the seller resides in California or the sale takes place in California[.]" Cal. Civ. Code § 986(a). The plaintiffs (a group of artists and/or their heirs) sued defendants Christie's, Inc., Sotheby's Inc., and eBay, Inc., in three separate cases, alleging that each defendant was the agent of one or more California-based sellers of works of fine art and that each failed to comply with its obligation to pay royalties under the CRRA.

image courtesy of Hickr user Jandy Stone pursuant to a Creative Commons CC BY-SA 2.0 license

Now Leaving California Bernardino UNTY LINE

Notably, the plaintiffs included at least one artist (plaintiff Chuck Close) who resides in New York rather than California, and Sotheby's and Christie's are both New York-based auction houses. Sotheby's and Christie's, whose cases were consolidated before the district court, moved to dismiss the claims alleging that the CRRA violated the Commerce Clause of the U.S. Constitution, art. I, § 8, cl. 3, due to the scope of its effects outside of California. Defendant eBay (a

> Delaware corporation with its headquarters in San Jose, California) filed a similar motion in its case.

On May 17, 2012, the district court (Nguyen, Circuit Judge, sitting by designation) granted the motions to dismiss. In the Sotheby's/Christie's case, Estate of Graham v. Sotheby's, 860 F. Supp. 2d 1117 (C.D. Cal. 2012), Judge Nguyen issued a detailed opinion focusing on the external impact of the CRRA and agreeing that it violated the dormant Commerce Clause:

The Court finds that the CRRA explicitly regulates applicable sales of fine art occurring wholly outside California. Under its clear terms, the CRRA regulates transactions occurring anywhere in the United States, so long as the seller resides in California. Even the artist - the intended beneficiary of the CRRA



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— does not have to be a citizen of, or reside in, California.

The following example illustrates the CRRA's problematic reach: Assume a California resident places a painting by a New York artist up for auction at Sotheby's in New York In such a situation, the transaction that the CRRA regulates — the one between the New York auction house and the New York purchaser — occurs wholly in New York. Despite the fact that even the artist receiving the royalty is a New York resident, the CRRA reaches out to New York and regulates the transaction[.]

Id. at 1124 (internal citations omitted). A parallel order entered in the eBay case in the district court. *Sam Francis Foundation v. eBay Inc.*, No. 2:11-cv-08622-JHN-PLA (C.D. Cal. May 17, 2012).

Judge Nguyen grounded her analysis in the "extraterritoriality" branch of the Supreme Court's Commerce Clause jurisprudence, with particular reliance on the Court's decision in *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989). *Estate of Graham* at 1124. In *Healy*, the Court summarized its principles of

analysis for determining when the extraterritorial effects of a state statute render it unconstitutional under the dormant Commerce Clause:

First, the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, *whether or not the commerce has effects within the State*; and, specifically, a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states. Second, a statute that

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commerce.

directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted

> similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.

491 U.S. at 336-37 (emphasis added; internal citations and quotation marks omitted).

Ninth Circuit

But the U.S. Court of Appeals, which has now decided to hear en banc a consolidated appeal of Judge Nguyen's rulings against all three defendants, has presented a conflicted approach to *Healy*. (A hat tip to Alison Frankel, who noted this split in her article *Artist royalties case asks en ban* 9th *Circ.: Can Calif. regulate whole U.S.?*, REUTERS.COM (Oct. 31, 2014)). In two 2013 decisions less than a month apart, different panels of the Ninth Circuit reached opposite conclusions as to whether *Healy* is circumscribed by its facts.

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In Association des Eleveurs de Canards et d'Oies du Quebec v. Harris, one panel stated that "[t]he Supreme Court has explained that Healy and Baldwin [v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)] involved 'price control or price affirmation statutes.'" 729 F.3d 937, 951 (9th Cir. 2013), quoting Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003). The panel held that Pharm. Research compelled the conclusion that Healy was not applicable to a California law that banned the sale of certain foods because it did not "dictate the price of a product." Id.

In contrast, in Rocky Mtn. Farmers Union v. Corey, a second panel found that the logic of *Healy* had been extended to other circumstances, including laws that attempted to impose minimum standards of environmental protection. 730 F.3d 1070, 1102 (9th Cir. 2013). Thus, while noting that the Supreme Court had declined to extend the extraterritoriality doctrine in Pharm. Research, it considered the extraterritorial impact of California's Low Carbon Fuel Standard. Id. at 1103. Nevertheless, the panel held that the fuel standard did not violate the dormant Commerce Clause, holding that "States may not mandate compliance with their preferred policies in wholly out-of-state transactions, but they are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants." Id.

Although California's artist royalty law mandates certain monetary payments in connection with the sale of fine art, it does not dictate prices and thus would likely be found not to fall within the strict factual framework of *Healy*. As such, the Ninth Circuit will likely need to resolve this apparent conflict in its decisions on appeal of Judge Nguyen's rulings.

But the effect of a Ninth Circuit ruling on the reach of *Healy* will not be limited to the CRRA. *Healy* and its progeny (in particular, *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997)) have been key to a line of dormant Commerce Clause decisions analyzing the extraterritorial effects of state laws regulating Internet communication. *See PSINet, Inc. v. Chapman*, 362 F.3d 227, 239-40 (4th Cir. 2004) (striking Va. statute criminalizing dissemination of material harmful to minors over the Internet); Ford Motor Co. v. Texas Dept. of Transp., 264 F.3d 493, 504-05 (5th Cir. 2001) (upholding Texas law banning car manufacturers from online sale of used vehicles in Texas); Am. Booksellers Foundation v. Dean, 342 F.3d 96, 103-04 (2nd Cir. 2003) (enjoining enforcement of Vt. statute criminalizing online distribution of harmful sexual materials to minors); ACLU v. Johnson, 194 F.3d 1149, 1160-61 (10th Cir. 1999) (enjoining enforcement of N.M. statute criminalizing dissemination by computer of material harmful to minors); Backpage.com v. Cooper, 939 F. Supp. 2d 805, 840-44 (M.D. Tenn. 2013) (enjoining enforcement of Tenn. Law criminalizing the online sale of certain sex-related advertisements); Backpage.com v. McKenna, 881 F. Supp. 2d 1262, 1285-86 (W.D. Wash. 2012) (enjoining enforcement of Wash. statute imposing liability on online intermediaries for advertising commercial sexual abuse of a minor); *Center for Democracy & Technology* v. Pappert, 337 F. Supp. 2d 606, 662-62 (E.D. Pa. 2004) (striking Pa. statute requiring ISP to remove or block content considered by Pa. to be child pornography upon notice from state attorney general); Pataki, 969 F. Supp. at 173-177 (enjoining enforcement of N.Y. statute banning online dissemination of harmful sexual content to minors); State v. Heckel, 24 P.3d 404, 412-13 (Wash. 2001) (upholding statute prohibiting the dissemination of false or misleading information from computer in Washington or to email address in Washington). None of these cases involved price controls.

Without *Healy*, an alternate dormant Commerce Clause analysis in such cases would likely proceed under the Supreme Court's decision in *Pike v. Bruce Church, Inc.*, in which the Court adopted the following balancing test: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only

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incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. 137, 142 (1970).

This test can, however, be problematic when evaluating the impact of a state law on Internet speech and commerce because of the difficulty of distinguishing between local and external interests. In *Am. Booksellers Foundation v. Dean*, the Second Circuit articulated this problem with respect to Vermont's attempt to protect its children from harmful online content:

The internet's boundary-less nature means that internet commerce does not quite occur wholly outside Vermont's borders. Even if a website is never visited by people in Vermont, it is available to them in a way that a beer purchase in New York or Massachusetts is plainly not. Vermont's interest in out-of-state internet activity is thus more significant than a state's interest in the price of out-of-state beer sales. However, internet regulation of the sort at issue here still runs afoul of the dormant Commerce Clause because the Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. Thus, at the same time that the internet's geographic reach increases Vermont's interest in regulating out-of-state conduct, it makes state regulation impracticable. We think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they imperatively demand a single uniform rule.

342 F.3d at 103-04.

If the Ninth Circuit were to resolve the current split in its decisions by holding that the Supreme Court's extraterritoriality rationale is limited to pricing issues, it would significantly alter the Commerce Clause analysis of state Internet legislation in jurisdictions that have proven quite willing to regulate online behavior beyond their borders.

Measures such as the California Online Privacy Protection Act, Cal. Bus. & Prof. Code §§ 22575-79 (requiring commercial websites collecting personally identifiable information from California residents to post privacy policy meeting certain criteria), California's "Yelp" law, Cal. Civ. Code § 1670.8 (prohibiting clauses in consumer contracts that would prohibit posting of online reviews), and the "California Eraser Law," Cal. Bus. & Prof. Code § 22581 (requiring online services directed to California minors to allow the removal of material posted by such minors) were all intended to have significant effects outside of the state in order to protect local interests. Meanwhile, Washington was responsible for the laws challenged in Backpage.com v. McKenna and State v. Heckel, discussed above.

This is not to say that the Internet cases discussed above would have turned out differently under *Pike* as opposed to *Healy*. Indeed, several of these cases also apply the *Pike* balancing test as a secondary analysis, and reach the same result. Nor is this article intended to suggest that Internet-oriented laws passed in the Ninth Circuit are particularly likely to run afoul of the dormant Commerce Clause; in particular, the increased efficacy of geofiltering and other technological tools over the last several years might in certain cases ameliorate extraterritorial effects that would have been unavoidable previously.

Nevertheless, a restriction of the application of *Healy* could encourage more aggressive state regulation in states that already actively legislate Internet behavior, and increase uncertainty in these cases by depriving courts in the Ninth Circuit of a tool well suited to analyzing laws that regulate online commerce and speech.

Jeff Hermes is Deputy Director of the MLRC.

Rehearing En Banc in Controversial "Innocence of Muslims" Copyright Case

This month the Ninth Circuit granted Google's petition to rehear en banc a controversial panel decision ordering Google to remove a YouTube video on the ground that an actress who appeared in the video had a copyright interest in her contribution to the work. *Garcia v. Google Inc.*, No. 12-57302 (Nov. 12, 2014), ordering rehearing of *Garcia v. Google, Inc.*, No. 12-57302, slip op. at 4, 14 (9th Cir. Feb. 26, 2014).

The plaintiff Cindy Lee Garcia alleged she was paid \$500 to appear in a desert adventure video which afterwards was dubbed to include inflammatory statements about Islam without her knowledge. The short video referred to as "Innocence of Muslims" provoked violent demonstrations in Egypt and other Arab countries and Garcia and other cast members received death threats.

Garcia served a takedown notice on Google under the Digital Millennium Copyright Act, 17 U.S.C. § 512, and then sued for copyright infringement after the request was denied. A divided Ninth Circuit panel ordered Google to remove the video from YouTube. Chief Judge Alex Kozinski held that Garcia was likely to succeed on her infringement claim because her performance had a "minimal degree of creativity" and was entitled to an injunction because the death threats against her constituted irreparable harm.

For more background on the case see <u>"Ninth Circuit Orders Take-Down of 'Innocence of Muslims'</u> <u>Video in Novel and Controversial Application of Copyright Law,"</u> *MediaLawLetter*, March 2014.

Due to the interest in the case, the <u>Ninth Circuit has created a web page</u> collecting parties' filings and amicus briefs.

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Writing On A 'Clean Slate' Seventh Circuit Sketches Legal Framework Governing Trademark Claims Based On Fictional Products In Expressive Works

Lisa J. Kohn and Andrew J. Thomas What trademark claims, if any, arise when a makebelieve product in a fictional work has the same name as a trademarked product in the real world?

The U.S. Court of Appeals for the Seventh Circuit recently helped to answer this question when it affirmed

result, questions linger regarding the First Amendment protections afforded to content creators under the standard set forth in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

the dismissal of trademark infringement and unfair competition claims brought by an Indiana software company against Warner Bros. Entertainment based on references to a fictional product in the 2012 film The Dark Knight Rises. Fortres Grand Corp. v. Warner Bros. Entm't Inc., 763 F.3d 696 (7th Cir. 2014). This decision, issued by a threejudge panel and written by Judge Daniel Manion, clarifies how the core

infringement standard for trademark law—the "likelihood of confusion" test—should be applied



Above, the fictional "clean slate" software from "Dark Knight Rises." Below, plaintiff's software.



CLEAN SLATE 6.5 Non-Restrictive Disk Protection End Computer Help Desk Calls

Restores your computer to its original configuration discarding unwanted computer changes. Just log off or reboot. Clean Slate is easy yet powerful.

Background

Fortres Grand sells software. Since 2000, it has marketed and sold a computer program branded with the descriptive name "Clean Slate," for which it obtained a federal trademark registration in 2001. Fortres Grand's Clean Slate is a program that "wipes away any user changes to a shared computer" so that clients such as libraries, schools, and hotels can "keep public computers functioning properly and free of private data." Fortres Grand, 763 F.3d at 699.

In July 2012, Warner

when a plaintiff alleges that the name of a fictional product in an expressive work creates the potential for consumer confusion as to the source of the plaintiff's product.

While this decision offers guidance in navigating a relatively uncharted area of trademark law, the Court of Appeals stopped short of addressing the significant free speech issues implicated by this case, which were highlighted by the district court's dismissal below. As a Bros. released *The Dark Knight Rises*, the third and final chapter of director Christopher Nolan's "Batman" motion picture trilogy. The film takes place in the fictional metropolis of Gotham City and tells the story of the DC Comics hero Batman and his alter ego, billionaire industrialist Bruce Wayne. One of the characters in the film, Selina Kyle (aka Catwoman), attempts to obtain a software program that will erase her

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criminal history from every computer database in the world. The term "clean slate" is used four times in the film to refer to this fictional software, which the film portrays as having been developed by a fictional company called Rykin Data.

In September 2012, Fortres Grand filed suit against Warner Bros. in the Northern District of Indiana, asserting claims for trademark infringement under Section 32 of the Lanham Act, false designation of origin under Section 43(a) of the Lanham Act, and unfair competition under Indiana state law. In addition to alleging traditional trademark infringement, Fortres Grand advanced a reverse confusion theory, arguing

that Warner Bros. had saturated the market with its use of the name "clean slate" in its blockbuster film and on promotional websites.

Under the theory of reverse confusion, the senior user of a mark is injured when a junior user floods the market with a trademark similar or identical to that of the smaller senior user, such that "the public comes to assume that the senior user's products are really the junior user's or that the former has become somehow connected to the latter." *See Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*, 188 F.3d 427, 436 (7th Cir. 1999).

The district court dismissed Fortres Grand's complaint for failure to state a claim under both the traditional and reverse confusion theories of infringement. *Fortres Grand Corp. v. Warner Bros. Entm't, Inc.*, 947 F. Supp. 2d 922, 931 (N.D. Ind. 2013). The district court held that the "obvious problem" with Fortres Grand's reverse confusion argument was that "Warner Bros.' 'clean slate' software only exists in the fictional world of Gotham; it does not exist in reality." *Id.* at 928.

The court stressed that "although the hallmark of trademark infringement is protecting against consumer confusion," the Lanham Act protects only against potential for consumer confusion, the district court held that the relevant comparison was between the parties' real world products – i.e., Fortres Grand's "Clean Slate" software and Warner Bros.' motion picture *The Dark Knight Rises*. It concluded that no consumer, "reasonable or otherwise," would believe that the fictional "clean slate" software was connected to Fortres Grand because the fictional software "does not exist in reality." *Id*. Taking a step further, the district court also found

mistaken purchasing decisions "and not against

confusion generally." Id. at 930. In analyzing the

that Warner Bros.' use of the phrase "clean slate" was protected by the First Amendment. *Id.* at 934. The

district court applied the two-part test first articulated by the Second Circuit in *Rogers v. Grimaldi*, which evaluates whether the use of a mark (1) bears some artistic relevance to the underlying work, and (2) explicitly misleads as to the source or content of the work. *See Rogers*, 875 F.2d at 999-1000.

Applying this test, the district court found that Warner Bros.' use of "clean slate" was artistically relevant to *The Dark Knight Rises* and did not explicitly mislead consumers that Fortres Grand was somehow affiliated with the film. 947 F. Supp. 2d at 932. The district court therefore found that Warner Bros.' use of "clean slate" was protected by the

First Amendment, rejecting the argument advanced by Fortres Grand that *Rogers* has no application to cases alleging reverse confusion. *Id.* at 934.

No Likelihood of Confusion

At the start of the Seventh Circuit's opinion, Judge Manion stressed the requirement that the plaintiff's pleadings must include a plausible claim of consumer confusion in order to survive a motion to dismiss. The

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how the core infringement standard for trademark law—the "likelihood of confusion" test—should be applied when a plaintiff alleges that the name of a fictional product in an expressive work creates the potential for consumer confusion as to the source of the plaintiff's product.

This decision clarifies

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court noted that, while it would accept all well-pleaded facts as true, "allegations of consumer confusion in a trademark suit . . . cannot save a claim if they are implausible." *Fortres Grand*, 763 F.3d at 700. Accordingly, Fortres Grand would need to "plausibly alleg[e] that Warner Bros.' use of the words 'clean slate' is 'likely to cause confusion'" in order to survive a motion to dismiss. *Id*. This approach tracks the path marked by the Seventh Circuit a year earlier in *Eastland Music Grp.*, *LLC v. Lionsgate Entm't*, *Inc.*, 707 F.3d 869, 871 (7th Cir. 2013), where the court applied a robust plausibility standard to a trademark claim at the pleading stage and thereby avoided deciding whether to adopt the *Rogers* First Amendment defense in the Seventh Circuit.

As the court explained, a plausible claim of "likelihood of confusion" from the plaintiff requires more than a mere description of "general confusion 'in the air." 763 F.3d at 700. Rather, "only 'confusion about origin, sponsorship, or approval of ... goods' supports a trademark claim." *Id.* at 700-01. In a traditional claim of trademark infringement, this confusion as to origin occurs when a junior user's product is mistakenly believed to have originated with a senior user.

However, the reverse confusion scenario involves the consumer's mistaken belief that the *senior* user's product has originated from (or is affiliated with or sponsored by) the *junior* user. As such, the court held that "[t]o state a claim for infringement based on reverse confusion, Fortres Grand must plausibly allege that Warner Bros.' use of the words 'clean slate' in its movie . . . has caused a likelihood that consumers will be confused into thinking that Fortres Grand's Clean Slate software 'emanates from, is connected to, or is sponsored by [Warner Bros.].''' *Id.* at 701-02 (citation omitted).

The court then turned to the Seventh Circuit's multifactor "likelihood of confusion" test in order to assess the potential that such confusion might plausibly occur. The factors comprising this test include, "[1] the degree of similarity between the marks in appearance and suggestion; [2] the similarity of the products for which the name is used; [3] the area and manner of concurrent use; [4] the degree of care likely to be exercised by consumers; [5] the strength [or "distinctiveness"] of the complainant's mark; [6] actual confusion; and [7] an intent on the part of the alleged infringer to palm off his products as those of another." *Id.* at 702. The court assessed Fortres Grand's claim in light of the first six factors, given that the seventh factor is irrelevant in cases of reverse confusion where the junior user is not trying to profit from the senior user's brand. *Id.* at 702 n.7.

Among these factors, the "similarity of the products" prong presented the court with its most novel legal question. As the court acknowledged, "[t]here is little

> authority on how to treat the 'similarity of the products' factor when one of them is fictional." *Fortres Grand*, 763 F.3d at 702. Fortres Grand argued that the proper product to compare to its software is the make-believe software in *The Dark Knight Rises* made by the fictional Rykin Data Corporation.

The court rejected this argument, affirming the lower court's conclusion that the proper product comparison was between Fortres Grand's software and Warner Bros.' motion picture. As the court noted, this approach makes sense in light of the Supreme Court's emphasis on confusion about the origin, sponsorship, or approval of the "tangible product sold in the marketplace." *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31 (2003).

In support of this conclusion, the court relied on two factually similar cases. In *Ocean Bio-Chem, Inc. v. Turner Network Television, Inc.,* 741 F. Supp. 1546 (S.D. Fla. 1990), the court considered the made-fortelevision movie *Incident at Dark River*, in which a child died after exposure to pollution from a fictional company called "Starbrite Batteries." In dismissing a

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The district court also found that Warner Bros.' use of the phrase "clean slate" was protected by the First Amendment.

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claim for trademark infringement brought by the manufacturer of "Star Brite" cleaners and polishes, the court held that it "must compare the parties' *ultimate* products: those that Ocean markets under the Star Brite name *and the movie itself*." *Id*. at 1557 (emphasis added).

Similarly, *Davis v. Walt Disney Co.*, 393 F. Supp. 2d 839 (D. Minn. 2005), concerned the Disney Channel's broadcast of *Up*, *Up and Away*, another made-fortelevision movie about a family of suburban superheroes who unearth and upend the misdeeds of an environmental software company called "Earth Protectors." The court found no likelihood of confusion between plaintiff's environmental organization "Earth

Protector Licensing Corp." and Disney's fictional use of the term "Earth Protectors." *Id.* at 845.

After determining that the appropriate comparison was between Fortres Grands' software and Warner Bros.' movie, the court nonetheless held that "that does not end the product comparison question." *Fortres Grand*, 763 F.3d at 703. While a movie and desktop management software are certainly very different products, the

court observed that "[t]he fact that the products at issue may be 'very different' is not dispositive of the issue of the similarity of the products in determining the existence of a likelihood of confusion between products. The question is 'whether the products are the kind the public attributes to a single source." *Id.* (citing *McGraw-Edison Co. v. Walt Disney Prods.*, 787 F.2d 1163 (7th Cir. 1986)).

For example, in *McGraw-Edison*, the senior user McGraw-Edison made electrical fuses bearing the "TRON" trademark, while the junior user Disney made videogames and toys and licensed telephones bearing the "TRON" trademark (styled after its *Tron* movie). There, the Seventh Circuit held that the product comparison factor favored *McGraw-Edison* because "utilitarian electrical products' could be confused as

The court noted that, while it would accept all well-pleaded facts as true, "allegations of consumer confusion in a trademark suit . . . cannot save a claim if they are implausible."

originating from the same source as 'entertainmentbased' products powered by electricity when both are labeled 'TRON.'" *See* 787 F.2d at 1169.

In the current case, the court noted, "Warner Bros., unlike Disney, does not sell any movie merchandise similar to Fortres Grand's software which also bears the allegedly infringing mark." *Id.* Left only to compare the similarity of a movie and a desktop software program, the court held that Fortres Grand could not plausibly allege that these products are related in the minds of consumers such that there would be confusion as to their origin, and that this factor therefore favored Warner Bros.

Noting Fortres Grand's argument that the lower court had relied too heavily on the product comparison

prong in its "likelihood of confusion" analysis, the court nonetheless held that "its allegation of reverse confusion is just as implausible in light of the other factors." *Id.* at 704. As to the "area and manner of concurrent use" factor, the court held that while both the film and software could be downloaded from the Internet, Warner Bros.' movie was first and primarily released in movie theaters. This factor favored Warner Bros. because its "use of the mark is not a

traditional use in the marketplace, but in the dialogue of its movie and in extensions of its fictional universe," so confusion is therefore unlikely. *Id*.

The "degree of consumer care" factor also favored Warner Bros. because purchasers of computer security software are discerning and skeptical and therefore less likely to be confused as to product origin. Furthermore, the "strength of the plaintiff's mark" factor also weighed against Fortres Grand, given that the phrase "clean slate" has extensive historical origins and its descriptive usage in a film is therefore unlikely to cause confusion as to origin. *Id.* Additionally, while Fortres Grand alleged that "Internet chatter" regarding whether the fictional product in *The Dark Knight Rises* could

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possibly exist is evidence that the "actual confusion" factor is satisfied, the court held that a reverse confusion claim requires evidence of actual confusion that Fortres Grand's software "emanates from, is connected to, or is sponsored by" Warner Bros., and that even "unusually gullible" consumers would not be deceived into believing this. *Id*.

Concluding its likelihood of confusion analysis, the court acknowledged the similarity between the name of "Clean Slate" software and references to a product called "the clean slate" in *The Dark Knight Rises*, but concluded that "juxtaposed against the weakness of all the other factors, this similarity is not enough." *Id.* at 705. The court therefore found that Fortres Grand's reverse confusion claim is "too implausible to support costly litigation" and affirmed the lower court's

dismissal of the complaint. *Id.* (citing *Eastland Music*, 707 F.3d at 871).

As a final note, the Seventh Circuit commented that Fortres Grand's real complaint is that Warner Bros.' use of the phrase "clean slate" in its film has tarnished Fortres Grand's mark by associating it with the illegal software referenced in the movie. *Id.* at 705. Under certain circumstances, the owner

of a famous mark may state a claim under a theory of trademark dilution by tarnishment, at least where the mark is used on a real-world product. *See* 15 U.S.C. § 1125(c) ("the owner of a *famous* mark ... shall be entitled to an injunction against another person who ... commences use of a mark ... that is likely to cause ... dilution by tarnishment of the *famous* mark" (emphasis added)).

However, given that Fortres Grand's mark is relatively unknown, the Seventh Circuit held that "it would not be appropriate to use a contorted and broadened combination of the 'reverse confusion' and 'related products' doctrines to extend dilution protection to non-famous marks which are explicitly excluded from such protection by statute." *Fortres Grand*, 763 F.3d at 705.

Dismissal at the Pleading Stage

The *Fortres Grand* decision is notable in that it reinforces the growing trend of courts dismissing at the pleading stage infringement claims based on the use of trademarks in expressive works. The Seventh Circuit recently endorsed this approach in *Eastland Music*, 707 F.3d at 871, upholding the dismissal on a Rule 12(b)(6) motion of a trademark infringement claim by a rap duo called "Phifty-50" against the producers of the motion picture *50/50*. The *Eastland* court held that the complaint "fails at the threshold: it does not allege that the use of '50/50' as a title caused any confusion about the film's source – and any such allegation would be too implausible to support costly litigation." *Id.* at 872.

Other decisions dismissing at the pleading stage

claims based on the use of trademarks in expressive works include *Louis Vuitton Mallatier S.A. v. Warner Bros. Entertainment Inc.*, 868 F. Supp. 2d 172 (S.D.N.Y. 2012); *Stewart Surfboards, Inc. v. Disney Book Group LLC*, 2011 U.S. Dist. LEXIS 155444 (C.D. Cal. May 11, 2011); *Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625 (S.D.N.Y. 2008); and *Burnett v.*

Twentieth Century Fox Film Corp., 491 F. Supp. 2d 962 (C.D. Cal. 2007).

First Amendment Defense Remains an Open Question in the Seventh Circuit

While the Seventh Circuit's opinion broke new ground in clarifying how the "likelihood of confusion" test applies to alleged infringement by a fictional product, the court stopped short of addressing the district court's significant holding that Warner Bros.' descriptive use of the words "clean slate" is shielded by the First Amendment. Given that Fortres Grand's complaint "fail[ed] at the threshold," the court held that

i, the court held that

Fortres Grand could not plausibly allege that these products are related in the minds of consumers such that there would be confusion as to their origin.

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it need not consider possible constitutional defenses to trademark enforcement. *Id.*

As previously discussed, the district court applied the two-part test first articulated *Rogers v. Grimaldi*,

875 F.2d 994, to hold that Warner Bros.' use was protected by the First Amendment. The *Rogers* framework has been adopted by the Sixth, Ninth, and Eleventh Circuits, but has not yet been either endorsed or rejected in the Seventh. The *Rogers* test has been applied to claims under both Section 32 and Section 43(a) of the Lanham Act and to claims based on the alleged use of protected marks in both the title and the body of expressive works. *See, e.g.*, *E.S.S. Entertainment 2000, Inc. v. Rock*

Star Videos, Inc., 683 F.3d 1095, 1100 (9th Cir. 2008); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901-02 (9th Cir. 2002).

The Fortres Grand decision is notable in that it reinforces the growing trend of courts dismissing at the pleading stage infringement claims based on the use of trademarks in expressive works.

Judge Simon of the district court described *Rogers* as "one of the beacons used to navigate the murky boundary between trademark law and the First Amendment." *Fortres Grand*, 947 F. Supp. at 931. While the Seventh Circuit stopped short of treading into

> this "murky boundary" in the course of its opinion, the district court opinion continues to lend support to *Rogers*' application as a defense to trademark enforcement.

On November 12, plaintiff filed a cert petition with the U.S. Supreme Court.

Andrew H. Bart, A. J. Thomas, Lisa Kohn, and Kate Spelman of Jenner & Block LLP represented defendant Warner Bros. Entertainment Inc. Phillip Barengolts and Elisabeth K. O'Neill of

Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP and Christopher R. Putt of May Oberfell Lorber represented plaintiff Fortress Grand Corporation.

UPCOMING MLRC EVENTS

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

Legal Issues Concerning Hispanic and Latin America Media March 9, 2014 | Miami, FL

Legal Frontiers in Digital Media

May 14-15, 2015 | Palo Alto, CA

Judge Apologizes in Court, Admits He Had No Basis for Prior Restraint Ruling

News Report Revealed Threat Against Trial Witness

By Cynthia Counts

A Georgia Superior Court Judge apologized in open court three days after he issued a temporary restraining order enjoining the media, and one television station in particular, from publishing a story about threats against a witness in a public corruption trial under way in his court. *State of Georgia v. Beverly Hall, et al.* (Ga. Super. Nov. 7, 2014).

Judge Jerry Baxter issued the order on a Friday at the request of Fulton County District Attorney Paul Howard, who was concerned that the pending story might taint the unsequestered jury in the trial of former Atlanta Schools Superintendent Beverly Hall, whose administration was accused of systematically facilitating cheating on standardized student tests.

After reviewing a response submitted over the weekend by attorneys for the television station, WAGA TV FOX 5, Judge Baxter said he had erred and reversed his ruling in court Monday morning before media



attorneys who had assembled could even make their arguments. The judge said he was trying to assure a fair trial, but after reviewing the law in the response brief, he realized he had no legal basis to stop publication of the report.

Background and Argument

At or about 3 p.m., and several times thereafter, on November 7, 2014, FOX 5 reporter Morse Diggs contacted the Fulton

County District Attorney's office seeking comment about an anonymous threat made to a witness in connection with the ongoing trial. Diggs had an audio recording of the telephone threat, which he shared with the DA.

The DA's office did not respond to Diggs' calls, but late in the afternoon, Paul Howard filed an Emergency Motion for Temporary Restraining Order to enjoin the media from airing "a certain news story." The DA's office did not serve FOX 5 with a copy of the motion until after ex-parte communications about the order, and the District Attorney stated that the prosecution "ha[d] NOT informed the media of [its] intent to file this TRO application as [it] fear[ed] that [would] trigger [FOX 5] to air the story even prior to the planned 6 pm air time."

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As the basis for the application, the District Attorney cited concerns that "the unsequestered jury *may* hear information from news sources, and WAGA in particular which may taint the jury, including against defendants."

At approximately 5:45 p.m., the court contacted FOX 5 and spoke with its in-house counsel. The court advised that it was issuing an order restraining FOX 5 from publishing its news report about the anonymous threat. The in-house counsel requested that FOX 5 be heard on the matter before the Court issued its order, but the Court denied the request. Thereafter, at 5:57 p.m., the Court served Diggs with an order enjoining "the news media, and particularly FOX 5, and Morse Diggs from airing a certain news story" until the matter could be heard on Monday, November 10, 2014.

On Saturday, November 8, the court again contacted the in-house counsel and orally informed FOX 5 that it would be allowed an opportunity to file a written response to the District Attorney's application for temporary restraining order on Sunday, November 9.

Counts Law Group submitted a response to the restraining order, citing the numerous instances in which the U.S. Supreme Court has ruled against prior restraint efforts aimed at the press. The list of more than half a dozen cases included *New York Times v. United States*, 403 U.S. 713, the 1971 "Pentagon papers" case in which the high court ruled that even cases involving "questions of allegedly urgent national security" could not justify such measures. Also referenced was 1975's *Nebraska Press Association v. Stuart*, 423 U.S. 1327, which involved a sensational criminal trial in which both the defense and prosecution had asked the court to bar media reporting concerning a confession or facts "implicative" of the defendant for fear of tainting the jury.

A Georgia Superior Court Judge apologized in open court three days after he issued a temporary restraining order enjoining the media, and one television station in particular, from publishing a story about threats against a witness.

The FOX 5 response to the restraining order noted that "these

cases hold that if a media outlet obtains truthful information about a matter of public significance, a court can neither prohibit its disclosure nor punish such disclosure after the fact, absent a need to further a state interest of the highest order."

FOX 5's response to the restraining order also argued the case for alternative remedies, particularly instructions to the jury to avoid reading or watching media reports about the trial. Cynthia Counts, representing FOX 5, and Tom Clyde of Kilpatrick Stockton, which represented The Atlanta Journal-Constitution and WSB-TV, came to court Monday morning prepared to argue the matter, but Judge Baxter explained that he would not need to hear any oral argument because he had already reviewed FOX 5's response to the restraining order. At this point, Judge Baxter apologized and said that he found the response compelling.

Shortly after the TRO was lifted, both FOX 5 and The Atlanta Journal-Constitution ran their stories.

Cynthia Counts is the principal at Counts Law Group and represented WAGA FOX 5. Paul Howard is the district attorney for Fulton County. Tom Clyde of Kilpatrick Stockton represented The Atlanta Journal-Constitution and WSB-TV.

New Australian Law May Have a Profound Impact on Newsgathering and Reporting

By Peter Bartlett and Sam White

The Australian government has recently introduced a raft of new legislation aimed at strengthening national security in response to perceived threats of terrorism in our region. One of these laws – the *National Security Amendment Bill (No 1) 2014* (Cth) (Bill) – is likely to have a negative effect on newsgathering, reporting and free press generally in Australia.

The Bill has been criticised on a number of bases since it was first introduced to Parliament on 16 July 2014. One common criticism has been concerning the new specie of 'special intelligence operation' (SIO) that

is created and protected under the Bill's Schedule 3. This article focuses on the introduction of SIOs and the impact they are likely to have on journalists reporting on national security issues.

The Bill passed through Parliament on 2 October 2014 and is currently waiting for Royal Assent, which is the final stage before it is enacted into law.

The New Law

The Bill has been criticised for,

amongst other things, making journalism a crime. See, e.g., Submission of Blueprint for Free Speech to the Parliamentary Joint Committee on Intelligence and Security in respect of the <u>National Security Legislation</u> <u>Amendment Bill (No 1) 2014</u>, p 2.

Schedule 3 of the Bill creates new crimes aimed at protecting the covert nature of SIOs. It states that 'a person commits an offence if the person discloses information... [that] relates to a special intelligence operation.' Sec. 35P (1). This person could be a journalist. The penalty for the offence is up to 5 years imprisonment, and up to 10 years imprisonment if the

A major concern for critics of the Bill is the penalty that may be imposed on journalists for reporting on matters of national security, and ultimately fulfilling the role the media should play in a democracy.

disclosure of the information *'intends to... or will* endanger the health or safety of any person or prejudice the effective conduct of an SIO.' Section 35P (2).

On this point, it is important to note that restrictions on reporting of certain information in order to preserve national security is not a novel concept in Australia. Section 79 of the *Crimes Act* (Cth) creates an offence for disclosure of 'official secrets.' Unlike the 'official secrets' provision in the Crimes Act, however, one key criticism of the Bill is the vague and imprecise scope of the kind of operation that might be granted SIO status and therefore become 'unreportable.'

> According to the Bill, an operation becomes an SIO when an application by the Director-General, a senior position holder or an employee of the Australian Security and Intelligence Organisation (ASIO) is granted by the Defence Minister. Sec. 35B. An SIO can be authorised for up to 12 months. Sec. 35D(1)(d). In granting an SIO application, the Minister is to have regard for whether there are reasonably grounds to believe that a number of matters set out in the Bill apply to the

operation in question. Sec. 35C(2). The power to grant SIO status, however, ultimately remains at discretion.

Impact on Newsgathering and Reporting

It is accepted that the media plays a crucial role in a healthy democracy – acting as a check on government and scrutinising acts of government agencies. It also, more recently, has had the function of informing the public about any planned acts of terrorism. A major concern for critics of the Bill is the penalty that may be (Continued on page 45)

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imposed on journalists for reporting on matters of national security, and ultimately fulfilling the role the media should play in a democracy.

The scope of operations that could be considered an SIO is broad enough that many stories that have been reported on in the past might not have been reported on had the Bill been in effect at the time of reporting.

One example given in submissions to Parliament was the reporting on the Australian Government's phone tapping of the then Indonesian President's wife's phone. See Media, Entertainment & Arts Alliance (MEAA) submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the *National Security Legislation Amendment Bill (No. 1)* 2014. This story exposed thousands of breaches of privacy and misuse of information on the part of the Australian Government. It is a clear example of the important expository role the media plays in Australia.

Not only is the scope of operation that could be considered an SIO dangerously broad under the Bill, it is also so imprecise that it is difficult for journalists to know for certain whether or not what they are reporting on is (or could become) an SIO. This uncertainty is likely to have a chilling effect, as journalists will be discouraged from reporting on stories of public concern for fear they might be disclosing information that relates to an SIO, and thus committing an offence.

While the Bill may be aimed at criminalising certain aspects of whistleblowing, submissions made to

Parliament raised concerns that the practical effect of the Bill will be to restrict legitimate reporting on security issues while encouraging 'unfiltered disclosures' of covert information. *See* Guardian Australia submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the *National Security Legislation Amendment Bill (No.* 1) 2014.

Australia is a signatory to the International Covenant on Civil and Political Rights, which sets out a freedom of expression at Article 19. However, Australia does not have an entrenched right to freedom of expression in its Constitution. This removes one avenue to challenge laws like the Bill that might be available in other liberal democracies.

Conclusion

Clearer guidance should be offered on the scope of an SIO to limit the Bill's indirect and unintended influence on reporting and newsgathering. If Parliament proposes that reporting on SIOs is to be limited by the Bill, the scope of that limitation should clearly be drawn so that journalists, and indeed members of the public looking to have their say, have a more certain understanding of what can and cannot be published.

Peter Bartlett and Sam White are lawyers with Minter Ellison, Melbourne, Australia.

12th Annual Entertainment and Media Law Conference



Keeping It Reel: Clearing and Distributing Real Content in the Digital Age

Thursday, January 15, 2015 | Los Angeles Times Building

Supreme Court of Argentina Rules Google Not Liable for Search Results

Valuable Precedent for Freedom of Expression on the Internet

By Eduardo Bertoni

In an important ruling, the Supreme Court of Argentina recently issued a decision on the liability of search engines for linking to defamatory and/or unlawful websites. <u>María Belén Rodriguez c. Google s/</u><u>daños y perjuicios</u>, Case No. 99.613/06 (Oct. 28, 2015).

The court rejected the theory of strict liability for search engine results. Instead the search engine must have actual knowledge of the defamatory or infringing content based on notice from a judicial official, except in cases involving clearly illegal content such as child pornography.

Background

In 2006, Argentinian model María Belén Rodriguez sued Google claiming that searches of her name returned links to and thumbnail photographs from pornographic websites. She alleged the search results falsely portrayed her as a prostitute and the thumbnails used her image without permission. A lower court ordered Google to pay damages of approximately \$6,000 U.S. on the basis that Google was responsible for



María Belén Rodriguez sued Google claiming that searches of her name returned links to and thumbnail photographs from pornographic websites

the harm caused by the third party sites which were not parties to the case.

Although the damages were modest, hundreds of similar lawsuits are pending in Argentina against Google and other search engines seeking to hold them liable for search results and content on third party websites.

I wrote a "<u>friend of the court</u>" amicus brief to the Supreme Court addressing the issue of intermediary liability of search engines and referring the Court to international standards in this area.

Court Ruling

The Court held that a strict liability regime for search engines would be contrary to freedom of expression. And search engines have no legal obligation to monitor the content they transmit. The Court extended this analysis to the thumbnails (the miniature images in online searches). Those would also be the

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responsibility of whoever produced the images and the content, and not the responsibility of the intermediary that simply indexes them.

The search engine is only responsible when it has "actual knowledge" of unlawful content. But such knowledge should be based on notice from a competent authority (a judge or tribunal, for example), and not merely upon a user's complaint to the search engine. The Court noted that search engines do not have to act as judges to determine whether content is defamatory.

However the search engine may be held responsible in cases in which the content is "explicitly unlawful," a standard which, in the Court's judgment, would be useful for clear cases like child pornography, and a list of other examples, including hate speech.

More clarification will be needed to determine whether and how notice applies in these situations, however, this does not detract from the Supreme Court's approach in resolving the core issue, particularly the Court's respect for freedom of expression.

In addition, the Court noted that preliminary measures to remove content should be limited to exceptional cases, given that restrictions and limitations on freedom of expression carry a strong presumption of unconstitutionality.

The case was resolved by a majority, not unanimously. Judges Ricardo Lorenzetti and Juan Carlos Maqueda dissented in part and their opinions will need to be analyzed in greater depth. In their dissent, for example, they would have held Google responsible for the thumbnails based on violation of rights to image. They also contemplated the possibility of preventive court measures to remove or block links that are clearly detrimental to personal rights.

In conclusion, while some of the issues covered in this ruling will need clarification in the future – like the standard on actual knowledge – in general the decision is, without a doubt, a valuable precedent for freedom of expression on the Internet.

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.

12th Annual Entertainment and Media Law Conference



Keeping It Reel: Clearing and Distributing Real Content in the Digital Age

Thursday, January 15, 2015 | Los Angeles Times Building

Registration starts at 1:00 p.m. Formal program begins at 2:15 - 7:00 p.m.

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MLRC 2014 Annual Meeting

MLRC's annual meeting was held on November 12, 2014 at the Grand Hyatt. Chair of the Board of Directors Susan Weiner of NBCUniversal called the meeting to order.

Board of Directors Elections

The membership elected Jonathan Anschell of CBS Broadcasting, Inc. to a two-year term. The membership reelected four current board members, whose terms would lapse at the 2014 meeting, for new two-year terms. The reelected board members are:

Karole Morgan-Prager, The McClatchy Company Lynn Oberlander, First Look Media Mary Snapp, Microsoft Corpoation Susan Weiner, NBCUniversal

Finance Committee Report

Karole Morgan-Prager directed the members' attention to the MLRC 2014 Financial Report prepared by MLRC's accountants pursuant to the requirements of New York law. The report was approved.

Lynn Oberlander asked why MLRC uses a compilation report as opposed to an audited finance report. Karole Morgan-Prager answered that for organizations of this size and type, there is no requirement for an annual audit.

Executive Director's Report

George Freeman thanked the MLRC staff for their performance and commitment and introduced the staff.

George spoke about the MLRC's 2014 activities. He began by talking about the Virginia conference. He stated that the Virginia conference had a terrific energy and had approximately 375 attendees, which was a record number. He reported that the MLRC was planning a conference for 2016 at the same hotel, which had been secured on favorable terms.

George then highlighted the spring 2014 Secrets & Sources program, which had been held in conjunction with The New York Times and the George Polk Foundation and which had featured numerous journalists such as James Risen and Glenn Greenwald and political figures such as Senator Chuck Schumer.

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He reported that invitations for a Native Advertising program had been sent to in-house counsel in New York and that 42 RSVPs had already been received.

George then reported on the MLRC's 2014's publications. He began by speaking about the 50-state surveys on privacy and libel. He highlighted that since the MLRC had transitioned to self-sales and distribution, the sales transactions were easier because members could now order the books by credit card. He stated that the MediaLawDaily remains a popular publication, and MLRC now has three years of the Daily in a searchable online archive. He also spoke about developments regarding the monthly newsletter, including new features such as a column written by himself and a column on digital media written by Jeff Hermes.

The end-of-year Bulletin will be coming out in approximately a month. The Bulletin will include a roundtable on copyright issues. At the beginning of the year Trial Report was issued.

George then highlighted some new committees and projects. The Next Generation Media Lawyers Committee met at the Media Law Conference in Virginia and also held a successful webinar on encryption and cloud security a few weeks ago. MLRC's Model Shield Law Committee and Anti-SLAPP Sub-Committee have also been active. MLRC started a new task force to be headed by Cynthia Counts to deal with drones and to respond to any new federal regulations. MLRC is also thinking of starting a Right of Publicity Committee.

With regard to other activities, George said that the MLRC staff is working with the Litigation Committee to update the Expert Witness Bank and reinvigorate the Brief Bank. MLRC has been invited to participate in a project of the Hague Conference on Private International Law, involving access to all nations' laws. MLRC will be starting a membership outreach program within the next few months and he is working with Dave Heller to grow the European membership. One idea is to have a conference with the IBA during the springtime in Paris.

He stated that next year is MLRC's 35th Anniversary and that the MLRC is working on the possibility of gala for the Spring.

Report on Miami and London Conference.

Dave Heller thanked George Freeman and Jeff Hermes and said that the transition had been great so far. He thanked the Board of Directors for their thought and effort in the restructuring and moving forward of MLRC.

MLRC's third conference on Hispanic Legal issues will be on March 9, 2015 in Miami. He stated that seventy lawyers were expected for the conference, including ten Latin American lawyers. He anticipated that there would be sessions Cross Border Libel, Privacy, and Newsgathering and Cross-border Copyright issues. He mentioned that invitations had been sent to two speakers: Edison Lanza, special rapporteur for freedom of expression for the OAS; and

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Jose Diaz-Balart, a news anchorman for Telemundo and MSNBC show host. He thanked Karole Morgan Prager for McClatchy's support of the conference. MLRC is also hoping to include a breakfast meeting on the day after the conference, ideally at newsroom to be followed by a tour and Q&A.

Dave then spoke about the London Conference, which is scheduled for September 28 – 29, 2014. The conference will take place at the Law Society. The logistical arrangements for the conference are currently underway. The programming for London began at the Virginia Conference. It was pointed out there that 2015 is the 800th anniversary of the Magna Carta and the conference may include a talk on that by Lord Justice Judge.

Report on Forum and Digital Conference

Michael Norwick noted that the MLRC Forum on the Right to be Forgotten would take place immediately after the Board Meeting.

Michael then spoke about the Digital Conference, which had taken place in May 2014. Although Stanford was no longer a partner in this conference, MLRC had partnered with the Berkeley Center for Law and Technology and hoped to continue a relationship with them. The 2014 conference was held at the Computer History Museum in Silicon Valley. The conference included sessions on digital video convergence, the NSA, online and advertising privacy, and venture capital. Michael described the conference as a great success. Next year's conference is planned for May 14- 15, 2015.

Jeff Hermes spoke about the plans for the May 2015 Digital Conference. Although the plans for the conference are still being finalized, the lineup will include an international panel on practical issues involved in managing the international digital needs of a media operation, a discussion on Section 230, a session on transformative use in copyright, discussions on hot privacy issues, and a session on net neutrality. MLRC was looking at replacing the VC session with a keynote talk.

Jeff then spoke about the Entertainment Law Conference which will take place on January 15, 2015 at the Los Angeles Times building, where many topics—such as fair use, clearing content, practical issues regarding obtaining licenses and clearances, and the digital distribution market and its implication for players in the market—would be discussed.

Defense Counsel Section

Louis Petrich then gave a report on the Defense Counsel Section. The DCS has 197 law firms that are full members and 11 law firms that are associate members. The membership is

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comprised of firms from countries including the U.S., U.K., Canada, Germany, and New Zealand. As of October 31, 2014, the Section had 17 committees that meet regularly and are a source for articles and reports throughout the year. The newest committee is the Next Generation Media Lawyers Committee, which began this year and is targeted at lawyers during their first ten years of practice. The Committee already has about 100 members.

Report on MLRC Institute

Dorianne Van Dyke thanked Dow Jones and the Wall Street Journal, the Institute's Trustees, and members who have participated in Institute programs throughout the year.

This year the Institute partnered with the American Booksellers for Free Expression for Banned Books Week and Free Speech Week. The Institute has coordinated 233 Speakers Bureau presentations to date and aims to do a few more presentation before the end of the year. The Institute has also created a presentation on Social Media, which will be finalized and launched in 2015. The Institute also launched its first annual video contest, which invited high school students to submit their thoughts on cyberbullying. The winner for the contest was from Milford, CT. The Institute was also involved in Sunshine Week, Freedom to Tweet, and helped present the Sources and Secrets program.

Dorianne invited members to view the Institute's blog on Actions Against Online Speech, and interact with the Institute on social media.

Lynn Oberlander raised a question about how to access the video contest and see the winning video. Dorianne said it was posted on the website and Facebook page. Lynn suggested that Institute activities be more publicly visible.

Open Discussion

Susan Weiner thanked the MLRC's staff and then opened the floor to any new matters.

Lynn Oberlander asked whether there may be subgroups of attorneys and industries that the MLRC might not be reaching. One attendee said there are many privacy lawyers who use digital media as part of their job and don't know about MLRC, so reaching out to them might be a good idea. A comprehensive membership drive will be MLRC's next big project.

It was noted that non-media companies are increasingly becoming media companies because of web presence and MLRC might consider broadening its membership to new companies such as ad agencies.

Susan Weiner thanked everyone and adjourned the meeting.