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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through November 30, 2019

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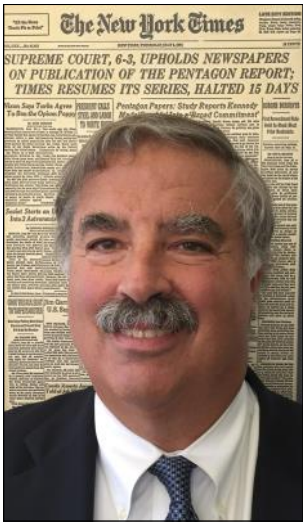
From the Executive Director's Desk

Controversies at Top College Newspapers Point to Bizarre Journalistic Standards, Political Correctness Gone Awry

And a Federal Judge Encourages Colleagues to Aggressively Defend Against Trump's Attacks

The world is pretty topsy-turvy these days. As just one example, all the evidence of Trump's nefarious acts with Ukraine and his quasi-criminal behavior has led to an increase in his approval rating. But for the most part, journalism has stayed on a pretty even keel. Despite the exponential growth and polarization of our media outlets, journalistic standards have remained fairly constant, even if not always adhered to.

Until recently. A few episodes involving university newspapers at our top schools have called into question whether the most basic of journalistic principles are being followed, or even accepted. While it would be easy to call these examples one-offs, the anti-First Amendment instincts on campus – not allowing unfriendly voices to speak, safe spaces and the like – signal a much broader and more serious underlying problem. After a review of these two incidents, you may agree that basic journalistic tenets, too, may be going down the tubes.



George Freeman

Take what happened last month at Northwestern, home of the Medill School of Journalism, one of the top ranked J-schools in the country. The Daily Northwestern – whose staff includes some Medill graduate students – covered a protest against a speech by former AG Jeff Sessions by reporting and running photos of the event, including the posting of some of the photos to Twitter. Strangely, some of the protesters complained about the newspaper's posting photos, calling them "retraumatizing and invasive." Why activists, protesting in public, would find photos of their actions traumatizing, let alone, retraumatizing, was not explained.

But to make such silliness more troublesome, the newspaper, in an immediate and quite amazing mea culpa, ran an editorial saying the photos should not have appeared – and pledging that they will no longer fully report on campus events if it risks making marginalized students feel unsafe or upset. Among the unanswered questions:

- Why would student activists protesting a College Republican event be or feel marginalized – they are clearly the majority group on campus

(Continued on page 4)

The Daily Northwestern

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Addressing The Daily's coverage of Sessions protests

November 10, 2019

Last week, The Daily was not the paper that Northwestern students deserve.

On Nov. 5, former Attorney General Jeff Sessions spoke on campus at a Northwestern University College Republicans event. The Daily sent a reporter to cover that talk and another to cover the students protesting his invitation to campus, along with a photographer. We recognize that we contributed to the harm students experienced, and we wanted to apologize for and address the mistakes that we made that night — along with how we plan to move forward.

One area of our reporting that harmed many students was our photo coverage of the event. Some protesters found photos posted to reporters' Twitter accounts retraumatizing and invasive. Those photos have since been taken down. On one hand, as the paper of record for Northwestern, we want to ensure students, administrators and alumni understand the gravity of the events that took place Tuesday night. However, we decided to prioritize the trust and safety of students who were photographed. We feel that covering traumatic events requires a different response than many other stories. While our goal is to document history and spread information, nothing is more

Ethics reform deferred to Nov. 25 meeting

- Why is there trauma at being photographed at a public event, whose purpose presumably was to gain publicity for their differences with Sessions?
- Why did they expect privacy at a public event? where does the safety issue derive from and is it a real concern? And so on.

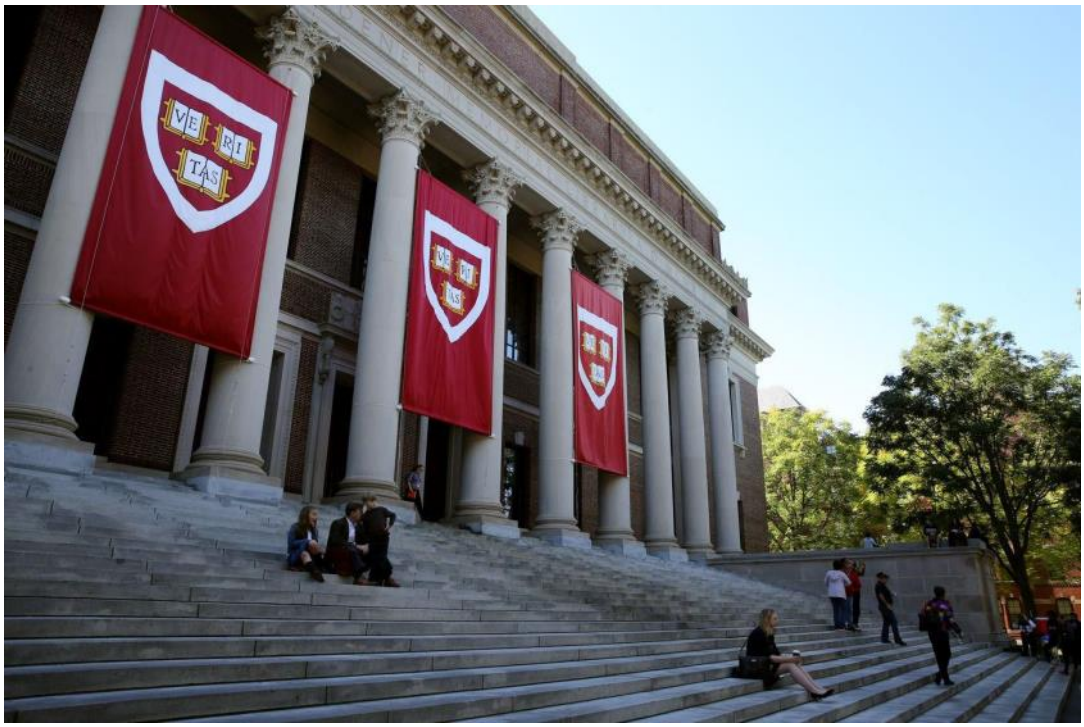
The editors also apologized for using the phone directory to contact students to see if they would be interviewed, recognizing this commonplace procedure as an invasion of privacy.

The reaction of the journalistic establishment was swift and sharp. Glenn Kessler of The Washington Post wrote, "How is it possible that a newspaper at what is allegedly a top journalism school would apologize for the basics of reporting? This is a travesty and an embarrassment." And Maggie Haberman, whom we saw a few weeks ago at our Annual Dinner weighed in: One of our biggest problems "is how few people understand what standard news-gathering process looks like. A student newspaper saying normal process is somehow a bad thing is incredibly troubling."

If self-censorship of public events and important public controversies is a "best practice" merely because a few people, neigh the activists involved, are somewhat offended by the coverage, journalism, too, is going topsy-turvy.

Strangely, some of the protesters complained about the newspaper's posting photos, calling them "retraumatizing and invasive." Why activists, protesting in public, would find photos of their actions traumatizing, let alone, retraumatizing, was apparently not explained.

The Harvard Crimson, generally thought of as the most famous and renowned college newspaper in the land, was involved in yet another terrible example – though one that shows the ignorance not of its journalists, but of the school's active student body. The



paper, in covering a student protest against the U.S. Immigration and Customs Enforcement agency (ICE), undertook the heinous act of calling ICE for comment. Apparently oblivious that Journalism 101 dictates that you get a response from a major subject of your article, students erupted at the temerity of the newspaper in contacting ICE.

Harvard students, understandably anti-ICE protesters, but un-understandably obtuse as to the fundamentals of journalism, lashed out at the Crimson and pledged to boycott it. Further, they submitted a petition to the Crimson expressing their disappointment in "the cultural insensitivity displayed by The Crimson's policy to reach out to ICE." In a startling non sequitur, they went on to say that the request for comment "is virtually the same as tipping them off, regardless of how they are contacted."

If self-censorship of public events and important public controversies is a "best practice" merely because a few people, neigh the activists involved, are somewhat offended by the coverage, journalism, too, is going topsy-turvy.

Fortunately, unlike at Northwestern, the Crimson did not apologize. In a Note to Readers, the head of the Crimson defended the very basic decision to contact ICE, noting that they did not provide names or immigration statuses of the people at the rally, nor an alert to ICE prior to the protest (although one questions whether there were many Harvard students or others at the protest with questionable immigration statuses.)

Unlike the Northwestern editors, the Crimson president and managing editor strongly stated the obvious: "At stake here, we believe, is one of the core tenets that defines America's free and independent press: the right – and prerogative – of reporters to contact any person or organization relevant to a story to seek that entity's comment and view of what transpired …

This ensures the article is as thorough, balanced, and unbiased toward any particular viewpoint as possible."

So kudos to the editors of the Crimson, but a huge demerit to the student activists who found contacting a subject of a story to consist of "cultural insensitivity." As Cambridge civil rights attorney Harvey Silverglate said, "They don't deserve to be at Harvard … It's something you'd expect from someone totally uneducated, but for those students to be questioning the way The Crimson has gone about its reporting is shocking and depressing … Narrow-minded people should wake up, and not be so stubbornly intolerant."

This sordid state of affairs, of course, mirrors the polarization and lack of community and meaningful communication which sadly exists in the country as a whole. Unfortunately, it is even more inappropriate on our college campuses, whose major purpose is to be a learning ground for divergent views, not a sanctuary of safe spaces where opposing views are forbidden.

Judge Friedman noted that "we are witnessing a chief executive who criticizes virtually every judicial decision that doesn't go his way and denigrates judges who rule against him, sometimes in very personal terms."

I have no brilliant answers, but as to the misplaced position of the Daily Northwestern and the Harvard undergraduates – and the many on campuses who seem to believe that political correctness and overwhelming sensitivity trump basic journalistic standards which have successfully existed for scores – I'd suggest that practicing media lawyers ought to consider teaching or speaking on these campuses.

I've been an adjunct at journalism schools in New York for about 20 years – at Columbia, NYU and City University, mainly in graduate journalism programs, but occasionally undergraduate as well – and I'd like to think that my students would not have committed the blunders that I believe the Northwestern editors and Harvard students did. (BTW: I was rejected as an undergraduate at Harvard, but am not biased by jealousy, and, at any rate, the statute of limitations has long passed.)

Teaching as an adjunct at a J-school will not make you rich, and can be time-consuming, especially the grading and editing of papers, but it also can be very rewarding, establishing connections with millennials and journalists-to-be which many of us old-timers otherwise might not have. But even more important, it might impart some experience and wisdom to students about what journalism is and how it works. In these fraught times, that ain't nothing.

* * *

Last month my column was about the importance of an independent judiciary, the outrageous attacks on it by the President in total ignorance of, or antagonism to, Separation of Powers, and, therefore, the need for us lawyers to speak up when judges are being unfairly attacked. A few days after the column was published, I came across a speech by Judge Paul Friedman, for 25

years a judge on the Federal District Court for the District of Columbia, whose theme was essentially the same.

As I had, but somewhat more eloquently, Judge Friedman noted that "we are witnessing a chief executive who criticizes virtually every judicial decision that doesn't go his way and denigrates judges who rule against him, sometimes in very personal terms. He seems to view the courts and the justice system as obstacles to be attacked and undermined, not as a co-equal branch to be respected even when he disagrees with its decisions." Judge Friedman then peppered his address with pertinent examples:

- As a candidate, Trump accused U.S. District Judge Curiel of being biased against him and Trump University because of the judge's Mexican heritage and as a Obama appointee and a "hater of Donald Trump," demanding that someone "ought to look into" Judge Curiel.

- A decision enjoining the Administration's program to make asylum seekers wait in Mexico based on the pertinent statutes was called the "tyranny of the judiciary" by the President.

- Judge Orrick's decision on sanctuary cities was called "a gift to the criminal gang and cartel element in our country."

- A Seattle judge who enjoined the Administration's first travel ban was called a "so-called judge" who is "taking law enforcement away from our country" by Trump.

- When the 9th Circuit affirmed that decision, Trump called it "disgraceful" and "political." (A dissenting judge nonetheless called Trump out, writing "such personal attacks treat the court as though it were merely a political forum in which bargaining, compromise and even intimidation are acceptable principles. The courts of law must be more that that, or we are not governed by law at all.")

- When the administration issued a proclamation suspending the entry of any alien coming from Mexico not through a designated port of entry, Judge Tigar enjoined its enforcement; Trump attacked him as an "Obama judge" and called the decision a "disgrace." The 9th Circuit affirmed, noting that "just as we [judges} may not, as we are often reminded, 'legislate from the bench', neither may the Executive legislate from the Oval Office."

- Finally, in litigation regarding the Border Wall, Trump called the 9th Circuit "a complete and total disaster … out of control." But, he said "we'll win in the Supreme Court," perhaps suggesting confidence in the five Republican appointees. "If it's my judges," he has said, "you know how they're going to decide."

Judge Friedman then made the same plea I did in my last column – "leaving it to lawyers and the organized bar to come to our defense." Noting that it's difficult for judges themselves to speak out, he urged us as important stakeholders in an independent judiciary to do so for them.

But then he went beyond that, saying that the above abuses are having such a dramatic impact on the public perception of the legitimacy of the courts, that judges, too, must add their voices –

loudly and often. While the long-run answer might be in civics education, civility and our engaging in participatory democracy, I was glad to see a member of the judiciary herald the active participation of judges themselves in this effort. He tellingly quoted Justice Gorsuch and Justice Sotomayor: as she said, "We are the best ambassadors of the work we do, and explaining our process to the population is what will keep us supported by our population. If we don't educate, we stand to be continuously assaulted."

The opinions expressed in this column are those of the author and not the MLRC. We welcome responses at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

MLRC Annual Dinner Celebrates Women Journalists on the Campaign Trail

And the William Brennan Defense of Freedom Award Goes to "Besieged Journalists Abroad"

More than 600 members and friends of the Media Law Resource Center gathered November 6th in support of MLRC and the causes it represents. Following a cocktail hour underwritten by AXIS Pro, the annual dinner program was presented in two parts.

First, the MLRC bestowed its William J. Brennan Jr. Defense of Freedom Award to "besieged journalists abroad." It was accepted by two brave women fighting on behalf of journalists worldwide: **Maria Ressa** and **Hatice Cengiz**. New York Times Managing Editor **Joseph Kahn** introduced Ressa, editor of the Philippine news site Rappler, who is facing multiple lawsuits following a series of investigative reports on president Rodrigo Duterte. Ressa spoke movingly of her journalistic background and legal travails, and repeatedly asked those in the room to consider what they would give up in the name of truth. The second awardee, **Hatice Cengiz**, activist and fiancée of murdered Washington Post columnist Jamal Khashoggi, appeared by video, thanking the media bar and exhorting us to keep up the fight.

Following a dinner of braised beef and fish, a panel of esteemed women journalists addressed their work covering the 2020 campaign and the advantages and challenges of being female in an industry historically dominated by men. The panelists were **Jennifer Epstein**, political reporter at Bloomberg News; **Maggie Haberman**, Washington correspondent at the New York Times; **Jenna Johnson**, national political correspondent at the Washington Post; and **Susan Zirinsky**, president of CBS News. The moderator was **Hallie Jackson**, Chief White House Correspondent at NBC News.

Maria Ressa, editor of online news site Rappler, accepting the William J. Brennan Jr. Defense of Freedom Award on behalf of besieged journalists abroad.

CBS News President Susan Zirinsky and New York Times Washington correspondent Maggie Haberman

NYT's Joseph Kahn on Maria Ressa

New York Times managing editor Joseph Kahn presented Rappler editor Maria Ressa with MLRC's William Brennan Defense of Freedom Award last month in New York City. The following are his opening remarks.

Thank you, and I'm honored to be with you tonight. I'm especially honored to be with you because we need you more than ever. The free press cannot survive without rule of law, and journalists cannot take on the toughest coverage without the guidance and partnership of the best defense lawyers. Since 1980, that's what the Media Law Resource Center has been offering – a critical source of support for journalists in this country and around the world who come under attack.

That support mattered a great deal even in the healthiest days of our democracy. It mattered even when American soft power penetrated the Iron Curtain, and when even some authoritarian leaders at least pretended to have a free press so they could have a seat at the table of global influence.

But as everyone here knows, these are not the healthiest days for this democracy, or for the Fourth Estate. We're under constant attack at home. And the US is less likely today to use its influence to try to protect American journalists overseas, much less our colleagues abroad who face even greater risks for reporting on the powerful.

President Trump is not the first American president to tussle with journalists or media organizations he does not consider supportive. It is probably fair to say, though, that he tends to be a little more vocal about it. He has used the term "fake news" in at least 600 tweets, and

dozens of press conferences. He has whipped up chants against the media at almost every major political rally.

The news media needs to have a thick skin. We don't always get it right. Good journalists try to remove bias from their work, but they are fallible. It's also not all that realistic to think that as society becomes more polarized, journalists are somehow going to remain above the fray.

But are we "the enemies of the people?" That term, which the president has tweeted multiple times, was used to justify mass executions during the French Revolution, to imprison or kill dissidents in Stalin's Russia, or rally the masses against class enemies in Mao's China.

These attacks are not just fits of pique. They are part of an effort to systematically undermine the notion of a shared set of facts, and to demonize journalists who seek to operate independently from political power. That's the threat we face in the United States. The institutions of the free press and the law remain strong here, though not invulnerable. Around the world, the situation is far worse.

By our count, at least 50 presidents and prime ministers have made "fake news" part of their vocabulary. Prime Minister Orban in Hungary, President Erdogan in Turkey, President Maduro in Venezuela, President Duterte in the Philippines, President Bolsonaro of Brazil, among many others, have taken cues directly from the president of the United States: It is okay to demonize, intimidate and incite violence against the press.

Groups like the Media Law Resource Center, the Committee to Protect Journalists, Reporters Without Borders and others are critical forces that help protect journalists and journalism. Their work is more indispensable now than it has ever been. But the impact of this repression overseas is devastating, and shows signs of getting worse. Is it a coincidence that 34 journalists were murdered in 2018 in connection with their work, almost double the number from the year before?

This year, the MLRC is honoring "besieged journalists abroad" with its William J. Brennan Defense of Freedom Award. Two champions of the free press and journalists in dangerous situations overseas will accept the award on behalf of their colleagues around the world.

One is Hatice Cengiz, the fiancé of Jamal Khashoggi, who was assassinated in the Saudi embassy in Istanbul one year ago. Over the past year, Hatije has pushed for the US and European governments to demand accountability for killing. She has yet to get results, but she is relentless, reminding us that, "It is not too late."

The other is Maria Ressa of the Philippines. Maria is the editor of Rappler, an innovative digital news site that has investigated corruption in the top ranks of the Philippine government and documented the extrajudicial executions in the brutal anti drug war led by President Duterte. She has been denounced as a spy, arrested and threatened repeatedly by the Duterte himself.

But her commitment to do great journalism in the toughest imaginable conditions has never faded. And we're lucky to have Maria here with us tonight to accept the award.

Planet Aid v. CIR: Lessons for Media Counsel in a Defamation Litigation

By D. Victoria Baranetsky and Ethan Forrest

For over three years, Reveal from The Center for Investigative Reporting ("CIR" or "Reveal") has been fighting a SLAPP suit brought in federal court by the non-profit Planet Aid, Inc., in response to CIR's years-long investigation—reported across the globe—examining Planet Aid and its affiliates.

The overall focus of CIR's story was that the United States government—particularly the Department of Agriculture—had known of problems with Planet Aid's misuse of government money, and had also known of Planet Aid's apparent links to Mogens Amdi Petersen, an internationally wanted fugitive, yet continued funding Planet Aid and related entities. Although the case is ongoing, our aim in this article is to offer some lessons for in-house and outside media counsel who may find themselves defending investigative journalists against SLAPP suits targeted at sweeping, long-term investigations.

Our aim is to offer some lessons for in-house and outside media counsel who may find themselves defending investigative journalists against SLAPP suits targeted at sweeping, long-term investigations.

CIR's reporting—which relied on documents and information provided by government investigators, court filings in Denmark and the United States, Planet Aid insiders, and government reports, as well as both on-the-record and confidential sources—led to immediate impact internationally. Congresswoman Barbara McCollum of Minnesota called for a government investigation into Planet Aid and its associates. UNESCO and UNICEF cut off ties to the group. The BBC partnered with Reveal for its own story in August 2016, prompting the U.K. Department for International Development to suspend funding and launch an investigation into Planet Aid as well.

Planet Aid responded to CIR's investigations with a lawsuit, filed on August 25, 2016 in Maryland federal court. Planet Aid asserts claims for defamation, contending CIR's reporting is false, as well as other related claims. In response, CIR retained Davis Wright Tremaine, with Thomas R. Burke as lead counsel, to represent CIR as well as its reporters Matt Smith and Amy Walters, who investigated and wrote the relevant stories. Reveal's General Counsel, D. Victoria Baranetsky began managing the litigation upon joining CIR in 2017. More recently, the litigation has been led by counsel from Covington & Burling LLP, including Ethan Forrest, alongside Davis Wright Tremaine.

Counsel has observed several issues in this case that can inform in-house and outside media counsels' approach to libel litigation—particularly when it arises in federal court.

First, Planet Aid's complaint is an example of how a SLAPP plaintiff can leverage the sheer volume of documents produced during reporting to seek tactical advantage. Rather than targeting specific statements in CIR's stories, Planet Aid challenges every single article and podcast CIR produced, totaling about 350 pages of complaint plus exhibits. Even now, three years into the litigation, Planet Aid has still offered shifting representations about what it believes its case is really about—feinting several times at amending its complaint further—leaving the basic substance of its allegations murky. This dissembling has complicated litigation by allowing Plaintiffs to constantly switch focus, prolong litigation, and essentially play an extended game of cat-and-mouse.

For in-house or outside counsel advising on investigative reporting, the scale of Planet Aid's complaint demonstrates how litigants suing investigative news organizations can essentially use reporters' diligence and thoroughness against them for punitive ends, targeting every step of the investigative and editorial processes. Large-scale investigations such as this one can span years of work over many different places. They also tend to generate voluminous records. As such, any in-house and outside counsel advising an investigative news outlet may benefit from working with their clients to organize, track, and store the raw materials for large, extensive investigations in particular. Counsel can help editors create organized trackers of data created during long-term and widespread investigations like these. By doing so, both counsel and client can be better situated to mitigate the threats inherent in SLAPP cases that arise in contexts like our case.

Planet Aid's complaint is an example of how a SLAPP plaintiff can leverage the sheer volume of documents produced during reporting to seek tactical advantage.

Second, Planet Aid has used jurisdictional challenges to seek better state law for its case as well as to batter CIR with jurisdictional motion practice. Planet Aid, which originally filed the suit in Maryland, has tried to move the case back to that jurisdiction from California (where CIR resides and published the material) at least four times. These tactics suggest that Plaintiffs wish to avoid California's more protective anti-SLAPP statute in favor of Maryland's narrower one.

Maryland, which has one of the country's weakest anti-SLAPP statutes, does not allow for fee-shifting or immediate appeals—unlike California's statute. Defendants were able to successfully move the case to California upon a motion to dismiss for lack of personal jurisdiction because despite Planet Aid being based in Maryland, all of the defendants were California-based, and story was published in California and worldwide in scope. The Maryland court agreed—over Planet Aid's voluminous briefing and sur-reply—and transferred the case to California in June 2017.

Despite not disputing that the California court has jurisdiction over its case, Planet Aid has spent most of its lawsuit's existence trying to get back to Maryland. It has sought to re-transfer its case four times within three years—between August 2016 and August 2019—including during a months-long period of jurisdictional discovery focused on Maryland. It has failed

every time. Judge Chesney of the U.S. District Court in San Francisco stated, "There is no problem with the case going forward in this district. It's that the plaintiff for some obscure reason wants to go back to Maryland." But the most likely reason is clear: Planet Aid risks having to pay Reveal's fees and costs in California, but it wouldn't in Maryland.

This case demonstrates how important it is for news organizations and its lawyers to take advantage of—and advocate for—robust anti-SLAPP laws as well as to keep apprised of the ever-changing laws. Approximately 30 states have enacted anti-SLAPP statutes, which appear to be shifting with increasing celerity. This past year, Texas's anti-SLAPP law, the Texas Citizens Participation Act—one of the most defense-friendly anti-SLAPP statutes in the nation—was narrowed and found not to apply in federal court. On the opposite end of the spectrum, New York's anti-SLAPP law, which is narrower in scope than most similar laws in other states, was considered for expansion several times this year in the New York State legislature.

In-house and outside media counsel should be aware of the patchwork of laws that could apply in places where clients report. That way, reporters can be mindful of how their reporting decisions might eventually be used in jurisdictional disputes that could have substantial impact on what defenses will exist in litigation. Of course, sometimes this won't be possible, as when cases undisputedly arise in jurisdictions without favorable anti-SLAPP statutes, but in any event, it may be one additional factor to consider.

Planet Aid has sought to weaponize the confusion anti-SLAPP discovery rules create in federal court.

Third, Planet Aid has sought to weaponize the confusion anti-SLAPP discovery rules create in federal court. The general rule in California is that SLAPP plaintiffs get no discovery. But federal courts in the Ninth Circuit generally permit discovery at least within issues raised in the anti-SLAPP motion. In this posture, Planet Aid has sought extensive discovery from Reveal—while resisting serious discovery into its own records and witnesses.

For itself, Planet Aid has served dozens of discovery requests and initiated numerous disputes before the court. Yet it has resisted and put off Reveal's discovery into issues related to Planet Aid's positions on Reveal's anti-SLAPP motion. Indeed, for months after responding to Reveal's written discovery, Planet Aid submitted that it would proceed with mutually convenient schedules for document productions and depositions. But recently, Planet Aid unilaterally moved for a protective order, aiming to stop Reveal from investigating Planet Aid's representations that it is not a public figure, and that Reveal's reporting on Planet Aid's relationship with the USDA was incorrect. These disputes remain pending.

There is, realistically, little counsel can do to change the fact that anti-SLAPP statutes interact with federal discovery rules in complicated ways. The *New York Times* recently faced a similar situation where a three-judge panel of the United States Second Circuit Court of Appeals sent the defamation case filed by Sarah Palin against the newspaper back down to the district court,

saying her case "plausibly states a claim for defamation and may proceed to full discovery." Given this increasing trend for discovery, lawyers should factor this issue into litigation strategy. In house counsel should advise reporters on how to maintain records and make them increasingly aware that communications will be pulled into court. And when a case arises in federal court, the defense might seek its own affirmative discovery.

Last, cases like this have underscored the rising concerns over general media liability insurance for investigative newsrooms. Deductibles have sharply risen across the news industry. For itself, CIR has experienced a sizeable impact on its own deductible even though it views Planet Aid's case as frivolous. Although CIR's deductible is promised to go down after one more year without any other claims brought against it—after already having two years of a clean bill of health—CIR has still spent three years in litigation, whose cost has exceeded $7 million, which CIR would not have been able to sustain without the excellent pro bono representation of Covington & Burling LLP and Davis Wright Tremaine LLP. Despite the difficulty of its case, CIR views its defense as a commendable example of two firms working together to represent a nonprofit investigative newsroom, and other organizations like First Look Litigation Fund stepping in to help.

Cases like this have underscored the rising concerns over general media liability insurance for investigative newsrooms.

As attacks on journalists in the courts continue to increase, it is more important than ever that that media organizations and outside media attorneys band together in some capacity to support each other, whether through joint defense arrangements (such as those in this case), risk pooling, or old-fashioned reporting. Organizations like First Look and Democracy Fund have already started work on such excellent initiatives, and we should all choose to support these efforts.

D. Victoria Baranetsky is general counsel at Reveal from The Center for Investigative Reporting. Ethan Forrest is a litigator in Covington & Burling's San Francisco office, where he focuses on IP, technology, and media issues.

Court Dismisses Sheriff Joe Arpaio's Defamation Suit Against HuffPost, Rolling Stone, and CNN With Prejudice

By Elizabeth Baldridge

Former Arizona sheriff Joe Arpaio's defamation, tortious interference with prospective business relations, and false light complaint against several media defendants was dismissed in October. Arpaio v. Zucker (D.D.C. Oct. 31, 2019).

Background

The Huffington Post, Rolling Stone, and CNN, along with a handful of their respective employees, each moved to dismiss Arpaio's claims, also moving in the alternative to dismiss on the basis that the case was a SLAPP suit.

Judge Royce C. Lamberth of the United States District Court for the District of Columbia agreed with the media defendants and dismissed Arpaio's claims with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6), although the court declined to dismiss under D.C.'s Anti-SLAPP Act.

In addition to being in the public eye for decades, Arpaio was in the national spotlight for several months in 2017 after he was convicted of criminal contempt of court and subsequently received a presidential pardon. Arpaio was convicted of contempt after refusing to obey a judge's order to stop detaining individuals without reasonable suspicion of criminal activity.

President Trump pardoned Arpaio in August of 2017, which relieved him of any punishment for the crime. Arpaio also unsuccessfully ran for United States Senate in 2018, and his complaint stated that he intends to run for political office again in 2020.

Arpaio's complaint against the Huffington Post, Rolling Stone, CNN, and associated individuals centered on allegations that the media defendants variously stated that Arpaio had been convicted of a felony—as opposed to a misdemeanor—or that he served prison time, which he did not. Specifically, Arpaio alleged that Rolling Stone and CNN both incorrectly stated that Arpaio had been convicted of a felony, and he alleged that the Huffington Post published an article inaccurately noting that Arpaio had been sent to prison. Arpaio's complaint stated that he had not been sent to prison for contempt of court. All three media entities corrected the news pieces at issue promptly after publication.

In addition to claiming that these statements defamed him and placed him in a false light, Arpaio alleged that the statements tortiously interfered with prospective business relations because they sought to influence the Republican National Committee and Republican National

Senate Committee and affiliated donors to withhold political funding from Arpaio for future political campaigns.

The Huffington Post, Rolling Stone, and CNN filed their respective motions to dismiss and alternative motions to dismiss pursuant to the D.C. Anti-SLAPP Act on March 15, 2019, and the motions were argued before Judge Lamberth on July 25, 2019. Arpaio did not challenge the defendants' arguments that he was a public figure for purposes of defamation law, and so Judge Lamberth's October 2019 order considered that point conceded.

Motion to Dismiss

Based on Arpaio's public figure status and the requirement for public figure plaintiffs to show actual malice, the court held that Arpaio's claims could not survive the Rule 12(b)(6) pleading standard. The opinion rejected Arpaio's position that the defendants' alleged "leftist enmity" could demonstrate actual malice in the publication of their respective news pieces, explaining that "the motivations behind defendants' communications—inspired by political differences or otherwise—do not impact whether defendants acted with actual malice as a matter of law."

Each of the media entities' motions to dismiss also made substantial truth arguments, and the Huffington Post also made an alternative argument that Arpaio was a libel-proof plaintiff. The court accepted CNN's substantial truth argument in addition to granting all three motions to dismiss based on a lack of adequate pleading of actual malice.

The court denied the defendants' respective motions to dismiss pursuant to the D.C. Anti-SLAPP Act, holding that application of the Act in D.C. federal court is currently in conflict with mandatory case law from the D.C. Circuit. The conflict at issue is whether D.C.'s Anti-SLAPP Act imposes a different standard than the requirements of Federal Rule of Civil Procedure 56 governing summary judgment. The D.C. Court of Appeals has held that the Anti-SLAPP Act does not require a different or conflicting standard. But despite case law that the D.C. Court of Appeals' authority supersedes the D.C. Circuit's rulings on issues of substantive D.C. law, the court's decision here fell in line with several other D.C. District Court decisions declining to "correct the D.C. Circuit on this issue."

This denial did not affect the defendants' ability to secure a dismissal pursuant to Rule 12(b)(6), but as the court pointed out in its opinion, the Anti-SLAPP Act's mechanism goes farther in deterring frivolous lawsuits that chill free speech by allowing a successful defendant to recover litigation costs and attorneys' fees.

Because the dismissal of Arpaio's complaint was with prejudice, the court entered judgment and closed the case on October 31, 2019. Arpaio filed a new complaint against the Huffington Post, Rolling Stone, and two of their respective reporters based on the same underlying facts in the same court on November 7, 2019. The defendants have not yet responded to this second complaint.

Jean-Paul Jassy, William Um, and Elizabeth Baldridge of Jassy Vick Carolan, LLP, and Laura C. Fraher of Shaprio, Lifschitz & Schram P.C. served as counsel for Defendants TheHuffingtonPost.com, Inc. and Kevin Robbilard. Alison Schary, Elizabeth A. McNamara, and Rachel Strom of Davis Wright Tremaine LLP served as counsel for Defendants Rolling Stone LLC and Tessa Stuart. Kevin T. Baine, Stephen J. Fuzesi, and Nicholas G. Gamse of Williams & Connolly LLP served as counsel for Defendants Cable News Network, Inc., Jeff Zucker, and Chris Cuomo. Larry Klayman of Klayman Law Group P.A. served as counsel for Plaintiff Joseph Michael Arpaio.

South Carolina Appeals Court Affirms Summary Judgment in Libel Case Over "Racist" Football Ritual

By Eric P. Robison

On Nov. 6, a three-judge panel of the South Carolina Court of Appeals affirmed the grant of summary judgment to the former owner of the *Charleston City Paper* in a defamation lawsuit against over two editorial columns about a high school football team pre-game ritual that some considered racist. *Garrard v. Charleston Cty. Sch. Dist.*, No. 2016-002525, 2019 WL 5778086, 2019 S.C. App. LEXIS 87 (S.C. Ct. App. Nov. 6, 2019). While the appellate court's decision is not too surprising, it does illuminate several well-established principles of libel law in South Carolina.

While the appellate court's decision is not too surprising, it does illuminate several well-established principles of libel law in South Carolina.

The libel suit stemmed from coverage of pre-game ritual in which, according to Charleston County School District Superintendent Nancy McGinley at an Oct. 21, 2014 news conference, members of the Academic Magnet High School (AMHS) football team celebrated their victories in several games by "gather[ing] in a circle and smash[ing] [a] watermelon while others either were standing in a group or locking arms and making chanting sounds that were described as 'Ooo ooo ooo.'" The watermelon was given the moniker "Junior," and then "Bonds Wilson" numbers one, two, three, four or five at subsequent games. Bonds Wilson was the name of the segregated blacks-only school that formerly occupied the site of AMHS, a name that was retained for the campus that AMHS now shares with another school. A face was drawn on the watermelon, which McGinley said "could be considered a caricature."

At the press conference McGinley said that the ritual had been reported to district officials by a member of the school board, who was concerned about the "racial stereotypes related to this type of ritual."

McGinley also announced at the news conference that AMHS football coach Eugene "Bud" Walpole would be removed his positions coaching the football and girls' basketball teams, but not from his teaching position. Walpole was fired by the board a few days later, but his position was restored after community opposition. McGinley eventually resigned.

City Paper published several items on the controversy, including two columns by editor Chris Haire: one after the press conference, and another after McGinley's resignation.

Six members of the AMHS football team and Coach Walpole filed separate defamation lawsuits against several defendants, including then-*City Paper* owner Jones Street Publishers. The

lawsuits, which were combined in 2015, cited language in the columns stating that the pre-game ritual "would be perceived as racist by any sensible outside observer," that it was condoned by Coach Walpole, and that someone should have told the players that that they were "racist douchebags." These statements, the lawsuits alleged, were made without *City Paper* or Haire researching the circumstances of the ritual or the intentions of the participants and coach.

City Paper sought summary judgment, arguing was that the columns used information from McGinley's press conference, and that Haire's conclusions were statements of opinion. Former Supreme Court Justice Jean H. Toal—who spent 27 years on South Carolina's highest court, and almost 16 as Chief Justice—ruled on the motion, acting as a judge of the Circuit Court in Charleston County.

As a justice of the South Carolina Supreme Court, Toal had sought to define modern defamation law in South Carolina in her concurrence in *Holtzscheiter v. Thompson Newspapers, Inc.* (*Holtzscheiter II*), 332 S.C. 502, 506 S.E.2d 497 (1998). In an earlier ruling in the case, Toal lamented that "[t]he majority does not address, nor did the parties here, the potential impact of the decisions of the United States Supreme Court on this case. Furthermore, the majority does not, in my opinion accurately interpret South Carolina case law." *Holtzscheiter v. Thompson Newspapers, Inc.* (*Holtzscheiter I*), 306 S.C. 297, 303, 411 S.E.2d 664, 667 (1991).

Judge Toal granted summary judgment in 2016, holding that the columns were "merely paraphrasing summaries of public statements made by School District officials describing [the] post-game rituals," and that "there is little doubt that the speech at issue in this case was addressed to a matter of public concern."

Five years later, in *Holtzscheiter II*, Toal's concurring opinion expressed the same complaint. "[C]ertain areas of South Carolina defamation law . . . are mind-numbingly incoherent," she wrote. "Case law in this state presents no clear analytical system for resolving defamation questions. Because a clear framework is lacking, the resolution of disputes often turns on chance, on whatever aspect of defamation law happens to arrest the parties' or court's attention in that case. As a result, the law lacks consistency and predictability, and confounds the bench, the bar, members of the general public, and media personnel who have to make important decisions based on court precedent." *Holtzscheiter II*, 332 S.C. at 516-17, 506 S.E.2d at 505.

She added: "Given the uncertainty existing in South Carolina defamation law, due to the lack of an analytical model and the failure to generally take account of the [U.S.] Supreme Court's recent opinions, this case presents an opportune time for this Court to look afresh at how defamation issues should be resolved." *Holtzscheiter II*, 332 S.C. at 517, 506 S.E.2d at 505. And she attempted to do so, delineating defamation standards that reconciled South Carolina defamation law with U.S. Supreme Court precedent.

In the *City Paper* case, Toal granted the newspaper's summary judgment motion in November 2016, holding that the *City Paper* columns were "merely paraphrasing summaries of public statements made by School District officials describing [the] post-game rituals," and that "there is little doubt that the speech at issue in this case was addressed to a matter of public concern[, and] it is settled law that expressions of opinion on matters of public concern are immune from liability for defamation."

The plaintiffs appealed that decision to a panel of the South Carolina Court of Appeals consisting of judges John D. Geathers, H. Bruce Williams and D. Garrison Hill, which heard arguments on April 1, 2019. That court's unanimous ruling, written by Geathers and issued on Nov. 6, affirmed the trial court's grant of summary judgment in favor of *City Paper*.

First, the appellate court held that the information in the columns had come from the statements made by Superintendent McGinley at the press conference. Because the columns accurately reported her statements, the court held, they are immune from a legal claim under the "fair report" privilege—first adopted in South Carolina as early as 1936—which protects "fair and accurate" reports of government proceedings and events such as McGinley's press conference. This protection continues even if it turns out that a statement at the government event is false and defamatory. If such a statement comes from a generally reliable source, anyone repeating it is not legally required to independently verify whether it is true or not.

The appellate court held that the information in the columns had come from the statements made by Superintendent McGinley at the press conference. Because the columns accurately reported her statements, the court held, they are immune from a legal claim under the "fair report" privilege.

Second, the appeals court held that the statements in the columns that the ritual, the players and the coach were racist regarded matters of public concern. Thus the court applied the United States Supreme Court's admonition from Milkovich v. Lorain Journal Co. 497 U.S. 1, 19-20 (1990), that "statement[s] on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations ... where a media defendant is involved."

Applying this standard, the South Carolina appeals court then examined whether the columns' statements were expressions of opinion or fact. The appeals court concluded that the statements in Haire's columns calling the ritual "racist" and calling the players "racist douchebags" could not be defamatory, since they were statements of opinion, not verifiable facts. The court added that these statements were "rhetorical hyperbole," not meant to be taken as literal statements of fact.

Third, the appeals court found that the plaintiffs—Coach Walpole and the players—had not shown any actual injury to their reputations from the statements in the *City Paper* columns. They did not identify any specific individuals who viewed the plaintiffs differently after reading

the *City* Paper columns. They also did not provide evidence of any lost opportunities as a result of the articles, such as lost friends, jobs, or college admissions. Some of the plaintiffs said that they had been questioned about the ritual, but could not identify those who had questioned them and whether they had seen the *City Paper* publications.

Fourth, the appellate court affirmed Judge Toal's determination that the individual members of the football team were libeled by statements made about the team as a whole. While individual members of very small groups may maintain a libel suit when false, defamatory statements are made about the group as a whole, the appeals court said that "a football team would not constitute a small group," and is too large to invoke this principle. Quoting *Hosp. Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 9 S.E.2d 796 (1940), the appellate court observed that "where defamatory statements are made against an aggregate body of persons, an individual member not specially imputed or designated cannot maintain an action."

As a public official, under U.S. Supreme Court precedent Walpole was required to show "actual malice" by clear and convincing evidence. And, the appeals court ruled, he had not done so.

Finally, the appeals court also affirmed the trial court's finding that Coach Walpole was a public official, and as a result was required to show that *City Paper* made its statements with "actual malice." Public officials, the appeals court observed, are government employees whose "position must be one [that] would invite public scrutiny and discussion of the person holding it," apart from the statements at issue. Applying this standard, the court said, various public school officials—including coaches such as Walpole—have been held to be public officials in prior cases, and Coach Walpole was no different.

As a public official, under U.S. Supreme Court precedent Walpole was required to show "actual malice" by clear and convincing evidence. And, the appeals court ruled, he had not done so.

The appeals court's decision ends the claims against *City Paper* without a trial. But Wapole or one or more of the football players in the lawsuit seeking may seek rehearing by the Court of Appeals, and if that is denied may seek review by the South Carolina Supreme Court.

Eric P. Robinson is an assistant professor who teaches media law and ethics at the University of South Carolina School of Journalism and Mass Communication and is Of Counsel to Fenno Law in Charleston / Mount Pleasant, South Carolina.

The plaintiffs were represented by John E. Parker and William F. Barnes III of Peters, Murduagh, Parker, Eltzroth, & Detrick, P.A., in Hampton, South Carolina. Wallace K. Lightsey and Meliah Bowers Jefferson of Wyche, P.A., in Greenville, South Carolina represented the newspaper.

Release and Statute of Limitations Bar Claims for Invasion of Privacy, Fraud, and Unjust Enrichment

By Cameron Stracher

In a case that has been litigated across two states over seven years, a New York trial court recently held that plaintiff's claims, arising from his participation in an unscripted television series about a bounty hunter, were barred by the release he signed and by the statute of limitations. Draughn v. Al Roker et. al., No. 152934/2018 (N.Y. County, Oct. 30, 2019).

Background

On October 10, 2011, plaintiff was apprehended at his home in Gretna, Louisiana, by bail enforcement agent Eugene "Tat 2" Thacker. The events were filmed as part of the unscripted television series *Big Easy Justice,* produced by defendant Al Roker Entertainment.

Following his arrest, plaintiff signed a written release in which he released "any and all claims" arising from the series. The release also provided that any dispute would be adjudicated in New York under New York law. Footage of plaintiff's arrest was broadcast by defendant Viacom on April 10, 2012. On September 12, 2012, Plaintiff sued defendants in Louisiana, claiming that he had signed the release while handcuffed and at gunpoint, and was unaware that it was for a television series.

Plaintiff sued claiming that he had signed the release while handcuffed and at gunpoint, and was unaware that it was for a television series.

After two motions to dismiss for improper venue (called a "Declinatory Exception" under Louisiana law), live testimony by the executive producer of the series, and two appeals, the Louisiana Court of Appeal held that plaintiff was not under duress when he signed the release, and granted defendants' motion to dismiss. *Draughn v. Thacker, et al.,* No. 17-C-337 (La. App. 2017). The Louisiana Supreme Court denied plaintiff's application for a writ of certiorari. *Draughn v. Thacker, et al.,* 237 So. 3d 519 (La. 2018).

On March 31, 2018, plaintiff filed suit against defendants in New York for, among other claims, misappropriation, fraud, and unjust enrichment. Defendants moved to dismiss the case, arguing that plaintiff's claims were barred by the release and by the relevant statutes of limitations. While that motion was pending, plaintiff tried to file an amended complaint, which was rejected by the clerk of the court in error. The New York Supreme Court (Hagler, J.) granted defendants' motion, and held that it would not consider the amended complaint because it was not before the court.

New York Court Decision

Subsequently, the case was re-assigned to Judge Kahn, and plaintiff filed a motion to vacate Judge Hagler's decision while defendants filed a motion to dismiss plaintiff's amended complaint. In his analysis, Judge Kahn noted that the first four counts of plaintiff's original complaint and his amended complaint were identical; thus, because plaintiff had not alleged any jurisdictional errors committed by Judge Hagler, there was no basis to vacate the original decision. Regardless, Judge Kahn held that all of plaintiff's claims were barred by the release he signed, and the decision of the Louisiana Court of Appeal barred plaintiff from re-litigating the issue of duress in New York. Finally, Judge Kahn found that plaintiff's claims were also time barred. Notably, he rejected plaintiff's argument that the statute of limitations for his claims for fraud and unjust enrichment did not begin to run until the episode aired, and held that those claims accrued when plaintiff signed the release on October 10, 2011.

All of plaintiff's claims were barred by the release he signed, and the decision of the Louisiana Court of Appeal barred plaintiff from re-litigating the issue of duress in New York.

Plaintiff was represented by Ferdinand Valteau (in Louisiana and New York) and Ike Dibia (in New York), and the media defendants were represented by Cameron Stracher (in Louisiana and, with Sara Tesoriero, in New York) and Loretta Mince (in Louisiana).

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Court Rejects Colombian Journalist's Copyright Infringement Lawsuit Over Netflix's 'Narcos' Series

By Louis P. Petrich and Elizabeth L. Schilken

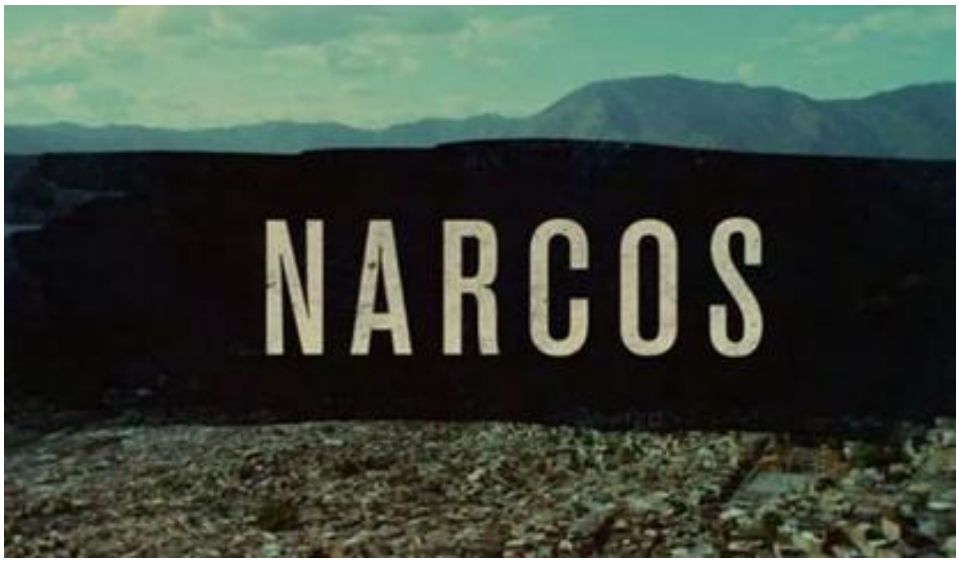
A Florida federal district court confirmed that film and television producers may freely use facts, ideas and *scenes a faire* found in published works to create biographies, docudramas and documentaries without incurring copyright liability. Vallejo v. Netflix, Inc., No. 18-cv-23462-RS , 2019 WL 5867970. (S.D. Fla. Nov. 8, 2019). Such access is important in the researching and vetting of scripts to avoid possible defamation and privacy liability.

The decision arose in the context of the popular *Narcos* series streamed on Netflix. The plaintiff, Virginia Vallejo, is a self-described "legend," a former Colombian journalist and top-rated anchorwoman who became romantically involved with the notorious head of the Medellin drug cartel, Pablo Escobar, from 1982–1987, and wrote about it 20-years later, in 2007 after he was killed in a 1993 shootout with Colombian police. He was reportedly responsible for thousands of deaths.

A Florida federal district court confirmed that film and television producers may freely use facts, ideas and scenes a faire found in published works to create biographies, docudramas and documentaries without incurring copyright liability.

Plaintiff's books ("Books") entitled "*Amando a Pablo, Odiando a Escobar,*" were initially published in Spanish in 2007 in Colombia and again in Mexico and registered for copyright in the U.S. Copyright Office. When translated into English, that version was published in 2018 entitled "*Loving Pablo, Hating Escobar*." As relevant here, several chapters described (1) Escobar is using a revolver to engage in foreplay with Vallejo, (2) Escobar's recruitment of M-19 terrorists to raid the Colombian Palace of Justice to burn evidence gathered for use by the government to seek Escobar's extradition to the U.S., and (3) Vallejo's awkward meeting with Escobar's wife.

Defendant Gaumont Television USA LLC (though a Colombian subsidiary, Narcos Productions LLC) created and produced a series of programs about drug trafficking for exhibition on Netflix, Inc's worldwide streaming service. The first two seasons focused on Colombia in the 1980s and 1990s. Plaintiff's initial Complaint alleged that several episodes in the first season infringed on the copyrights in her Books and violated her rights under the federal Lanham Act and Florida state unfair competition law. She asserted she had especially strong copyright protection because she was the first to publish certain facts - a theory of protection commonly described as "sweat of the brow" - which was rejected by the then Fifth Circuit in a case arising from the same division of the Southern District of Florida (Ft. Lauderdale). *Miller v. Universal*



City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981). (The Fifth Circuit was later split to create an Eleventh Circuit. Pursuant to *Bonner v. Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981), opinions of the Fifth Circuit issued prior to October 1, 1981, are binding precedent in the Eleventh Circuit.) *Miller* was extensively quoted and cited in *Feist Publ'ns, Inc. v. Rural Tel. Serv*. Co., 499 U.S. 340 (1991) (holding that lists of telephone numbers were just "facts" and not protected expression.

Narcos Productions, Gaumont and Netflix initially moved for dismissal of the Complaint pursuant to FRCP 12(b)(6). The Court (presiding Judge K. Michael Moore) held that the plaintiff's allegation that the 75-second scene of defendant's character named Virginia Velez in the series, in an encounter that involved a revolver stated a plausible claim because the Complaint did not "provide the specific details of the scene" in *Narcos* to compare.

The alleged portrayal of Escobar's wife as "uncomfortable," and "outwardly cold towards Velez" – the name of her husband's mistress in *Narcos* - was deemed a *scene a faire* and not actionable. The scenes regarding the Palace of Justice were deemed similar only as to unprotected facts, but plaintiff was given leave to replead. Order, 2019 WL 5884413 (S.D. Fla. 5/24/19).

The court dismissed plaintiff's Lanham Act claim on both of plaintiff's theories of liability. As a claim for false designation of origin, the complaint failed to allege that defendants created an impression that Plaintiff produced *Narcos*. Alternatively, if the claim was that the series falsely identified plaintiff as endorsing the series, the Court held that theory precluded by *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), because *Narcos* was an expressive work entitled to First Amendment protections and could not be actionable because the plaintiff – if treated as a servicemark – was artistically relevant to the Narcos series and defendants did not explicitly mislead the audience about the source or the content of the work. The Florida common law unfair competition claim was evaluated by the same standards as the Lanham Act claim and dismissed.

Plaintiff's Amended Complaint omitted the Lanham Act and unfair competition claims and realleged only the copyright claims for infringement of the Revolver scene and the Palace of Justice scenes.

After extensive discovery the parties filed cross-motions for summary judgment with English translations of Plaintiff's Books and copies of the Narcos episodes at issue. Before the court considered them, it had to decide a motion by defendants that the court lacked subject matter jurisdiction because Plaintiff may have assigned away to another movie producer the same motion picture and other audiovisual rights which formed the basis of her claims. Thus, she might have lacked standing to sue for an alleged infringement of those assigned rights. However, the newly appointed District Judge Rodney Smith determined that the option given by Plaintiff to a third party was not exercised until the Narcos series had been available on Netflix for about 16 weeks. Plaintiff had standing to sue to that extent. Order, 2019 WL 5884612 (S.D. Fla. 10/28/19).

Judge Smith then considered and decided the pending cross-motions for summary judgment. Order, 2019 WL 5867970 (S.D. Fla. 11/8/19). For the sake of the motions, defendants assumed "access" and actual copying, but contended that anything that was actually copied did not constitute protectable expression. The sole issue was whether any allegedly copies elements were protected by copyright. (The Eleventh Circuit does not employ the discredited "inverse ratio" theory that the more access the less similarity is needed to prove actionable copying. *See Beal v. Paramount Pictures Corp*., 20 F.3d 454, 460 (11th Cir. 1994); *see also*, *Rentmeester v. Nike, Inc*., 883 F.3d 1111 (9th Cir. 2018)).

Plaintiff still maintained that the fact that she allegedly was the first to publish certain facts made them protectable – a theory debunked in *Miller*, *supra*, and later in *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication") (citing *Feist*,499 U.S. at 349-50).

Plaintiff argued that what appeared to be facts were actually fabrications - "magical realism" or reconstructed dialogue - but she failed to point to any examples. Her Books purported to be factual and at her deposition she insisted that everything in her Books is true. Defendants reminded the court that Plaintiff could be estopped to argue now that her Book did not report facts. *See Houts v. Universal City Studios, Inc*., 603 F.Supp. 2d 26 (C.D. Cal.1984); followed in *Thompson v. Looney's Tavern Prods., Inc*., 204 Fed. Appx. 844, 849 (11th Cir. 2006).

Her arguments about "substantial similarity" fared no better. Plaintiff contended that under the test used in the Eleventh Circuit to determine substantial similarity, which asks whether "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work," *Narcos* infringed on the protected expression in her memoir. See *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 829 (11th Cir. 1982).

However, Defendants pointed out that the similarities Plaintiff identified between the two works consisted solely of unprotectable facts (e.g., that Escobar offered the leader of the Colombian guerilla group M-19 $2 million to raid the Palace of Justice) and ideas (e.g., a sex scene involving a gun); or consisted of elements that were not actually present in both works. The court agreed with Defendants and ruled that a comparison of the two works revealed that "not all of [Plaintiff's alleged] similarities actually exist and the similarities that do exist are ideas and facts." Order at p. 12. That Plaintiff's Books were "the first to make some of these facts public does not change the analysis." *Id.* at p. 15. The court granted Defendants' MSJ and denied Plaintiff's cross-motion.

Judgment of dismissal was entered on November 12, 2019. Plaintiff's counsel has been since been quoted as planning an appeal to the Eleventh Circuit based on the theory that only "historical" facts are exempt from copyright protection, apparently contending that the Revolver scene is not "historical." Plaintiff's burden seems insurmountable. Apart from the fact that Escobar was an historical figure, and Plaintiff describes herself on her website as a "legend," the landmark *Feist* decision held that lists of telephone numbers – not remotely historical – were still "facts" and not protected by copyright. Additionally, *Feist* and other copyright decisions expressly hold that *biographical* facts are also "facts" exempt from protection.

Louis Petrich, Elizabeth Schilken and Loralee Sundra of Ballard Spahr, Los Angeles, together with Scott Ponce of Holland & Knight, Miami, represented defendants. Plaintiff was represented by Robert Thornburg and Stephenie Vazquez of Allen, Dyer, Doppelt + Gilchrist, P.A. of Miami.

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Second Circuit Rules for Facebook in Landmark Section 230 Immunity Case

Facebook Did Not Provide "Material Support" for Hamas

By Jane Marie Russell

In recent years, Facebook has faced many claims, in court, in the media, and in the political arena for facilitating the publishing of dangerous, violent, and/or false information by its users and not doing enough to prevent such dissemination. Passed in 1996, 47 U.S.C. § 230(c)(1) ("Section 230") of the Communications Decency Act (the "CDA") has been used as an affirmative defense for interactive computer services facing civil liability for allowing problematic content to be published on their websites. The CDA was originally passed to regulate the publishing of pornography on the Internet, especially those targeting children, and Section 230 was meant to be a compromise to provide immunity for publishers who may be taking an active role in regulating obscene materials online but should not be held liable where third-party obscene content still managed to be published, despite best efforts to the contrary.

That immunity has extended to social media sites in recent years involving information beyond pornography, and the extent of that scope is being contested in federal courts today, as sites like Facebook not only publish third-party information, but also use artificial intelligence through algorithms to disseminate, promote, and connect information and users. This past summer, the Second Circuit Court of Appeals weighed in on the scope of Section 230, issuing a decisive victory for immunity of social media sites in Force v. Facebook, Inc., 934 F. 3d 53 (2d Cir. July 31, 2019).

Plaintiffs claimed that Facebook's failure to remove all "openly maintained" accounts of Hamas leaders and Facebook's algorithms that suggest content to users allowed Hamas to both encourage and celebrate its attacks on the website.

In July 2016, a group of representatives of deceased U.S. citizen victims of attacks by the Palestinian militant group Hamas filed suit against Facebook in federal court in New York. Plaintiffs alleged that Facebook should be held liable for supporting Hamas in its 2014 through 2016 attacks in Israel. Plaintiffs, who included one attack victim and the remainder as representatives of deceased U.S. citizen victims of attacks living in Israel, claimed that Facebook's failure to remove all "openly maintained" accounts of Hamas leaders and Facebook's algorithms that suggest content to users allowed Hamas to both encourage and celebrate its attacks on the website. Plaintiffs argued that Facebook should face civil liability for aiding and abetting international terrorism committed by Hamas, in addition to conspiring with Hamas in furtherance of and providing material support to a terrorist group under 18 U.S.C. Section 2333.

Second Circuit's Analysis

Adopting a broad construction of Section 230, the Second Circuit evaluated whether Facebook should be entitled to immunity to Plaintiffs' claims. Section 230 provides immunity for online publishers where: (1) the defendant is a provider of an interactive computer service as defined by §230(f)(2); (2) the defendant is the publisher of the actionable information; and (3) that information is provided by a third party "information content provider," § 230(f)(3) that is different from the defendant interactive computer service.

Under this analysis, Plaintiffs and Facebook stipulated that Facebook is a "provider of an 'internet computer service.'" *Force*, No. 18-397 at 29. Their arguments diverged on the second and third prongs of the Section 230 analysis.

On the second prong, the Second Circuit concluded that Facebook is the "publisher", not the speaker of the Hamas information. While the definition of a "publisher" is not included in Section 230, the Second Circuit looked to the term's plain meaning as "one that makes public." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (citing Webster's Third International Dictionary 1837 (1981). By disseminating information published by its users and not deleting content posted by Hamas members, Facebook is acting as a publisher in the traditional sense of the role.

The majority dismissed Plaintiffs' argument that Facebook's use of various algorithms makes Facebook a non-publisher, because the algorithms enable Facebook to suggest content and connections to users in a way that transcends publishing.

The majority dismissed Plaintiffs' argument that Facebook's use of various algorithms makes Facebook a non-publisher, because the algorithms enable Facebook to suggest content and connections to users in a way that transcends publishing. The majority reasoned that these algorithms and the resulting connections of users to content are really an editorial extension of Facebook's role in publishing third party content in the first place. While algorithm technology was not contemplated by the drafters of Section 230 within its original scope, to deny immunity to online publishers for the use of any algorithms – as an extension of the editorial function of publishers, according to the Second Circuit – would completely change the scope and application of Section 230 today.

On the third prong, the Second Circuit concluded that Plaintiff's claims treat Facebook as only the publisher, not the information content provider, of the Hamas content. Plaintiffs argued that Facebook's various algorithms transform it from a publisher to the actual developer of Hamas's message, because the algorithms suggest Hamas content to users and connect users interested in Hamas to each other. While "development" is undefined in the CDA, the Court looked to other courts' interpretations, explaining that it means that a defendant "directly and 'materially' contributed to what made the content itself 'unlawful.'" *F.T.C. v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016). In *LeadClick Media*, the Second Circuit adopted the Ninth Circuit's "material contribution" test, which turns on whether the publisher displays the content

or takes responsibility for developing the content. The Second Circuit held that the defendant company had developed the actionable content by giving specific instructions about how to edit the published material.

In a similar case (but not adopting the material contribution test), the D.C. Circuit held that a "website's display of third-party information does not cross the line into content development." *Marshall's Locksmith Service v. Google*, 925 F.3d 1263 (D.C. Cir. 2019). In *Locksmith*, businesses submitted false location information to internet mapping services like Google, Microsoft, and Yahoo to deceive consumers as to their locations. The D.C. Circuit concluded that this translation of information from users to be displayed on the website was within the websites' role as publisher and did not transform their role into that of a developer of the content itself. Further, the websites' use of algorithms that could not distinguish between accurate and false location data shows that the algorithms themselves are "neutral" in analyzing content provided by users and do not "materially alter" the content itself.

Similarly, Facebook does not edit or alter material posted by users online, but instead enables its publishing on the site. Further, personal information that Facebook collects from users is uniform for all users (name, telephone number, email address) is not published by Facebook, and does not impact what or how material is published online. *Id*. Finally, similar to the algorithms in *Locksmith*, Facebook's algorithms are neutral in that the suggested connections are not based on Facebook's instructions, users' personal information, or the content itself. The Second Circuit concluded that the use of neutral algorithms to connect users and information is an inherent part of Facebook's role as a publisher and does not transform Facebook into a developer or material contributor of Hamas's content. The Second Circuit also dismissed Plaintiffs' claims that Facebook's efforts to eliminate "objectionable and dangerous content" should prevent Facebook from obtaining Section 230 immunity, stating that the very point of Section 230 is to protect interactive computer services against liability where they undertake such efforts, even if they are not completely effective.

Chief Judge Robert Allen Katzmann dissented from the majority, arguing that the basis of Plaintiffs' claims is not the content posted by Hamas, but instead Facebook's algorithms that further disseminate that content and grow Hamas's real-life networks by connecting users.

Dissent

Chief Judge Robert Allen Katzmann dissented from the majority, arguing that the basis of Plaintiffs' claims is not the content posted by Hamas, but instead Facebook's algorithms that further disseminate that content and grow Hamas's real-life networks by connecting users. Chief Judge Katzmann took a more skeptical view of the expansion of Section 230 to include protection for websites using algorithms that take a more active role in promoting content, advertising, and connections amongst users of similar ideologies than simply publishing content online. This active role of algorithms allows Facebook to send its own message to users, telling them that they will like other content or users. Chief Judge Katzmann issued a warning that without Congress's input in amending Section 230 or enacting new legislation, this decision

would prevent sites like Facebook from ever being held accountable for their role in disseminating dangerous information and creating real life connections with real world consequences.

Conclusion

While this case granted an influential victory for internet publishers' ability to use Section 230 as a shield against liability for the unintended consequences of its algorithms, the Dissent brings up an important point. Whether or not the CDA was passed with the growth of the Internet in mind, a law written twenty years ago cannot keep up with the ever-changing technology inherent to social media. *Force* maintains Facebook's immunity for suits involving its algorithms, but it is possible that future courts may take the immunity standard even further in immunizing websites from liability well beyond what Congress may have intended in enacting Section 230.

Jane Marie Russell is Director, Digital Counsel at Univision Communications, Inc., where she is responsible for Univision's technology and digital transactions. Prior to Univision, Ms. Russell was an Associate at Holland & Knight LLP in Miami, Florida.

Colorado Federal Court's Order Adopts Senator's Agreement to Stop Social Media Blocking—and Pay Plaintiff

By Ashley I. Kissinger

A federal district court in Colorado has entered an order that puts all public officials in the state on notice that blocking a critic from their social media pages violates the First Amendment when the blocking is based on the critic's viewpoint.

In *Landman v. Scott*, No 1:19-cv-01367 (D. Colo. filed May 13, 2019), Anne Landman, who lives in Grand Junction, Colorado, sued her state senator, Ray Scott, for blocking her from commenting on his official Facebook page and Twitter account. Landman is a longtime critic of Sen. Scott. She and two other constituents filed an ethics complaint with the Colorado Senate when Scott blocked them from commenting on his official social media pages. Scott made public statements suggesting that he had blocked these critics based on their viewpoint. The Colorado Senate dismissed the ethics complaint, and Ms. Landman filed suit in federal court asserting claims under 42 U.S.C. § 1983 and state law for violation of her free speech rights. She sought nominal damages and injunctive relief.

Scott responded to the lawsuit by filing a motion to dismiss, contending that he thought he had unblocked Ms. Landman, and all others whom he had blocked, earlier this year when another Colorado senator paid money to settle similar claims brought against him. Scott contended the case was mooted by his voluntary pre-suit actions. He also contended he had qualified immunity from the claims brought against him in his individual capacity, and Eleventh Amendment immunity from the claims brought against him in his official capacity.

While Scott's mootness contention added complexity to the case, the developing law on this subject around the country is overwhelmingly in Ms. Landman's favor.

While Scott's mootness contention added complexity to the case, the developing law on this subject around the country is overwhelmingly in Ms. Landman's favor. All of the many courts—including both federal appellate courts—to consider the issue, save one, has concluded that when a government official blocks a person based on that person's viewpoint, it is unconstitutional censorship of speech in a public forum.

On September 10, the court resolved the case with an order of dismissal that sets forth the holding of every case in this area of law. While the order recites that Sen. Scott "takes no position on the case law," it should nonetheless make clear to other public officials in Colorado that this conduct is unlawful. The order states that Sen. Scott unblocked everyone from these social media accounts; agrees to refrain from engaging in such conduct in the future; and paid Ms. Landman $25,000 in attorneys' fees and costs. It also makes clear that the court retains jurisdiction over the case should Ms. Landman file a motion to enforce the order; that the

dismissal is without prejudice to the extent Ms. Landman files any such motion; and that the attorneys fee-shifting provision of the civil rights statute applies to any such motion.

For more analysis on this issue, see "INSIGHT: Government Attorneys – Tell Your Clients They Can't Censor People on Social Media," by Ashley I. Kissinger and J. Matthew Thornton (Bloomberg BNA, Sept. 12, 2019).

Ballard Spahr is hosting a First Amendment Salon on these issues sponsored by the Floyd Abrams Institute for Freedom of Expression at Yale Law School. The by-invitation event, to be held on January 22, 2020, in Ballard Spahr's New York and Washington, D.C. offices, will feature Harvard Law Constitutional Law Professor Noah Feldman (of Trump impeachment hearings fame) and Jameel Jaffer, the lead attorney on the Twitter blocking case successfully brought against President Trump and affirmed by the Second Circuit Court of Appeals.

Ms. Landman was represented by Ashley I. Kissinger and J. Matthew Thornton of Ballard Spahr LLP in Denver, Colorado, in conjunction with Mark Silverstein and Sara R. Neel of the ACLU Foundation of Colorado. Sen. Scott was represented by Maureen Reidy Witt and Jessica Smith of Holland & Hart in Denver, Colorado.

President Trump Asks Supreme Court to Block Release of Tax Records

Claims Broad Immunity from State Criminal Prosecution While in Office

By Raymond Baldino

In November, President Trump asked the Supreme Court to quash a state grand jury subpoena seeking his tax records, arguing that he is immune from state court criminal proceedings while in office under the Supremacy Clause and Article II of the U.S. Constitution. Trump v. Cyrus Vance. The Solicitor General filed a brief in support of the President, arguing that there is no demonstrable and specific need for the tax information, but stopping short of arguing that Trump is categorically immune from criminal prosecution.

Background

In October, the Southern District of New York denied President Trump's request to block the release of his tax returns pursuant to a grand jury subpoena issued by the Manhattan District Attorney. The District Court relied primarily on *Younger* abstention that generally forecloses federal court intervention into a pending state criminal proceeding, but the court also ruled on the merits and rejected Trump's broad executive privilege claims, specifically rejecting Trump's radical claims of immunity from criminal prosecution.

In early November, the Second Circuit Court of Appeals affirmed on the merits, but disagreed with the district's court's *Younger* analysis. The Supreme Court issued a stay on November 25, 2019 and is currently reviewing the President's Petition for Cert.

Manhattan DA Cyrus Vance subpoenaed the Mazars accounting firm for the tax records of the Trump Organization. As confirmed in the Second Circuit's discussion of the subpoena, the District Attorney's office is investigating alleged instances of fraud and criminal conduct by the Trump Organization, including former Trump Organization attorney and fixer Michael Cohen's testimony to Congress that he committed tax fraud at Trump's direction and made improper campaign expenditures for which he pled guilty to. Trump brought suit in the Southern District of New York to enjoin the subpoena pursuant to his claims of executive privilege, claiming complete immunity from the subpoena until he is no longer in office.

***Younger* Abstention**

The Southern District abstained from reviewing the President's request, pursuant to the first prong of the three-part test of *Younger*, that a federal Court shall not interfere in "ongoing state criminal prosecutions." *Spring Comm'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013). The district court also determined that the subpoena satisfied the *Middlesex* test in determining *Younger*

abstention, which analyzes: (1) [whether there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims. *Falco v. Justices of the Matrimonial Parts of Supreme Ct. Suffolk Cty.*, 805 F.3d 425, 427 (2d Cir. 2015).

The Second Circuit reversed the abstention determination. The Court found that the overwhelming authority indicated that comity interests weigh in favor of not abstaining when a federal official seeks relief to pursue federal Constitutional rights, much more so when the federal official is the President, and the Constitutional questions are as novel as those presented by the Mazar's subpoena.

Executive Privilege

In finding that the President's claims of immunity lacked merit, the district court reviewed the historical record from the earliest days of the Republic dating to the trial of Aaron Burr for treason, to the Nixon tapes, as well as the three most recent memoranda from the Department of Justice on Presidential immunity from criminal prosecution. The court concluded that the President is not immune from criminal subpoena directed to a third party seeking information pertaining to the president. The Second Circuit, reviewing the same information, agreed and upheld this determination. These decisions rejected the President's claim that "no State can criminally investigate, prosecute, or indict a President while he is in office."

In particular, the Second Circuit found controlling the *Burr* and *Nixon* decisions. Both cases affirmed that the President is not immune from a subpoena that concerns third parties. The Second Circuit found unpersuasive attempts to distinguish *Nixon* on the ground that the President was not an ostensible target of the investigation in that case, given that he was an unindicted co-conspirator. In particular, the *Nixon* decision articulated that only a President's official conduct, as opposed to private conduct, is privileged. The Second Circuit also focused on the expansive role of the grand jury, which is subject to only narrow exceptions. The Second Circuit rejected the notion that the President and other third parties could escape such state investigation (as opposed to the President being arrested or indicted, etc.) pursuant to executive privilege.

In the Southern District, the President relied on the Department of Justice's Moss Memorandum, which indicates under its guidelines that a sitting president should not be subject to criminal prosecution, and which incorporates two prior memoranda, which were also analyzed by the Southern District. The District Court distinguished the Moss memorandum, noting that it is not precedential, and that it is narrowly focused on "criminal prosecution," not all aspects of the criminal process. Further, it governs *federal* prosecution, not state prosecution. The Southern District determined that the scope of the phrase "criminal proceedings" from the Moss Memorandum was meant to be relatively narrow.

Both the Southern District and Second Circuit were critical of one of the justifications offered for the claim of immunity – that it would interfere with the President's execution of his office.

As the Southern District noted, some criminal proceedings could be less intrusive than certain civil proceedings, and the President is not immune from civil proceedings. The Second Circuit noted that every recent president had released his tax returns to the public without it interfering with his office.

As the Southern District said well in its conclusion: "the Court cannot square a vision of presidential immunity that would place the president above the law with the texts of the Constitution, the historical record, the relevant case law, or even the DOJ memos on which the President relies most heavily for support." The Second Circuit appeared to fully agree.

With the President asserting the broad claims of executive privilege on appeal to the Supreme Court, it remains to be seen whether the SCOTUS will take the same view of the President's claims that seem to be at odds with the established precedent.

Raymond Baldino is an associate at Zazzali Fagella Nowak Kleinbaum & Friedman in Newark, NJ.

MLRC Forum Focuses on Technology in the Newsroom

This year's MLRC Forum (held immediately prior to the annual dinner on November 6) – entitled: "The Possibilities and Perils of Journalism Tech: Automation, AI and Disinformation in the Newsroom" – took a deep dive into technologies that have the potential to transform newsrooms and provide challenges to media lawyers.

The event, held at the Grand Hyatt, brought together three journalist that work with technology for major media companies: Tiff Fehr, Assistant Editor and Lead Developer, Interactive News desk New York Times; Christine Glancey, Deputy Standards Editor, Wall Street Journal and John Keefe, Investigations Editor, Quartz, and each gave presentations on technologies that impact the way journalists do their work.

The presentations were followed by a panel discussion that included Quartz's General Counsel, Ava Lubell, and moderator, Alexia Bedat of Klaris Law. The Forum was made possible by sponsorships from Microsoft and Prince Lobel (who have each generously supported this event for the past several years).

The first presentation, by Ms. Glancey, demonstrated how artificial intelligence (AI) and other techniques can be used to manipulate images, audio and video to create so-called "deepfakes"– videos that appear to be real, e.g., depicting public figures to be doing or saying something that never occurred. A lower-tech form of this type of deception recently entered the public discourse when a slowed-down video of a Nancy Pelosi speech – circulating on social media – made it appear that she was slurring her words, perhaps under the influence of alcohol. With the existence of such reality-distorting techniques, the take-away from this presentation was that journalists need to do basic reporting on all videos encountered during the newsgathering process, speaking with sources and authenticating the recorded content.

Ms. Fehr presented on a number of new technologies being utilized to assist reporters at the New York Times. This included technologies that allow the Times to format, organize and curate large breaking-news documents, such as the Mueller Report. Also developed by the Times was a facial recognition tool, called "Who the Hill," that allows reporters to – with the snap of a photo – identify a member of Congress. Interestingly, Ms. Fehr indicated that this technology had been offered to the Style desk for spotting celebrities at red carpet events, but those reporters felt they had no such need, apparently already knowing all the glitterati attending such events.

Mr. Keefe discussed implementations of AI in the newsroom, including the serving of "recommended stories" on news websites, the generation of leads by AI, and even the creation of simple stories by AI programming. While AI is currently being used by a few news organizations to generate basic summaries of earnings reports and sports scores, with programs designed to fill in what Keefe described as a "Mad Libs"-style template, he cautioned that AI algorithms can often misunderstand language, such as attribution of statements, in raw source materials, which could lead to misleading – and potentially libelous – stories if used more broadly.

Mr. Keefe, in his presentation, discussed a particularly interesting AI application that he had developed to track the radar locations of every police helicopter in a city (since helicopter transponder codes are public information). By training the program to search for circling helicopters – those hovering in a stationary position (and presumably near the site of a police investigation) – and alert reporters when this occurs, news organizations can home in on breaking news. AI can also be implemented to search for the proverbial needle in a haystack in searches through massive documents. Keefe gave the example of training a program to recognize what a tax return looks like, and to pull out those documents for further review by journalists.

The panel discussion that followed the presentations focused on the manner in which in-house counsel should engage with technologists. Ms. Lubell shared that she likes to keep tabs with what the technologists are working on in a non-adversarial manner, emphasizing to them that she's there to help them do journalism. She added that its important to understand enough about what the technology is doing to determine what type of outside counsel should to be retained where needed.

MLRC 2019 Annual Meeting

New Board Member Elected; MLRC Projects and Events Reviewed

The Annual Meeting of the Media Law Resource Center, Inc. was held on November 6, 2019, at the Grand Hyatt in New York.

Chair of the Board of Directors, Randy Shapiro, called the meeting to order. The first item on the agenda was the election of directors.

I. Elections of Directors

Members elected Adam Cannon of The Sun newspaper as a new director to a two-year term.

The Directors whose current terms lapsed at the 2019 Annual Meeting and whom the membership reelected for two-year terms are:

- Ted Lazarus, Google
- David McCraw, The New York Times Company
- Randy Shapiro, Bloomberg L.P.
- Regina Thomas, Verizon Media

The Directors who were elected last year and entered the second year of their two-year terms are:

- Jonathan Anschell, CBS Broadcasting, Inc.
- Lynn Carrillo, NBCUniversal
- Ben Glatstein, Microsoft
- James McLaughlin, The Washington Post
- Lynn Oberlander, Univision Communications, Inc.

Gill Phillips of the Guardian newspaper stepped down from the Board and was thanked for her service to MLRC.

II. Executive Director Report

George Freeman highlighted that MLRC should be pleased with membership levels. And noted that MLRC added media and DCS members in 2019, notwithstanding the tough media business environment.

He previewed the upcoming Annual Dinner program, noting that he originally invited several late-night talk show hosts to be featured at the Dinner. However, when that failed to come together, he put together a program featuring women journalists covering the 2020 Presidential campaign. It was noted that the topic was very well received by members. In addition, MLRC will be awarding its William J. Brennan Jr. Defense of Freedom Award to Besieged Journalists Abroad – and is honored that it will be accepted by Maria Ressa, editor of the Rappler in the Philippines; and Hatice Cengiz, fiancée of murdered Saudi journalist Jamal Khashoggi.

George noted the success of the MLRC Listserv which has over 400 subscribers and is being used primarily to ask about litigation and practice issues.

He noted that the biennial Media Law Conference will be held in 2020 at a new location - The Landsdowne Resort Hotel in Leesburg, Virginia. The dates for the conference are Sept. 30 to Oct. 2. He also noted that 2020 will be the 40th Anniversary of MLRC – and that would be marked at the conference. Planning for the conference will begin tomorrow (Nov. 7th) with a planning meeting, hosted by Dow Jones, where all members are invited to share ideas.

George also gave an update on a new public service advertising initiative – the goal of which is to respond to the hostile attitude of the Trump Administration toward the press. The initiative was started last year with financial support from a consortium of organizations, including MLRC, RCFP, CPJ, and PEN. CPJ and RCFP took over the leadership of the effort. MLRC will continue to provide some financial support to what was noted is an important effort. The campaign is set to launch on Nov. 6 with a public service ad touting the importance of the public's right to receive news and information.

George noted that MLRC's finances in 2019 were boosted by renting out its excess office space. Three offices are now rented by the Editorial Freelancers Association; and two, by former NYS Senator Tom Duane.

III. Report on Digital Conference, Forum, and 50-State Surveys

Staff Attorney Michael Norwick thanked the many members who prepare the chapters for MLRC's three Survey books, and also thanked administrative assistant Jill Seiden for her work in facilitating publication. He highlighted that the current publication contract with Lexis will terminate in 2020 and that George Freeman and Jeff Hermes will review the relationship.

He recapped the program for the Nov. 6 Forum on The Possibilities and Perils of Journalism Tech: Automation, AI and Disinformation in the Newsroom, which would include expert presentations on detecting "deepfakes" and counseling media clients on using AI in reporting.

Mr. Norwick noted the success of the 2019 digital conference with an increase of attendance of about 20% over the prior year. He attributed the recent success to (1) the move to San Francisco; and (2) the conference's focus on new regulation which are of great concern to the lawyers for digital platforms that attend the conference. Mr. Norwick also gave an update on plans for MLRC's 2020 Digital Media Conference, and indicated that regulation of platforms

will continue to dominate the agenda. He indicated that sessions were already being planned to cover: (1) California Consumer Privacy Act; (2) Political Advertising; (3) Cross-Border Takedown Demands from Foreign Governments; and (4) the Implications of the 9th Circuit's recent decision in *Hi-Q* on enforcement of the Computer Fraud and Abuse Act.

IV. MLRC International Conferences

Deputy Director Dave Heller announced that MLRC had an extremely successful conference in London in September, bookended by two terrific sessions – starting with US Supreme Court Justice Stephen Breyer and ending with a mock trial of a Julian Assange-like defendant. In between, the conference featured a series of topical sessions, from protecting whistleblowers to regulating online platforms. He thanked Bloomberg and Hiscox for their hospitality at their receptions and all the other sponsors of the MLRC Conference.

MLRC held its European Media Lawyers Conference in Berlin in June 2019, with approximately 50 participants, including many in-house lawyers from German media companies. He noted that the conference is an effort to build bridges to non-member lawyers in Europe, to strengthen ties with current European members, grow the membership, and share expertise across borders. The conference is not advertised to the entire membership so as not to compete with the London Conference. MLRC invites members of its Boards, International Law Committee and other members focused on international law issues to participate. MLRC is planning a June 2020 meeting in Amsterdam with the assistance of MLRC's three members in the Netherlands to be hosted at Google's offices in the city.

MLRC's Latin American Law Conference was held on March 11 in Miami. He noted it's a unique event that typically includes lawyers from Argentina, Brazil, Colombia, and Mexico and discussion of press freedom and practical business issues. The 2020 Conference will be held on March 9 at the University of Miami.

VI. Report on Entertainment Law Conference; Northern California Initiatives; and Knight Grant

Deputy Director Jeff Hermes reported on the MLRC Entertainment Law Conference coming up on January 16, 2020. The conference will be at a new space at Southwestern Law School. It will include sessions on 1) Hollywood and the Supreme Court, including discussion of the Allen v. Cooper, Comcast v. NAAAOM, and Iancu v. Brunetti cases; 2) Life Rights in the U.S. and Abroad; 3) Social Media in Crisis; and 4) Making Sense of a Shifting Media Landscape.

Mr. Hermes gave an update on Northern California, announcing that the call series for in-house attorneys at tech companies has returned after the summer break for its 2019-2020 season. Recent topics have included a Ninth Circuit review and recent cases from Europe and India involving global content removal orders.

He also gave an update on the media law for journalists programs being done under the Knight Foundation grant. The MLRC Institute presented five full programs this year in coordination

with Knight, three at Knight-sponsored journalism conferences and two in Northern California for regional journalists. An additional copyright session in Brooklyn was presented under the MLRC Institute umbrella. The current grant ends in early 2020, but we expect that it will be extended to accommodate a third season of training sessions in the summer of 2020. The MLRC 501(c)(6) entity continues to receive compensation from the MLRC Institute 501(c)(3) entity for MLRC staff time spent on the Knight sessions.

As to the MLRC Survey Books, he noted that he and George Freeman will be reviewing the publication agreement and will make recommendations in 2020 on whether and how to proceed. The books have been performing adequately under Lexis' oversight, but we are still not seeing the returns we expected on the e-book versions of the volumes or a significant expansion of sales of the Employment volume – both of which were specific areas with which we were hoping Lexis could assist.

VII. Report on MLRC Website and MediaLawDaily and Revised LawLetter

Production Manager Jake Wunsch reported that the Daily remains the most popular publication with its updates on media law, policy and business issues. The monthly LawLetter has been updated to include several new popular features: 10 Questions to a Media Lawyer; Letter to a Younger Media Lawyer; and Roundtables on hot topics, such as the Sandmann libel case; Led Zeppelin music copyright case; and the indictment of Julian Assange.

Mr. Wunsch is in the process of vetting vendor proposals to revamp the MLRC website and once a developer is selected he will work with the Website Advisory Group for assistance going forward.

VIII. Defense Counsel Section Report

Outgoing DCS President Jay Brown reported on the work of MLRC's committees (set out in detail in the DCS Committees Report), highlighting the work of the newest committees: Insurance, Criminal Law, and Data Privacy. He provided an update on DCS leadership, with Rob Balin to become President, Toby Butterfield to join the DCS Board as Treasurer, and Jay to become Emeritus. George Freeman thanked Jay and the entire Executive Committee for their excellent work in overseeing all the committees and their projects.

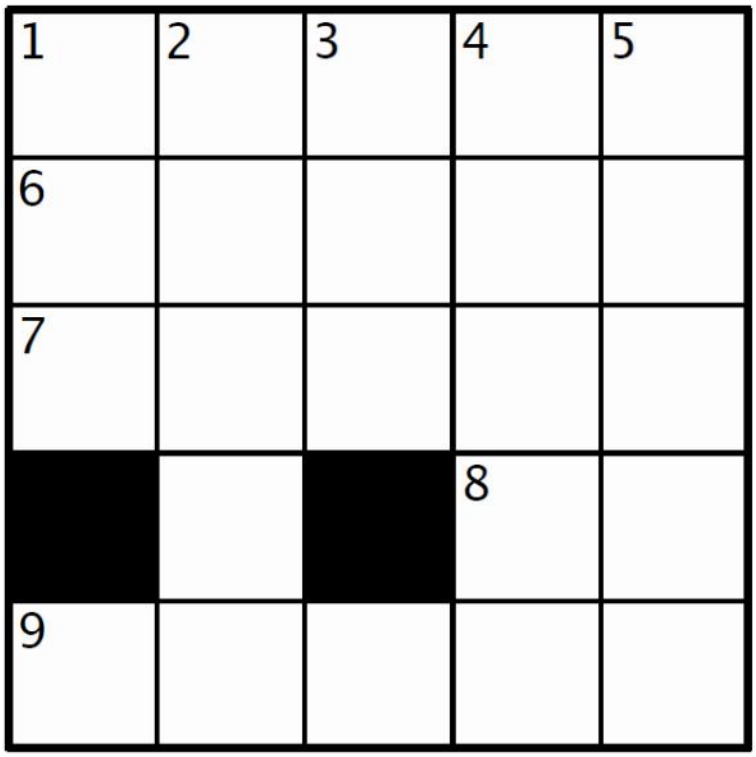
IX. Finance Committee Report

George Freeman delivered the Finance Committee report on behalf of Regina Thomas. He referred to the Statement of Financial Position and noted that MLRC's finances are sound.

Conclusion

There being no further business, the 2019 Annual Meeting concluded.

MLRC Mini-Crossword & Last Month's Answers



ACROSS
1. Defamation and invasion of privacy, for example
6. Greeting in Maui
7. Recorded defamation
8. Salacious faux memoir "Coffee, Tea or ____?"
9. Branzburg adversary

DOWN
1. Former Soviet World Chess Champion
2. Former Twins hitter Tony
3. Lowe or Gronkowski
4. Subject or topic of an article
5. Ad department's goal

W	A	L	T	E	R	S				T	O	W	E	L
I	G	O	T	T	H	I	S			M	I	A	M	I
N	E	W	S	W	O	M	E	N		I	L	I	A	N
D	I	S				B	L	Y				T	I	E
Y	S	T	A	D		A	F	C		S	C	A	L	A
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M	E	T	I	E	R				E	T	T	A	S	
E	T	H	O	S		P	B	S		E	O	M	E	R
N	H	L				A	L	T				B	L	U
T	A	E	B	O		I	D	A	B	W	E	L	L	S
O	N	E	O	N			G	R	I	E	V	E	A	T
S	E	N	S	E				R	O	B	E	R	T	S