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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through October 25, 2017

ACCESS

INTERNATIONAL

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER
WEDNESDAY, NOVEMBER 8, 2017

Trump and the Press:
A Conversation with Former Presidential Press Secretaries

Ari Fleischer
White House Press Secretary for President George W. Bush

Joe Lockhart
White House Press Secretary for President Bill Clinton

Dana Perino
White House Press Secretary for President George W. Bush

and

Mark McKinnon
Co-Executive Producer,
"**THE CIRCUS: INSIDE THE GREATEST POLITICAL SHOW ON EARTH**"
A Showtime television documentary about the 2016 presidential campaign

Moderated by:
Katy Tur
Anchor, MSNBC Live

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

Dinner at 7:30 P.M.

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

RSVP by Friday, October 20, 2017
Business Attire

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER — WEDNESDAY, NOVEMBER 8, 2017

RSVP for Dinner by Friday, October 20, 2017

Reservations are not refundable for cancellations received after Monday, October 30, 2017

Firm/Organization: _____

Contact Person: _____

Address: _____

_____

Phone: _____ Fax: _____

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Please reserve: ____ Single seat(s) at $495 each

____ Table(s) for 10 at $4,950 each

____ Table(s) for 11 at $5,445 each

____ Table(s) for 12 at $5,940 each

Amount Enclosed for Dinner Reservations: $ _____

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If you prefer to pay by credit card please go to our website, www.medialaw.org, and click on MRLC Annual Dinner. Please note that online payments will be 2.9% higher to cover credit card fees.

Dietary restrictions/requests: _____

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

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Thursday, November 9, 2017

Family style lunch will be served

12:00 NOON to 2:00 P.M.

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

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MLRC
DEFENSE COUNSEL SECTION

2017 ANNUAL MEETING

$75.00 per person includes lunch.

To reserve your seat and pay by credit card
go to www.medialaw.org and click on DCS Annual Meeting

— OR—

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Payment enclosed @ $75.00 per person: _____

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

Firm Name: _____

Address: _____

Phone: _____ Fax: _____

Please list names of individuals attending below (print clearly)

Name: _____ E-mail: _____

Name: _____ E-mail: _____

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Name: _____ E-mail: _____

Name: _____ E-mail: _____

Reservations are not refundable for cancellations received after Friday, November 3, 2017.

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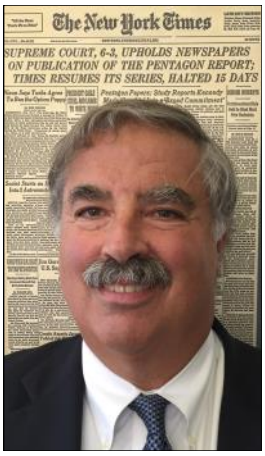
From the Executive Director's Desk

Q&A: MLRC Offers an Affordable Way to Train Journalists

Editor's note: This month's Executive Director's column is the transcript of an interview of George Freeman by James Warren, chief media writer for the Poynter Institute, as published in his blog/column. It deals with the state of the MLRC, the changes and recent challenges in media law, the goals of the MLRC Institute's workshops and the recent libel case filed by Bill O'Reilly. It occurred soon after Warren, former Managing Editor of the Chicago Tribune and former Washington Bureau Chief of the Tribune and The New York Daily News, participated in the Editorial Roundtable at the recent Media Law Workshop presented by the MLRC Institute in Chicago.

So what is the center?


The New York Times
SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS

George Freeman

The MLRC was founded as the Libel Defense Resource Center in 1980. At about the turn of the century, in recognition that its work entailed all media law, far more than just libel, it changed its name to what it is today. There are eight people on our staff, half lawyers. We are a non-profit trade association whose mission is to support its media company members and their law firms in legal matters. To that end, we put on numerous conferences, including one last month in London focusing on both American and European media law (for 240 lawyers, half from each side of the pond), an entertainment law conference in L.A., a digital law conference in San Francisco and so on. We distribute a daily newsletter about all things media law related, a monthly law letter, quarterly reports with longer articles and annual 50 state surveys of media law topics. We organize policy initiatives and have 18 substantive committees where members can discuss current developments of common interest and can network.

How are you different from other groups?

We are an organization of lawyers and we focus on media law. (Members cannot represent plaintiffs in defamation cases.) Although RCFP does a lot of great legal work, they are, at bottom, an organization of journalists. And the Committee to Protect Journalists' main focus is on journalists' freedoms abroad. I should emphasize that lately we are working very closely with those and other groups to head an effort to rebut the administration's offensive against the press and to better explain to the public how and why the media and the First Amendment protects all of us.

How does funding work and who are your members?

We are a membership organization. As such we are primarily funded by annual dues from our members. They include over 125 media companies from ABC to Yahoo! and about 200 law

(Continued on page 8)

Media Law for Journalists was held last month at the Chicago Tribune.

(Continued from page 7)

firms who work in the media law space. We are currently trying to grow our digital and international membership, though we already do count as members most of the larger digital platforms and digital news companies. Our secondary funding source is our annual dinner, which happens to be this month in New York City and will feature a program of Bush and Clinton press secretaries discussing Trump's relationship with the press. Last year our speakers were Dan Ellsberg and Edward Snowden (by Skype).

Who attended the Chicago gathering?

We had over 100 attendees, a combination of young people, even students, entering the profession and seeking journalistic jobs, freelancers and bloggers, and reporters and editors at small community newspapers and websites. Our idea was that these days fewer and fewer journalists work for large enterprises like the Tribune or Times, but more and more work on their own as freelancers or documentarians or on small websites, none of which have access to an in-house attorney or a lawyer on retainer. So we felt these folks could really use a day of basic legal training. Our expert faculty is MLRC staff and the top media lawyers in the city we're in. We've been aided by a grant from the MacArthur Foundation and sponsorship of the Mutual Insurance Company. Chicago was our seventh workshop. We had 200 attendees in New York and between 65-85 in Boston, D.C., Miami, L.A. and San Francisco.

What are the biggest changes in the press and the law in recent years?

There really have been two major revolutions in the media in the past decade, affecting media law in different ways. First, of course, is the internet and the growth of digital news platforms.

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That has led to a greater importance of copyright and intellectual property law and unique digital law issues. One consequence of digital growth has been the financial fragility of the traditional media, leading to a decrease in legal resources, among other frailties. In a sense our workshops are a response to both those trends.

But really, the biggest change in the media law environment since I started at the Times in 1981 is the strengthening of First Amendment law and greater protection of the media. In the 1980s I had to go to court once or twice a week to argue why a courtroom should not be closed to the press and public or why a filing should not be sealed; today that's no longer an issue — almost all judges recognize that the judicial process is presumptively open. Likewise, at least until this year, the number of libel suits filed against the mainstream media is way down since the '80s and '90s. So, in general, the media's legal position has gotten stronger through the past decades.

Freeman talks libel and privacy

What tend to be the big issues at these gatherings?

I've found that, more than anything, our audiences are really appreciative of our presenting these workshops. They know that the business and the law have gotten more complex, that they are busier with the 24/7 news cycle, that there's less resources for lawyers and training, but, at the same time, that they need to know the law and how to keep out of legal trouble.

So while our evaluations show that our audiences find the workshops interesting and educational, their first response is how badly needed it is. And they also appreciate the price: $20 for breakfast, lunch and a full day of programs from top legal experts.

Different people get the most value out of different sessions, but everyone seems to realize the importance of the libel and invasion of privacy sessions to ensure avoiding getting sued; many like the session on FOIA which teaches them how to get government documents they are entitled to; and the internet folks value the sessions on copyright and digital law.

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What's the biggest challenge today?

I think the biggest challenge — unprecedented, in my view — is the daily bashing and minimizing of the media by the president. Although almost all of it is — in his words — fake news, it has taken a toll. And if the credibility of the media is lessened, not only is that terrible for the media and for our democracy, but it has legal ramifications as well. Judges and juries certainly are influenced by public opinion.

The recent increase in libel filings and a few recent huge results in favor of plaintiffs against the media —such as the over $200 million settlement by ABC in the "pink slime" case — may well be affected by Trump's anti-media rants and offensive. That and the threat that this Administration, unlike any in our history, might prosecute a reporter or media organization for publishing national security information it legally obtains are the biggest challenges we face. And I don't see much affect or influence of the huge Hulk Hogan/Gawker result: It was a sex tape case and, as such, sui generis and without much impact on other more usual issues and situations.

Finally, this: Bill O'Reilly on Friday sued a former New Jersey politician whose Facebook posting detailed allegations made by the politician's ex-girlfriend against O'Reilly. The ex-girlfriend was seemingly bound by a non-disclosure agreement. What do you think?

I think it's extremely unlikely that O'Reilly can win — similar to my belief that Harvey Weinstein's threat to sue the Times for libel was downright laughable. A few points:

The fact that this was a Facebook post makes it no different than if it were a newspaper report. Libel law is the same online or in print. The NDA (non-disclosure agreement between the woman, a former Fox employee, and O'Reilly) doesn't matter. O'Reilly may have a good contract case against the ex- girlfriend who probably broke her nondisclosure agreement , but that shouldn't affect his defamation suit against (former politician Michael) Panter, who is not a party, I assume, to the NDA.

Assuming Panter learned of the harrassment from his ex, and there was no clear reason not to believe her, how can O'Reilly prove that Panter had "serious doubts as to the truth," the standard O'Reilly, as a public figure, must meet. Seems highly improbable.

Finally, why would O'Reilly want there to be a long public saga, with discovery and evidence in public, about what he did to this, and possibly other, women? Seems unwise.

Federal Court Rejects Timber Company's RICO and Defamation Claims Against Environmental Advocates

By Lance Koonce and Lisa Zycherman

In a case brought by Resolute Forest Products, Inc., a timber conglomerate, against Greenpeace, Stand, and others, saying the nonprofits fraudulently profited from donations based on false information about Resolute, including claims for violation of federal RICO laws as well as state law claims including defamation, racketeering, conspiracy, and tortious interference, the U.S. District Court for the Northern District of California, Judge Jon Tigar, dismissed the action, in its entirety, with leave to amend. *Resolute Forest Products v. Greenpeace at al.*, (Oct. 16, 2017).

The deployment of civil RICO, with its threat of treble damages – which one judge has called a "thermonuclear" remedy – against speech is a very troubling development. Since the Resolute case was filed, plaintiffs have brought three other defamation/RICO actions, including two more against Greenpeace.

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Resolute's action, which has been widely condemned as "a textbook SLAPP suit," alleged the defendants spread materially false accusations about the impact of the company's operations on the Canadian boreal forest, indigenous people, the woodland caribou and climate change, via fabricated evidence, threats and cyberattacks. The company said the campaign targeted its customers and cost it millions of dollars' worth of business, while intentionally "emotionalizing" issues and aiding in Greenpeace's fundraising efforts. The defendants urged the court to throw out Resolute's racketeering suit over its anti-logging campaign, saying the plaintiff had mischaracterized prototypical environmental advocacy as predicate criminal acts of mail and wire fraud under RICO, where the speech activity at most might support defamation claims, but here those defamation claims were barred on First Amendment and other grounds.

The court granted the defendants' Rule 12(b)(6) motions in full. Despite Resolute's attempt to make its RICO claims the focus of its case, the court first addressed the defamation count, holding that Resolute, a limited purpose public figure, had failed to plausibly plead that defendants acted with actual malice. The court also held that many of the statements were shielded by the First Amendment as not provably false, statements of opinion, and/or "obviously emphatic" language.

Noting that many of the statements at issue concerned matters of scientific debate, the court concluded "[t]he academy, and not the courthouse, is the appropriate place to resolve scientific

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disagreements of this kind." Greenpeace had argued that challenged statements from its "Resolute: Forest Destroyer" campaign were constitutionally protected calls to action based on facts from other credible sources, like the nonprofit Forest Stewardship Council (which had pulled its eco-friendly certification for some Resolute products), as well as other scientific and governmental reporting. While Resolute had challenged the science behind assertions that its practices put caribou populations at risk or exacerbate global warming, the court concluded that "[t]he submission by Resolute of two expert declarations makes more manifest, not less, the degree to which the challenged statements are protected by the First Amendment."

The court dismissed Resolute's RICO claims because Resolute fell "far short" of the applicable heightened pleading requirements and failed to show proximate cause insofar as Resolute did not sufficiently explain how it was the victim of an alleged fundraising scheme where "the only persons who could have been defrauded were the donors who gave the money." The court thus rejected Resolute's claim that threats to boycott Resolute customers contributed to the harm, and amounted to extortion.

Noting that many of the statements at issue concerned matters of scientific debate, the court concluded "[t]he academy, and not the courthouse, is the appropriate place to resolve scientific disagreements of this kind."

The court granted the defendants' motions to strike pursuant to California's anti-SLAPP statute, finding defendants are entitled to attorneys' fees as to each state law claim. The court concluded that defendants "were involved in protected activity with respect to Resolute's state claims," on concerns regarding "environmental harm," – a "matter of public interest for the purposes of anti-SLAPP." The court did not apply the anti-SLAPP to the federal claim.

Earlier in the case, Greenpeace successfully transferred the suit from the Southern District Georgia to the Northern District of California. Resolute tried to argue venue was proper because Greenpeace activists had attended a Resolute shareholder meeting in Georgia. But the Georgia judge said that, far from presenting evidence of fraud or extortion committed there, "the allegations in the complaint, at best, support the inference that Defendants organized and held a protest in Augusta."

Defendants were joined by an amici effort brought by The Reporter's Committee for Freedom of the Press and a group of media companies and an amici group of environmental advocacy organizations.

Davis Wright Tremaine LLP attorneys Laura R. Handman, Tom Burke, Lance Koonce, and Lisa Zycherman represent Greenpeace International, Greenpeace Inc., Daniel Brindis, Amy Moas, Matthew Daggett and Rolf Skar. Karl Olson and Aaron Field of Cannata O'Toole Fickes & Almazan LLP represent Greenpeace Fund, Inc. Arthur Curley and Peter Finn of Bradley, Curley, Barrabee & Kowalski, P.C. represent STAND and Todd Paglia. Resolute is represented by Michael J. Bowe, Lyn Agre and Lauren Tabaksblat of Kasowitz Benson Torres LLP.

Court Affirms Dismissal of Defamation Suit Arising from Wrongful Arrest

By Elizabeth Seidlin-Bernstein

The U.S. Court of Appeals for the Third Circuit upheld the dismissal of a libel suit against multiple media outlets based on their reporting about the arrest of a woman who, it later became clear, had been wrongly arrested in a major drug and prostitution ring sting. Lee v. TMZ Productions Inc., et al., No. 16-2736 (3d Cir.). While the decision rested primarily on a straightforward application of New Jersey's fair report privilege, the court also affirmed on the alternative ground that the plaintiffs had not adequately pleaded actual malice – the first ruling of its kind from the Third Circuit.

Background

In late January 2014, New York Attorney General Eric Schneiderman issued a press release announcing that an undercover investigation into a drug trafficking and prostitution ring had resulted in criminal charges and the arrest of 18 people, including plaintiff Janice Lee. The Attorney General also held a press conference at which he displayed a chart with the names and photographs of the individuals who had been arrested, including Lee. According to the Attorney General, the ring had marketed "party packs" of cocaine and sexual services to out-of-town clients visiting New York for the Super Bowl.

This appears to be the first time the Third Circuit has joined the growing number of federal appellate courts to hold that a defamation plaintiff whose claims are subject to the actual malice standard must plead facts sufficient to establish fault.

The Attorney General's statements were widely reported in the media. Approximately a week later, however, Lee was released from custody, apparently the victim of a mistake in identity by law enforcement officials. She subsequently sued the Attorney General and other officials for the wrongful arrest and settled out of court. Lee and several of her family members also filed a separate suit for defamation and emotional distress in the U.S. District Court for the District of New Jersey against TMZ, the Daily News, the Korea Times New York, Your Daily Media, and All Things Crime, based on stories those media outlets had published immediately following the Attorney General's press conference.

The challenged articles ranged in tone from a neutral recitation of the Attorney General's statements to more jocular commentary about the ethnicity and age of the women who had been arrested and the timing of the bust in relation to the Super Bowl. Each of the articles referenced the Attorney General's statements and either mentioned Lee by name or included a photograph of the visual aid from the press conference that contained Lee's name and image. The trial court granted the defendants' motions to dismiss the complaint for failure to state a claim,

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holding that the articles were protected by New Jersey's fair report privilege because they all presented a "full, fair and accurate account" of the Attorney General's official statements. Lee appealed to the Third Circuit.

Court of Appeals Decision

The Third Circuit affirmed in a non-precedential opinion, agreeing with the district court that all of the challenged articles fell within New Jersey's fair report privilege. The appellate court noted that the various statements Lee's complaint identified as defamatory – references to "party packs" and targeting of Super Bowl attendees, for example – came directly from the Attorney General's press release and press conference. And, the court recognized, the fact that Lee was ultimately exonerated was irrelevant to the applicability of the privilege, because the articles in question accurately reported the information available from official sources at the time of publication. The court also held that the use of "colorful language" in some of the articles, even if "distasteful or insulting to certain readers," did not remove them from the protection of the fair report privilege.

Though the court could have disposed of the case on the basis of the fair report privilege alone, it did not stop there: It also addressed an alternative ground, pleading of actual malice, that the district court had not reached. Under New Jersey law, the actual malice standard applies to all defamation claims involving matters of public concern, even if the plaintiff is a private figure.

The Third Circuit's willingness to affirm on this alternative ground is nonetheless a promising development for media defendants.

Lee did not dispute that the criminal investigation at issue was a matter of public concern. Thus, the court held, Lee had the "heavy burden" of pleading that the media outlets knew their statements to be false or acted in reckless disregard of their truth or falsity. Lee could not meet this burden because the factual allegations in her complaint – including that the challenged articles were published "without fact-checking, without investigation, without interviewing those involved, and with no regard for accuracy" – rose at most to allegations of "no more than professional negligence."

This appears to be the first time the Third Circuit has joined the growing number of federal appellate courts to hold that a defamation plaintiff whose claims are subject to the actual malice standard must plead facts sufficient to establish fault. One other recent decision from the Third Circuit, *Soobzokov v. Lichtblau*, 664 F. App'x 163, 169 (3d Cir. 2016), affirmed the dismissal of a defamation suit against a book publisher on the basis of actual malice pleading, but in that case the plaintiff had "[t]acitly admit[ed] that he failed to plead actual malice," and instead argued that his claims did "not implicate a matter of public concern."

Now, in *Lee*, the Third Circuit has gone a step further by putting the factual allegations of the complaint to the test. Though not the resounding embrace of a more rigorous actual malice

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pleading standard seen in some of its sister circuits in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) – indeed, the *Lee* opinion does not even cite those landmark decisions – the Third Circuit's willingness to affirm on this alternative ground is nonetheless a promising development for media defendants.

Defendant-Appellee TMZ Productions Inc. was represented by Tom J. Ferber of Pryor Cashman LLP. Defendants-Appellees Daily News, L.P., Erik Badia, David Handschuh, Corky Siemaszko, and Joseph Stepansky were represented by Matthew A. Leish of Daily News, L.P. and Bruce S. Rosen of McCusker Anselmi Rosen & Carvelli. Defendant-Appellee The Korea Times New York, Inc. was represented by Jay Ward Brown and Elizabeth Seidlin-Bernstein of Ballard Spahr LLP. Defendant-Appellee Your Daily Media was represented by Garrett A. Heilman and Sean M. McChesney of Focal PLLC. Defendant-Appellee All Things Crime was represented by Jared A. Geist. Plaintiffs-Appellants Janice Lee, Bon Hyun Koo, R.J.M. K., Hong Sea Lee, and Yoon Soon Lee were represented by Michael S. Kimm and Adam Garcia of Kimm Law Firm.

Massachusetts Federal Court Dismisses 'Inventor of Email's' Defamation Suit vs. Techdirt

Articles Are Protected Opinion; Plaintiff Failed to Plausibly Allege Actual Malice

A Massachusetts federal district court last month dismissed a high-profile defamation suit filed by entrepreneur Shiva Ayyadurai against Techdirt over articles disputing his claim to be the inventor of email. *Ayyadurai v. Floor64, Inc. d/b/a Techdirt.* (Sept. 6, 2017) (Saylor, J.).

At issue were a series of 14 articles that mocked his claim in various colorful ways, including calling it "fake," "fraudulent," "a lie," and "bogus." Dismissing the complaint, the court noted that "by its nature, the question of who invented e-mail is not subject to one, and only one, 'true' answer." The dispute therefore was not capable of being proved true or false. Moreover, looking at the articles in context, it was clear they employed figurative language and hyperbole.

Ayyadurai had separately sued Gawker Media for similarly disputing his claim. That case was reportedly settled for $750,000 as part of Gawker Media's bankruptcy and settlement of the Hulk Hogan privacy judgment.

In the instant cast, plaintiff alleged that Techdirt published its articles with actual malice because it was aware of his settlement with Gawker. This allegation, however, failed to plausibly support actual malice. "A settlement," the court explained, "is not a direct reflection of the merits of a claim" and therefore "knowledge of the settlement does not establish knowledge of the falsity of the statements."

Plaintiff was represented by Charles J. Harder, Harder Mirell & Abrams. Defendants were represented by Jeffrey Pyle and Robert Bertsche, Prince Lobel Tye in Boston.

D.C. Federal Court Dismisses Russian Oligarch's Libel Suit Against Associated Press

No Actual Malice; Statements Not Actionable

The D.C. federal district court this month dismissed a Russian oligarch's libel suit against The Associated Press over an article discussing his connections to Paul Manafort, President Trump's former campaign manager now under indictment for conspiracy to launder money, being an unregistered agent for a foreign government, and other charges. *Deripaska v. Associated Press*, No. 17-00913 (D.D.C. Oct. 17, 2017) (Huvelle, J.).

The plaintiff, Oleg Deripaska, a private investor, industrialist, and one of President Putin's closest confidantes, sued alleging the article falsely implied he engaged in criminal conduct with Manafort and was part of the wider Trump-Russia campaign controversy.

AP moved to dismiss the complaint arguing the statements at issue were either not "of-and-concerning" plaintiff, protected opinion and privileged, not defamatory; and alternatively that plaintiff is a public figure who failed to plead facts to support actual malice.

Dismissing the complaint, the court had no doubt that plaintiff – who appears frequently in the media -- was a public figure for purposes of the libel suit involving 1) the controversy over Russian oligarchs acting on behalf of the Russian government; and 2) the Trump campaign's contacts with Russia. His allegation that AP omitted facts about the political situation in the Ukraine "does not come close to plausibly alleging that the AP acted with actual malice or reckless disregard for the facts."

Plaintiff's allegation that AP omitted facts about the political situation in the Ukraine "does not come close to plausibly alleging that the AP acted with actual malice or reckless disregard for the facts."

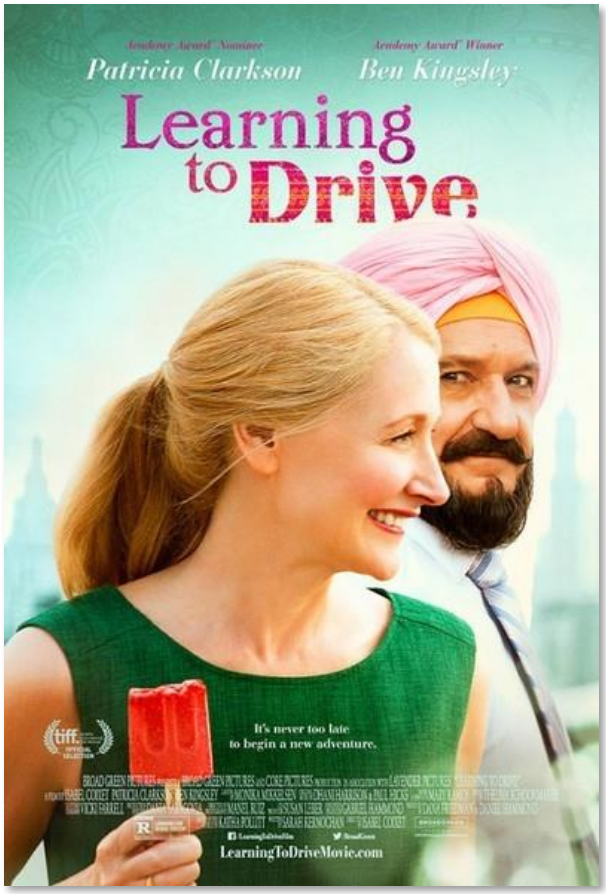
The complaint also failed on other grounds. One of the statements complained of was not defamatory. "Defamation is not made up of hints and suggestions and it cannot be merely unpleasant or offensive," the court explained. Speculation about potential investigations into Deripaska's business deals was not a verifiable statement of fact. And taken as a whole, the article could not reasonably be read to suggest that Deripaska was personally involved in the Trump campaign controversy or was accused of stealing Ukrainian assets.

The Associated Press was represented by David A. Schulz and Chad Bowman of Ballard Spahr LLP. Plaintiff was represented by Jonathan Sherman of Boies, Schiller & Flexner, LLP.

Former NYTs Columnist's Libel in Fiction Claim Survives Motion to Dismiss

People Who Know Plaintiff Could Reasonably Think Movie Character Was "Of and Concerning" Him

A New York trial court ruled this month that a slander claim against the producers of the movie "Learning to Drive" can go forward. *Cohen v. Broad Green Pictures LLC*, 2017 NY Slip Op 32230 (N.Y. Sup. Oct. 19, 2017). The court reasoned that people who know plaintiff could reasonably believe that statements in a movie trailer about an adulterous husband who dates "skanks" were about plaintiff – notwithstanding that they were made in a fictionalized movie. Moreover, at the motion to dismiss stage the court declined to find plaintiff a public figure or that the statements at issue were a matter of public concern. The producers have appealed the ruling. They also obtained an interim stay of the trial court's ruling on the ground that the trial court committed multiple errors of law.



Background

The plaintiff, Randy Cohen, is an author and humorist best known as the writer of the 'The Ethicist' column in The New York Times Magazine from 1999 and 2011. In the late 1980's, Cohen was married to magazine columnist Katha Pollit.

The movie "Learning to Drive" is loosely based on an autobiographical short story written by Pollit in 2002 for The New Yorker. The story, written after Pollit and Cohen were divorced, is about her effort to learn to drive at age 52, after breaking up with her then-boyfriend, described as "a womanizer, a liar, a cheat, a manipulator, a maniac, a psychopath." The article doesn't mention Cohen by name, but refers to him briefly and sympathetically stating "Actually, my ex and I get on very well. He's an excellent father."

Cohen sued the producers of the movie for slander over two statements that appear in a movie trailer. The first is a line uttered by the main character stating "Instead of buying a motorcycle, Daddy decided to give adultery a spin." Second, after a mention of her husband "Ted," the main character says "Where does he find these skanks?"

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"Of and Concerning"

The court accepted that the reference to adultery and skanks was defamatory and "of and concerning" plaintiff. According to the court, the movie merged into one character Pollit's hated ex-boyfriend and ex-husband and attributed all the negative characteristics to "Ted," the fictional ex-husband.

> "Persons who know plaintiff are reasonably likely to know that he and Katha Pollitt formerly were married/and have a daughter and thus reasonably likely to identify him on these bases if they view the trailer without having read the article, especially when the trailer announces that it is based on a true story. Persons who know plaintiff are not reasonably likely to know whether he carried on affairs with other women during his romantic relationship with and marriage to his former wife. Moreover, even if persons who know plaintiff read the article and view the film trailer, no allegation or documentary evidence establishes that persons who know plaintiff would find the article more believable than the trailer."

Fault

Although plaintiff had a regular column in The New York Times, published several books, and won five Emmy awards as a television writer, the court declined to hold him a public figure at the motion to dismiss stage. Defendants had included on their motion to dismiss a biography of plaintiff detailing his accomplishments, but the court found the book "unsworn" and inadmissible – or alternatively "short of demonstrating plaintiff's actions to achieve notoriety."

Regardless of plaintiff's status, the court found the complaint sufficiently pled fault by alleging that "that defendants acquired the rights to produce a film based on the article, raising the inference that defendants were aware of the article's contents, which their film and trailer themselves admit are true, and thus knew that the film and trailer departed from the truth."

Moreover, the statements about adultery and skanks were not matters of public concern in the context of a film about "the main character's personal life, her driving lessons in which she occasionally describes her former husband, without touching on any discernable issues of public interest."

Kate Bolger of Davis Wright Tremaine in New York represents defendants. Plaintiff is represented by Richard Altman and David Feige, Giskan Solotaroff & Anderson in New York.

California Appeals Court Affirms Dismissal of Actress's Publicity and Contract Claims

Creative Decisions Protected Under California's Anti-SLAPP Law

By David Aronoff and Rom Bar-Nissim

The California Court of Appeal issued a decision this month that clarified the anti-SLAPP statute and its application to filmmaking. Paz de la Huerta v. Lions Gate Entertainment Corp. et al., B271844 (Oct. 18, 2017).

As this article shall explain, the decision illustrates that:

1. Creative decisions regarding the performance of well-known performers in widely reviewed motion pictures are matters of public interest under California's anti-SLAPP statute;

2. The California Supreme Court's recent decision in *Park v. Board of Trustees of California State University*, 2 Cal. 5th 1057 (2017), and the Ninth Circuit's recent decision in *Jordan-Benel v. Universal City Studios, Inc.*, 859 F.3d 1184 (9th Cir. 2017), cannot be interpreted to stand for the proposition that claims arising from breaches of contract in connection with motion pictures and other works of entertainment can never be attacked under California's Anti-SLAPP statute;

3. The Screen Actor's Guild ("SAG") agreement authorizes using a different performer to re-dub the original performer's lines when the original performance is merely artistically unsatisfactory, although the language of the SAG provision states that dubbing is allowed "[w]hen the performer fails or is unable to meet certain requirements of the role, such as singing or the rendition of instrumental music or other similar services requiring special talent or ability other than that possessed by the performer."; and

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4. Right of publicity and state trademark claims are preempted by the Copyright Act when the use at issue solely involves a performer's dramatic performance.

Factual & Procedural History

The case concerned two incidents that occurred during the creation of the horror genre motion picture "Nurse 3D" ("the Film"): (1) the Film's lead actress, Paz de la Huerta ("Appellant") suffered a workplace injury during filming when she was accidently hit by an ambulance (the "Workplace Injury"); and (2) the Film's director and producers decided to re-record Appellant's voice-over narration parts with another actress because they considered Appellant's original performance artistically unsatisfactory (the "Overdubbing"). In total, approximately 27 out of 228 of Appellant's vocal parts in the film were overdubbed.

In 2014, the New York State Workers' Compensation Board awarded Appellant $70,000 for her Workplace Injury. In 2015, Appellant filed an action for negligence in New York state court against the filmmakers regarding her Workplace Injury, which was dismissed due to the exclusive remedy rule of workers' compensation.

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Later in 2015, Appellant sued the filmmakers in California state court for her Workplace Injury and the Overdubbing, seeking damages totaling $55 million. Plaintiff claimed that the Overdubbing was in breach of her the SAG agreement provisions incorporated by reference in the Performer's Agreement for her work on the Film, and also vitiated her consent for the use of her performance in the Film. Based on the Overdubbing, Appellant brought nine claims for relief that can be summarized as: (1) contract based claims; (2) right of publicity and state law trademark based claims; and (3) emotional distress claims ("Dubbing Claims"). Regarding her Workplace Injury, Appellant brought two breach of contract claims based on allegations that the filmmakers had violated contractual and SAG obligations to provide a safe work environment ("Workplace Injury Claims").

The filmmakers filed an Anti-SLAPP Motion under California Code of Civil Procedure § 425.16 and a Demurrer. The trial court granted the Anti-SLAPP Motion for the Dubbing Claims, finding that creative decisions regarding a motion picture were protected activity under the Anti-SLAPP Statute and Appellant had not shown a probability of prevailing on the merits because she could not show damages for any of her claims. The trial court sustained the Demurrer without leave to amend for the Workplace Injury Claims, finding Appellant's claims were barred under the exclusive remedy rule of workers' compensation.

The California Court of Appeal affirmed the trial court's rulings for the Anti-SLAPP Motion and the Demurrer.

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Anti-SLAPP

The Court found that the Dubbing Claims arose from protected activity under the anti-SLAPP statute. Appellant argued that breaches of contract are not protected activity under the California Supreme Court's recent decision in *Park v. Board of Trustees of California State University* 2 Cal. 5th 1057 (2017), which held that an employment discrimination claim does not fall under the Anti-SLAPP Statute just because denial of tenure (the wrong complained of by the plaintiff) was based on communications in connection with an official proceeding, the tenure decision making process at a public university. However, the Court disagreed, ruling:

> The court in *Park* held that an action challenging a tenure decision did not fall within the purview of the anti-SLAPP statute because a tenure decision is not a protected activity even though statements made in connection with the peer review process leading to such a decision would be protected. …[S]peech or petitioning activity does not lose its protected status under the anti-SLAPP statute if it forms the basis of a breach of contract claim; to the contrary, it falls within the statute precisely because it forms the basis for such a claim.
>
> Here, appellant's claims arise from the decision to use a voice double to rerecord lines originally read by a well-known lead actress in a widely reviewed film. That is a creative decision implicating a matter of public interest and hence within the scope of the anti-SLAPP statute.

Slip Op. at 5.

Because the publicity and trademark claims solely involved the dramatic performance of an actor as captured on film, the claims are preempted under the Copyright Act.

The Court also found that Appellant could not show a probability of prevailing on the merits. Regarding her contract-based claims, the Court found the filmmakers did not breach Appellant's Performer's Agreement or the SAG agreement and that she had not introduced evidence of recoverable damages. The Court ruled that the Performer's Agreement allowed the filmmakers to dub or simulate Appellant's voice in their sole discretion, subject to the SAG agreement. The SAG agreement authorizes re-dubbing vocal parts with the voice of another "[w]hen the performer fails or is unable to meet certain requirements of the role, such as singing or the rendition of instrumental music or other similar services requiring special talent or ability other than that possessed by the performer." The Court interpreted the examples listed after "such as" as non-exhaustive and held, as a matter of law, that the "fails or is unable to meet certain requirements of the role" condition in the SAG agreement can be triggered when a performance is merely "unsatisfactory" to the filmmakers. *See* Slip Op. at 7-8.

Regarding Appellant's right of publicity and trademark claims, the Court found that because the publicity and trademark claims solely involved the dramatic performance of an actor as

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captured on film, the claims are preempted under the Copyright Act. Additionally, since the Performer's Agreement contained a work-for-hire provision, Appellant expressly consented the use. Slip Op. 10-13.

Regarding Appellant's emotional distress claims, the Court found that Appellant proffered no evidence of emotional distress from the Second Dubbing. Slip Op. at 13-15.

Demurrer

The Court affirmed the trial court's ruling that Appellant's Workplace Injury Claims were precluded by the exclusive remedy rule of workers' compensation. While Appellant sought to argue she suffered an independent economic injury – which does not fall within the exclusive remedy rule, the Court disagreed – finding that Appellant's purported economic injury was not independent of her personal injury – like a wrongful termination claim. Appellant also argued that the Workplace Injury was an intentional tort and, therefore, exempt from the exclusive remedy rule. The Court found that Appellant was barred from making this argument under the doctrine of res judicata and the applicable statute of limitations. Slip Op. at 15-20.

Key Takeaways

In light of the decision, the key takeaways for media law practitioners are as follows.

1. Creative decisions in motion pictures involving the performance of well-known actors are matters of public interest for purposes of the anti-SLAPP statute.

A breach of contract claim pertaining to the creation of an expressive work may fall within the ambit of protection under the anti-SLAPP statute.

2. A breach of contract claim pertaining to the creation of an expressive work may fall within the ambit of protection under the anti-SLAPP statute. In this regard, the case stands in counterpoint to the controversial Ninth Circuit decision of a few months ago in *Jordan-Benel v. Universal City Studios, Inc*., 859 F.3d 1184 (9th Cir. 2017), a decision in which the Ninth Circuit incorrectly held that a "*Desny*" breach of implied-in-fact contract for the use of an idea claim regarding a motion picture could not be challenged via an Anti-SLAPP motion because "*Desny*" claims involve contracts, not creative expression.

3. The SAG agreement authorizes studios and filmmakers to manipulate an actor's performance when it is artistically unsatisfactory. The Court's interpretation of this provision is expansive and could apply with equal force to other post-production manipulations through techniques other than vocal dubbing, for example by means of computer generated imagery.

4. When a right of publicity or state trademark claim solely involves an actor's performance in a motion picture, the claim is preempted under The Copyright Act.

David Aronoff and Rom Bar-Nissim of Fox Rothschild in Los Angeles represented defendants in this case. Plaintiff was represented by Tensor Law and Aaron G. Filler.

White House Announces Possible Precursor to Stricter Local Regulation for Drone Journalism

By Charles D. Tobin

The White House has announced a new Department of Transportation pilot program for state, local and tribal governments "to test the further integration of" drones into the national airspace.

The Presidential Memorandum, issued on October 25, could lead to more flexibility for state, local and tribal governments to interfere with drone journalists' newsgathering flights, although some members of Congress eager to cut down on drone traffic have said the Trump Administration did not go far enough.

The Trump Administration has couched the new pilot program as a follow-on to the federal testing program that the Obama Administration and Congress set up in 2012. That program was a precursor to the small UAS regulation the FAA enacted last year that now permits journalists with FAA remote pilot certification to fly news missions below 400 feet. The federal testing program provided the opportunity in 2015 for journalists, for the first time, to lawfully train at the controls of drones, since at the time a full pilot's license was required under federal regulation.

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The new Presidential Memorandum calls for:

- state, local and tribal governments to partner with industry "to test within their jurisdictions the integration of civil and public UAS operations into the NAS below 200 feet", or up to 400 feet if the Secretary of Transportation decides to adjust the parameters.

- DOT and the FAA to enter into agreements "with the selected governments to establish the terms of their involvement in UAS operations within their jurisdictions."

- DOT and the FAA "to grant exemptions, authorizations, and waivers from FAA" drone regulations to conduct the testing.

The Presidential Memorandum sets out a timeframe of: 90 days for the DOT and FAA to set the program up; another 180 days for the DOT to begin entering into agreements five at a time with the state, local and tribal governments interested in participating; and another 90 days for those "to begin the integration of drones" into the airspace in their jurisdictions. The program will sunset in three years unless the Transportation Secretary extends it.

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The Presidential Memorandum falls short of authorizing new regulation by the state, local and tribal governments. But it comes in response to increasing pressure from those governments, and from some members of Congress, for the relinquishing of FAA's nearly exclusive control over the regulation drone flights.

As many newsrooms have experienced, many state, local and tribal governments have enacted drastic laws and regulations—and some have put outright bans in place—over drone flights in their region. The FAA has issued vague guidance to those governments about the limits of local authority, but it has repeatedly asserted that Congress provided the FAA with near-absolute control over the national airspace.

A federal judge in Massachusetts last month underscored the FAA's strong authority and struck down the city of Newton's ordinance banning on all drone flights under 400 feet. The judge held that federal FAA law pre-empted the city's authority. The city last week appealed that ruling.

Charles D. Tobin is with the Washington D.C. office of Ballard Spahr LLP. The firm represents a coalition of news media organizations involved in litigation and government policy development on drone regulation affecting journalists. The coalition consists of: Advance Publications, Inc.; American Broadcasting Companies, Inc.; The Associated Press; Capitol Broadcasting Co.; Gannett Co., Inc.; Getty Images (US), Inc.; Gray Television, Inc.; MPA – the Association of Magazine Media; The National Press Club; National Press Photographers Association; NBCUniversal Media, LLC; The New York Times Company; The E.W. Scripps Company; Sinclair Broadcast Group, Inc.; TEGNA, Inc.; The Washington Post.

A Legislative Battle in Long War to Access Body Camera Footage

California News Publishers Association Helps Pen Bodycam Law

By Nikki Moore

It's probably safe to say that California has among the worst laws in the country for accessing police records. It's due to a strong law enforcement lobby that, in a politically divided, overwhelmingly progressive state unluckily garners bipartisan support.

The California News Publishers Association and the state's media lawyers have long advocated to loosen the vise on these records in court and in the legislature without much success. But the advent of body cameras has brought a new focus to the access exemption that allows police to unilaterally withhold body camera footage.

Moving to Offense

The problem with California's law for accessing police records is that it requires only the release of *information*, not actual records. So even though police must disclose the "facts and circumstances" of an incident, they don't have to produce video footage that depicts those facts, just summary information. Of course, this is less than satisfying for news agencies, and flies in the face of longstanding principles supporting the public's right of access.

The problem with California's law for accessing police records is that it requires only the release of information, not actual records.

This year, after beating back numerous efforts by law enforcement in 2015 and 2016 to limit access to body camera footage and permit officers to obtain injunctions to bar the release of footage, CNPA helped pen legislation that went the other way.

The Art of Compromise

Simply settling on language to put in print was tough. We started with the MLRC Model Policy, to help us hone our purpose. The MLRC policy starts with the premise that existing laws already provide the framework for releasing body camera footage with existing privacy protections in existing state laws. The policy also encourages a focus on access, not logistics like how to store data or when to turn on cameras.

To achieve an approach similar to that advocated by the MLRC policy, we started with the idea that the state's balancing test should apply to allow access unless the public interest in nondisclosure clearly outweighs the public interest in disclosure was the most straightforward

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approach. But that was too broad for the San Francisco assembly member who authored the bill, and the ACLU, which often works in tandem with CNPA on police access issues.

After much hemming and hawing, we agreed on language that would mandate disclosure of body camera footage that depicts an incident of public concern, defined as including an officer's use of force, or where an individual believes an officer have engaged in misconduct. While some CNPA members wanted to see a broader right of access, it was necessary to narrow the scope of mandated disclosure to reach any consensus to move forward.

How the Sausage Gets Made

The first version of AB 748 was initially put into print in February. It contained innocuous language that would have required any police department adopting body cameras to also adopt a policy on public access. The bill sailed through the first house on the consent calendar. It wasn't until a week before the first hearing in the second house that CNPA, the ACLU and the author could agree on language to put into print.

Predictably, law enforcement lobbyists failed to appreciate the narrow approach and opposed the bill, in part due to procedure because the bill was "gutted and amended" after passing through the Assembly. Despite this, the bill was approved by the Senate's progressive public safety committee and was set for an appropriations hearing before a floor vote.

The advent of body cameras has brought a new focus to the access exemption that allows police to unilaterally withhold body camera footage.

But, in a political gambit that was the likely result of law enforcement lobbying, the bill was pulled for review by the judiciary committee, chaired by a privacy zealot. And that's where it currently sits, due to legislative deadlines in a two-year session. The measure could be heard as soon as January, or as late as June. Either way, it will be during an election year, making any effort to roll law enforcement exponentially tougher.

Navigating Political Reality

Flying under the radar was another body camera bill which was signed into law. AB 459 was a privacy bill that flew through the legislature without a "no" vote. It makes confidential body camera footage depicting a victim of domestic violence or a sex crime. However, based on CNPA's influence, the confidentiality only applies to the extent necessary to protect a victim's privacy, allowing for disclosure if blurring and voice distortion is used to protect a victim's identity.

Unfortunately, the new law doesn't take one step further and say that body camera footage is different from other police records, continuing the quagmire that permits an agency to produce only summary details of an incident. Arguably, though, the measure indicates a larger intent by

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the legislature to recognize that body camera footage should be treated differently from other traditional investigatory materials.

Lessons Learned

Overall, the current state of access to body camera footage in California is patchwork and based on each local police department policy. Some release heroic video footage, while more enlightened agencies, like one in Oakland, CA, produce more. Sometimes the footage ends up as evidence in court and is disclosed under court access rules. In one instance in Fresno, CA, footage was released by a police department to counter a bystander's perspective of a shooting caught on a cellphone.

But permitting police to cherry-pick footage, edit it, and have no accountability for disclosing the complete record is a recipe for corruption.

Currently, the Los Angeles Police Department's civilian oversight body is considering drafting a policy that may mandate the prompt release of police shooting videos, due largely in response to public demand. As the Los Angeles Times points out, a chief concern given credence by district attorneys is that juries will be tainted and key witness will be improperly influenced if footage is released to the public. These rote arguments don't recognize the reality that bystander and surveillance video exists, and that steps can be taken to seat a fair jury. Media advocates have long emphasized similar arguments to permit coverage of ongoing legal battles, and this will continue to be a salient point by the opposition in advancing any legislation.

In crafting a law from scratch, particularly in a state as large and diverse as California, the most flexible and politically feasible approach may be to draft minimum standards that apply statewide, which mandate the release of footage of incidents of high public concern, including those that end in the death of a civilian, where courts have consistently said the interest in disclosure is particularly great.

Additionally, requiring the release of unedited recording once some of the footage is released ensures that the police agency isn't also the editor of the public's right to know.

By legislating the floor for access, local law enforcement agencies can still craft better rules for access and remain politically accountable to demands for disclosure.

Nikki Moore is Legal Counsel at the California News Publishers Association. This is the first in a series of articles the MLRC State Legislative Committee will produce on legislative efforts on media law issues.

High Court of England & Wales: TV Formats Protected by Copyright Even if Elements Are Spontaneous or Changeable

Media companies that create TV game or quiz shows can win copyright protection for the format of those programmes in certain circumstances, the High Court in London has ruled. Banner Universal Motion Pictures Limited v. Endemol Shine Group Limited, et al. (Oct. 26, 2017). The format of such shows is capable of being classed as "a dramatic work" under UK copyright laws, according to the ruling.

Under the Copyright, Designs and Patents Act, copyright can be said to subsist in dramatic works which are “recorded,” whether in writing or otherwise. Dramatic work is not defined in the legislation other than where it states that the term includes a work of dance or mime. However, the scope of the concept of 'dramatic work' has been considered by courts in the UK and in New Zealand, most notably.

Mr Justice Snowden said that copyright protection applying to dramatic works cannot be said to subsist in a TV format "unless, as a minimum, there are a number of clearly identified features which, taken together, distinguish the show in question from others of a similar type; and that those distinguishing features are connected with each other in a coherent framework which can be repeatedly applied so as to enable the show to be reproduced in recognisable form."

The judge said that it is possible for the format of a TV game show or quiz show to qualify for copyright protection as a dramatic work "even though it is inherent in the concept of a genuine game or quiz that the playing and outcome of the game, and the questions posed and answers given in the quiz, are not known or prescribed in advance; and hence that the show will contain elements of spontaneity and events that change from episode to episode."

In his ruling, however, Mr Justice Snowden rejected claims made by Banner Universal Motion Pictures (BUMP) that the document in which the format for the TV show ‘Minute Winner’ was contained was a dramatic work in which UK copyright subsisted.

"Before this decision, the protection of TV formats under UK copyright law was a mere theoretical possibility rather than an established right," intellectual property law expert Emily Swithenbank of Pinsent Masons, the law firm behind Out-Law.com, said. "While the claimant was unsuccessful in this case, the High Court has both confirmed that copyright protection does extend to such works and provided helpful guidance as to when a TV format will qualify for protection."

"Producers and other potential rights holders will need to bear in mind the need to provide sufficient detail in the documents setting out the TV format in order to meet this new test but ensure that robust confidentiality restrictions are in place to ensure that what may still prove to be an easier claim for breach of confidence can be relied upon should such information be misused," she said.

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According to the judgment, BUMP claimed that the information about the format was misused by other TV companies, who it alleged were liable for infringement of copyright, breach of confidence and passing off.

BUMP claimed, in particular, that the format for 'Minute Winner' had been used to form the basis of a former ITV2 gameshow called 'Minute to Win It.' BUMP said the companies had sold rights to that gameshow in 70 countries around the world.

However, Mr Justice Snowden said there was "no realistic prospect of BUMP persuading a court that the contents of the Minute Winner document qualified for copyright protection."

The judge also rejected BUMP's breach of confidence claims on the basis that a Swedish court had already considered, and rejected, similar claims that BUMP had raised in that jurisdiction. This meant BUMP was barred from bringing those claims before the High Court. The judge said that he would have been "inclined" to rule in any case that "the information in the Minute Winner document was too vague and insufficiently developed to qualify for protection as confidential information under English law."

Mr Justice Snowden further determined that BUMP had "no realistic prospect of success" in its claim for passing off after considering that the businessman behind BUMP, Derek Banner, had failed to show that he had goodwill in relation to the Minute Winner name or format.

This article was first published in Outlaw.com, published by Pinsent Masons, an international law firm based in London.

Canada's New Shield Law for Confidential Sources

By Brian MacLeod Rogers, Lisa Taylor and Ryder Gilliland

Canada has a new federal law that offers significantly enhanced protections to reporters' confidential sources and recognizes the societal value in protecting the journalist-source relationship.

The *Journalistic Source Protection Act* (S.C. 2017, c. 22) became law on Wednesday, Oct. 18, after being approved unanimously by both the House of Commons and the Senate. This Act amends both the *Criminal Code* and the *Canada Evidence Act* in favour of giving considerably more weight to a journalist's promise of confidentiality to sources and sets out a process more respectful of journalists' rights.

As a first step, it protects journalists' work product from ready access by authorities through search warrants, production orders and other judicial authorizations. The Act establishes a new procedure that police must follow any time they want access to a journalist's communications or some object in their possession – not necessarily involving a confidential source. On those applications, the police will have to show there is no other reasonable way to obtain the required information and the public interest lies more with the investigation/prosecution of a crime than a journalist's right to privacy in gathering and disseminating information.

As a first step, it protects journalists' work product from ready access by authorities through search warrants, production orders and other judicial authorizations.

This goes well beyond the minimal protections imposed by the Supreme Court of Canada in earlier cases involving search warrants against the media, such as *CBC v. Lessard*, [1991] 3 SCR 42. It also represents a crucial practical safeguard that will deter police from regarding journalists as easy targets.

In the past, most applications for warrants or production orders to obtain information from journalists were made before a justice of the peace, a lower level court official. Recent evidence of practices in Quebec have shown that virtually all warrants against journalists were obtained in this way, and almost all applications were granted, and without any special conditions. Indeed, it was the revelations in Quebec that gave the impetus to the present

However, the Act makes a radical change and requires all such applications to be made to superior court judge. This takes them out of the normal process relied on by police and emphasizes that these orders should be considered exceptional. Unfortunately, these applications can still be made ex parte, without notice to the journalist, although a judge can appoint a "special advocate" to address issues of freedom of the press.

If police are successful in obtaining the warrant and executing it, the materials obtained must be put under court seal and notice given to the journalist, who then has 10 days to argue that the information identifies a journalistic source. If so, the police must show that:

1. The information can't be produced in evidence by any other reasonable means; and
2. The public interest in administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source, with regard to the importance of

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the information to a central issue, freedom of the press and the impact of disclosure on the source and journalist.

This reverses the present onus on a journalist to meet the four-part Wigmore test for protecting confidential communications, as upheld by the Supreme Court of Canada in *R. v. National Post*, 2010 SCC 16. In addition, even in cases where police are able to convince the court to allow disclosure, the judge may impose conditions to protect the identity of the source.

This same approach must be followed for any order during a case that would require disclosure of a confidential source where the Canada Evidence Act applies. This includes all prosecutions under the Criminal Code and any other proceedings before a court, tribunal or board that is under federal jurisdiction. However, it has no application to the vast majority of civil proceedings, which take place under provincial laws and process. Hopefully, the provinces and territories will be pushed to consider similar provisions, and the new law will help persuade judges of the need to protect sources under the common law.

To qualify for protection under the new law as a "journalist," a person must do journalism as their "main occupation", rather than as a sideline (like a chef who writes a weekly food column), and to contribute directly, whether regularly or occasionally. They must also receive some form of "consideration" for producing information for "dissemination by the media." While not defined and open to interpretation, this term is generally regarded as referring to mainstream news media, as opposed to a solo blogger.

While this will become clearer through judicial interpretation over the coming years, freelancers and others who maintain a side hustle (or two, or three) to pay the rent may fall outside the law's protection. But those tasked with drafting the new law were apparently concerned that, if they defined "journalist" too broadly, a shady organization would be able to use the law to protect its work from police scrutiny. Similarly, the protections against investigative orders do not apply where the journalist is accused of the criminal offence under investigation.

The law will undoubtedly make it easier for investigative journalists to do their work, but protecting journalists is not its primary purpose. Ultimately, it is the confidential source who is protected here. Senator Claude Carignan, the Conservative senator who originally proposed the private member's bill in November 2016, says the new law will allow whistleblowers more confidence when they take the risk of revealing vital information about matters of public interest.

Much credit for the new law must be given to a number of lawyers and journalists organizations which kept the pressure on for a dramatic change to Canada's weak protections for journalists and their sources. The Chamberland Commission of Inquiry on the Protection of the Confidentiality of Journalistic Sources in Quebec (https://www.cepcsj.gouv.qc.ca/accueil.html) has revealed just how far police and other authorities were willing to go to uncover journalists' sources and clamp down on whistleblowers.

Prof. Lisa Taylor teaches media law and ethics in the School of Journalism, Ryerson University. Media lawyers Brian MacLeod Rogers and Ryder Gilliland are adjunct professors at Ryerson.

Ten Questions to a Media Lawyer: Ashley Messenger

Ashley Messenger is Senior Associate General Counsel at NPR in Washington D.C. If you'd like to be profiled in this series, write us: medialaw@medialaw.org.

1. How'd you get into media law? What was your first job?

I had a bumpy start. In law school, I was a research assistant to Ben Stein, and I continued working for him after I graduated. But I didn't want to stay in L.A., so I moved to Albuquerque, N.M. I had to take the bar exam there, so I temporarily went to work at a radio station selling ads to make money until I passed the bar. I was a terrible salesperson and was fired — but the program manager hired me back as an on-air talk show host because he liked my ideas. Around the same time, I met a guy who happened to be one of the guys who founded The Onion and who was starting an alt-weekly in Albuquerque. He hired me to work for him, and because it was a small start-up, I was not only the company lawyer but also wrote articles. Between these two jobs, I learned a lot about media, and my career evolved over time into more traditional legal roles.

2. What do you like most about your job? What do you like least?

I love the people and the creativity and being a part of making something great — whether it's a story or a music video or anything else.

What I like least is when I come across a situation that feels like an injustice: for example, when a reporter wants to request records that I know will be exempt under the relevant FOI law, but those records would have clearly shown something that is a matter of great public concern. I hate that I probably can't do anything to get those records.

3. What's the biggest blunder you've committed on the job?

Very, very early in my career, I got into an argument with an editor who wanted to do something unwise. It undoubtedly would have created significant legal liability. During the course of the argument, I made it clear that I was the lawyer, that I knew more about the law

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Messenger's office features a limited edition George Burns doll and loads of art

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then he did, and that his proposed plan was stupid. I eventually got my way, but the editor felt disrespected, and it became difficult to work with him. I learned that even if I'm right, I still need good relationships with the editorial staff in order to be effective. I have never again attempted to pull rank on someone; it's always a bad idea.

4. Highest court you've argued in or most high profile case?

I was a litigator for only a short time, but I did argue an appeal in the New Mexico court of appeals.

5. What's a surprising object in your office?

A limited edition collectors series George Burns doll. Number 1 of 18,000. I won the doll as a prize in the RCFP/SPLC bake-off when I was a Fellow there. Other objects in my office that are fun but perhaps less surprising include a piece of the Berlin Wall, the NPR logo made out of Pocky boxes, a Silver Gavel Award from the State Bar of New Mexico, some crystals, and a lot of art.

6. What's the first website you check in the morning?

I'm a little embarrassed to admit it, but I go to Facebook first, after I check email and text messages.

7. It's almost a cliché for lawyers to tell those contemplating law school: "Don't go." What do you think?

I tell people they should go if they can afford to go and not practice law when they get out. It's an excellent education and I think more people should go just for the educational value. But I don't think everyone should necessarily be a lawyer.

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NPR logo made of Pocky boxes and Messenger's son auditioning audio equipment.

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8. One piece of advice for someone looking to get into media law?

Understand your clients. My experience in media was important, because I understood what my clients were trying to do. It is not an academic exercise to me. Clients need to be able to implement the advice you provide, which means you need to know what will actually work in real life, what's practical.

9. What issue keeps you up at night?

The potential for reporters to get shot or killed. Two NPR journalists were killed in Afghanistan last year. It was awful. But not only do I worry about them getting killed in a war zone, I worry about them getting killed here in the US. The hostility towards the press is disconcerting, and too many people seem to be suggesting that violence is an acceptable option.

10. What would you have done if you hadn't been a lawyer?

It never occurred to me to do anything else, but maybe other possibilities would be radio host or philosophy professor. I like to engage with people. Any job that involves talking and/or abstract thinking would probably work well. I'm also very organized. I would probably be a fantastic closet designer.