Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section

Spring/ Summer 2018 — Volume 27 • No. 1

The Role of the Film Commission

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The Texas Entertainment and Sports Law section of the State Bar of Texas is comprised of more than 950 Texas-licensed attorneys practicing in the areas of film, music, art, collegiate and professional sports. The TESLAW website at ***www.teslaw.org*** *offers attorneys a chance to be listed with their focus area of practice in a publically searchable database. The TESLAW Journal is a recognized publication providing scholarly and insightful articles on the law and practice of entertainment law. Join today to be part of a collegial organization growing the practice of entertainment law in Texas and for new bar members the first year's dues are free.*

CHAIR'S REPORT

Mike Farris
Chair 2017-2018

Welcome to 2018 and the Spring issue of the *Entertainment and Sports Law Journal*, once again beautifully put together by Joel Timmer. I hope the new year is being good to all of you and that you're looking forward to exciting things in your law practice. Among those things, please be sure to calendar the three-hour CLE program the Entertainment and Sports Law Section will sponsor at the State Bar's annual meeting in Houston, on June 21. The Section's Chair-Elect Victoria Helling, working with a committee made up of Brent Turman, Dena Weaver, and Erin Rodgers, has put together an interesting program that you won't want to miss. You can find out more about it in her letter in this issue.

I want to take a moment to thank the members of the TESLAW council serving for the 2017-2018 term. You can find their names on the cover of the Journal, but you should know how hard they've worked to help promote the practice of entertainment and sports law in Texas. As President John F. Kennedy said in a 1963 speech, borrowing from the New England Council, "A rising tide lifts all boats." That not only works in the economy but also in law practice.

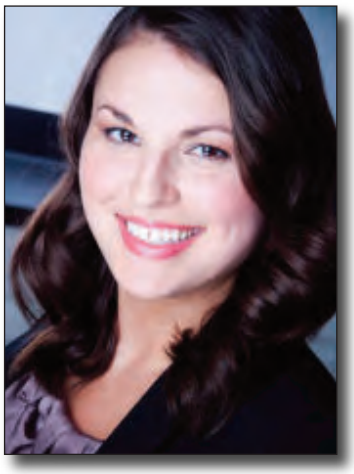
Two council members will see their terms expire this summer, and we'll be looking to add three new members, whose terms will expire in 2021. We'll vote on this just prior to the CLE on June 21, so if you have any interest in serving on the council, please let me or any other officer or council member know as soon as possible.

If you have articles to contribute to the Journal or the Newsletter, let Joel or Victoria know. And if you have suggestions on how to improve the Section or its programs, please let me hear from you. My email address is **msfarris1@att.net**.

Mike Farris

2017-2018 Chair

STATE BAR CLE LETTER



Victoria Helling
Chair Elect
TESLAW

Dear TESLAW Members,

We are very excited to offer three CLE Programs during the Texas Bar's Annual Meeting on **Thursday, June 21st** at the **Mariott Marquis** in **Houston, Texas**.

Our first program will address Best Legal Practices for advertising on Social Media and will provide 1.0 hr of Ethics Credit! Both for-profit and non-profit entities will be addressed.

Our second program will provide an overview of the 10 Biggest Gaming Decisions that impact your gaming clients and help you navigate common pitfalls.

Our third program will take you Fifty Shades deeper and analyze the Fifty Shades of Grey Litigation that was tried before a jury in Fort Worth, Texas. Plaintiff's Lawyers Mike Farris and Brent Turman will discuss the case that resulted in a $13.2 Million Judgment in their client's favor.

Register **here** to secure your seat. We look forwarding to seeing you at the **2018 State Bar of Texas Annual Meeting** on **Thursday, June 21st**.

Sincerely,

Victoria Helling

Chair Elect

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Submissions

The Texas Entertainment and Sports Law Journal publishes articles written by practitioners, law students, and others on a variety entertainment and sports law topics. Articles should be practical and scholarly to an audience of Texas lawyers practicing sports or entertainment law. Articles of varying length are considered, from one-to-two-page case summaries and other brief articles, to lengthier articles engaged in in-depth analysis of entertainment and sports law issues. Endnotes must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form. Please submit articles for consideration in Word or similar format, or direct any questions about potential article topics, to Journal Editor Joel Timmer at j.timmer@tcu.edu.

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The Role of the Film Commission

By Taylor Hardy

Taylor Hardy graduated from Texas Christian University with a B.S. in Film, TV, Digital Media and Strategic Communication. She currently works as the Film and Marketing Coordinator at the Fort Worth Film Commission and Visit Fort Worth.

The work of a film commission can often go unnoticed; however, these offices can assist filmmakers to cut through red tape and turn a script into reality. A film commission is a free resource that serves the interest of filmmakers as well as advocating for the local business and creative communities. The primary functions of a film commission are to 1) simplify the filmmaking process and 2) promote an area as a filming destination while attracting more creative talent to a city.

The Purpose

Before taking a look at what a film commission does, it's important to understand why they exist. The bottom line is that filming creates jobs and bolsters the local economy. When a production comes to town, local companies and residents benefit. Lumber companies are utilized to build sets. Hotels are filled with crew members. Off-duty police officers are hired to help with street closures. Restaurants are called on to cater large meals. The financial impact of a project on a locality reaches much further than most people would imagine. Even after a project is completed, media exposure continues to boost the local economy. As film tourism continues to grow, many people want to visit locations from their favorite movie or TV show. Travel or reality shows feature specific locations and activities which can bring in tourists. These tourists choose to spend their money at the destination which brings more business to the location.

This purpose helps to explain how film commissions are funded. Some film offices are housed under local convention and visitors' bureaus (CVB). Other independent film commissions are funded through local governments and/or private donations. Therefore, the CVB, government or financiers are investing in the economy by having an office to promote the city and bring in business. Many film commissions must actively work to demonstrate the economic impact of the projects they assist in order to keep or grow their funding.

1. Facilitating

A film commission works to make the production process simple, efficient and enjoyable for everyone involved. Often, this means that commission staff will work as a liaison to help facilitate interactions between creatives and businesses. This is helpful to filmmakers who come to a new region and may not be familiar with how the city operates. Facilitation also gives film commission staff an opportunity to educate businesses on the production process and advocate on their behalf. Film commissions have a wealth of existing partnerships and connections to draw upon, which makes them a go-to resource and good place to start with any questions a film crew might have. A film office can help filmmakers in a variety of ways, but the most common are assistance with location scouting, permitting, and potentially providing incentives.

Location Scouting

A film commission is not designed to replace the expertise or scope of work of a location manager or scout. However, for general location needs, a film commission can be a great place to start. Many film commissions use a website called *Locations Hub* (**www.locationshub.com**) to list photos of common locations and city landmarks. This database is a good place for filmmakers to start searching for ideas and allows users to filter locations based on name, category, or architectural style. If a filmmaker finds something of interest, they can contact the film office directly to learn about next steps for securing the location.

The staff at a film office are authorities on their region. If a filmmaker has a more specific location need, the film office can provide recommendations. For example, if a filmmaker is searching for a grocery store, the film commission can provide photos

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of a variety of local stores to find one that matches the director's vision. The film commission may also know which grocery stores are open to working with productions.

By creating partnerships with film-friendly businesses and locations, film offices can streamline the approval process and introduce the crew to location management to discuss project logistics. Knowledge of popular locations helps film commissions create suggestions tailored to a crew's budget and filming footprint. In some cases, a business may not be able to accommodate a full day of filming or may charge a flat fee. Other locations will need to review the script to make sure the content aligns with their brand. The film commission staff work as a third-party liaison to suggest locations that are a good fit and gather information the management will need to approve filming. This will save time for crews and location owners and help to make locking in locations easier.

Permitting

Every location is different and will have unique permitting requirements before filming. If a crew is unsure if they need a permit or documentation before filming, they should contact the local film commission.

It is common for a location to request a certificate of insurance from a production. The location owners will likely require liability coverage of $1,000,000 per occurrence and provide names of specific entities that should be insured. Documentation may also include a location release or hold harmless agreement that states that the location owners are not responsible for any damage to persons or property. These forms make the production responsible for damages and repairs that are needed if an incident occurs. A standard license agreement detailing items such as space usage and timeframes may be required so both parties understand their rights and responsibilities.

A film commission can help guide filmmakers through the permitting process and in some cases, provide sample documents for reference. In Fort Worth, a city permit is required if a production crew needs to close a street or sidewalk. This application requires a written synopsis of filming specifics, traffic plans, bathroom plans, neighbor notification letter, list of equipment, and insurance. Film commission staff are familiar with these requirements and can assist with submitting a formal request.

Incentivizing

Film incentives are a hot topic as they often influence if and where a production chooses to film. Film commissions use incentives to help entice filmmakers to their region and in turn make the production more financially viable for the producers. Incentives often take the form of a tax refund, rebate or grant. When filming in Texas, crews that meet the criteria outlined by the Texas Film Commission can apply for a rebate. Requirements include a minimum in-state spend, 60% of production days in Texas, and 70% of crew members that are Texas residents. Specifics for this program can be found on the Texas Film Commission's website. (**https://gov.texas.gov/film/page/miiip**) Filmmakers should ask their local film office about area-specific incentives.

A commission may also offer soft incentives, such as access to discounted hotel rates or location fees. For example, the Fort Worth Film Commission has strong partnerships with many area hotels and is able to help negotiate a production rate for qualifying crews. If there is availability, room rates range from $79 to $99 per night for hotels around the city, including downtown.

The DFW metroplex has additional benefits that some might overlook. These include no state income tax, lower cost-of-living, access to a strong crew base and production houses, proximity of an international airport, favorable weather conditions, etc. It's important for filmmakers to look at the big-picture when making decisions about locations and consider the unique incentives that each area can offer.

2. Promoting a Destination

Film commissions utilize several strategies to market their destination to filmmakers. Most of the outreach is focused on bringing in prospective crews, but it's also important to support a strong local film community.

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Local Engagement

A strong local film community benefits the region by creating a network of professionals, supporting jobs, and cultivating the arts. It also helps attract prospective crews because it shows that the foundation for a successful project is already in place.

Many commissions have a production database on their website. This allows local crew to list their contact information and industry credits. Then, if a production from out of the area needs to hire additional crew, they have an easy way to find candidates and reach out.

Film offices can also connect with locals through social media. Many commissions share job alerts and crew calls to help employ local crew. Posts also include behind the scenes photos, articles about industry trends, news about local productions or filmmakers, and announcements about local festivals. Posts may also promote networking opportunities like industry happy hours or screenings from local filmmakers. Many times, a commission representative will attend these events.

Often, there is an education element that the commissions promote. This could be hosting an event like a production assistant boot camp or speaker series. Many film commissions partner with local schools to increase awareness of services offered and help young filmmakers create successful projects. These connections also help students to find internships and network with film professionals.

Events

Often, film commissions will have a presence at major film festivals. For example, the Texas Association of Film Commissions host an annual networking event during Sundance Film Festival. During this event, commissioners meet with filmmakers who may have never heard of or considered filming in their region. There are major conferences that serve those in the industry and film commissions alike. These are great opportunities to network and become educated on a variety of facets. They also may generate new leads or at the very least increase awareness of the region and what it has to offer. For example, the Association of Film Commissions International hosts an annual event in Los Angeles where industry leaders such as location managers, finance executives, and production heads can connect with film commissions.

Project Pitches

Commissions also must actively pitch their region to filmmakers. This requires offices to get creative. This can be accomplished through sending marketing materials to production companies in different areas or creating pitch books with sample locations for projects that have just been greenlit.

Final Thoughts

It's important to note that every film commission works a little differently, so crews should reach out to their local representatives to learn more. The staff are a resource for filmmakers and can help in a variety of ways and prevent dead ends. Even though many residents may never interact with a film commission first-hand, these offices are working to benefit everyone in the community.

For more information about the Fort Worth Film Commission, visit **FilmFortWorth.com** or follow the office at **@filmfortworth**.

SOME THEY DO, AND SOME THEY DON'T – LITIGATION PRIVILEGE FOR PRE-LITIGATION DEMAND LETTERS IN CALIFORNIA

By Edwin F. McPherson

Edwin F. McPherson is a partner at McPherson Rane LLP in Century City, specializing in entertainment litigation, intellectual property litigation, and crisis management.

Two cases have been published by the same district of the California Court of Appeal, four years apart, that are arguably polar opposite views of the protection that pre-litigation demand letters receive under the California Civil Code Section 47 litigation privilege.[1] Coincidentally enough, both letters were written by the same attorney, Martin D. Singer.

Malin v. Singer

The first letter was so egregious that a Superior Court judge viewed it as criminal extortion, as a matter of law. The second letter was perhaps no different than demand letters that are written every day by attorneys, particularly by defamation/First Amendment practitioners. Yet, the first letter was held to be protected under the litigation privilege,[2] and the second letter was not—potentially opening a floodgate of which virtually every lawyer (and client) in the state may soon feel the adverse impact.

The first case, *Malin v. Singer*,[3] involved a pre-litigation demand letter that was sent by Singer to one of his client's partners in a consortium of restaurants and nightclubs. The letter accused the partner and other co-conspirators of misappropriating company resources for many years, hiding assets from creditors and taxing authorities, and engaging in insurance fraud. Then, the attorney takes it to the next level:

> Because [the other partner] has also received a copy of the enclosed lawsuit, I have deliberately left blank spaces in portions of the Complaint dealing with your using company resources to arrange sexual liaisons with older men such as "Uncle Jerry," Judge [name redacted from opinion, but specified in original letter], a/k/a "Dad" (see enclosed photo), and many others. When the Complaint is filed with the Los Angeles Superior Court, there will be no blanks in the pleading. My client will file the Complaint against you and your other joint conspirators unless this matter is resolved to my client's satisfaction within five (5) business days from your receipt of this Complaint . . . .[4]

Singer did include with the letter a photograph of the judge and a copy of the draft complaint. He did not identify any of the other alleged sexual partners in the draft complaint, but he did leave several blank spaces and redactions that, according to the demand letter, would be filled in before the complaint was filed. The draft complaint stated, in pertinent part:

> [O]ver the past several months, _____ has arranged through email and through Internet websites such as craigslist.org to have multiple sexual encounters with [redacted] which include _____. Based on information and belief, _____ used company resources to facilitate these rendezvous and to communicate with various [redacted] including _____, _____, and _____.[5]

After receiving the demand letter, Malin sued Singer and his client (and others) for civil extortion (based on the demand letter and draft complaint), violation of civil rights (based on alleged illegal wiretapping and computer hacking activities), and intentional and negligent infliction of emotional distress.

Singer's client ultimately did sue Malin for conversion, breach of contract, breach of fiduciary duty, accounting, and civil conspiracy. However, instead of disclosing the name of the judge, or even stating that one of the men with whom Malin allegedly engaged in the sexual encounters was a judge, as Singer threatened in his letter, the complaint that was ultimately filed alleged that Malin had misappropriated company assets to arrange and facilitate "multiple sexual encounters," and that:

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Some They Do, And Some They Don't – Litigation Privilege For Pre-Litigation Demand Letters In California

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> Over the past several months, Malin has arranged through email and through Internet websites such as craigslist.org to have multiple sexual encounters with various older men during which Malin would live out fetish role play fantasies, whi[le] playing out Malin's versions of a father/son and uncle/nephew relationship. Based on information and belief, Malin used company resources and assets embezzled from Plaintiffs to facilitate these rendezvous and to communicate with various sex partners, including a[n] older man he referred to as 'Uncle Jerry,' one he referred to as 'Dad,' and several others.[6]

Singer and his client filed an anti-SLAPP motion, claiming that everything in the letter was protected under the litigation privilege, as all of the statements were made in contemplation of litigation.[7] The trial court denied the motion, citing *Flatley v. Mauro*,[8] in which the California Supreme Court indicated that, although pre-litigation demand letters are typically protected by the litigation privilege, there is an exception (the "Flatley exception") for a demand letter that is so extreme that it is found to constitute criminal extortion as a matter of law.[9]

The trial court, in fact, determined that the letter did constitute extortion as a matter of law, explaining that the allegations of sexual misconduct were "very tangential to the causes of action in Defendants' complaint, which have to do with a business dispute and alleged misuse of company resources."[10] According to the court, the letter was "well beyond a typical demand letter,"[11] in which a party threatens to file a complaint if some sort of settlement is not reached; here, the letter threatened to reveal the names of Malin's alleged sexual partners, including a judge, and it enclosed a photograph of one of those partners. The court found that the letter "accuses or imputes to the Plaintiff some disgrace or crime or threatens to expose some secret affecting him for purposes of obtaining money."[12]

Singer and his client appealed from the denial of the Anti-SLAPP motion. The Court of Appeal, Second District, reversed the trial court, ruling that the letter did not constitute criminal extortion as a matter of law under *Flatley*.

Malin argued that the letter constituted actionable extortion because it "contained, at the very least, an extortion demand that threatened to not only embarrass [Malin] and force him to 'settle' with the Appellants on whatever terms they deemed 'reasonable,' but also to expose and embarrass various innocent third parties who had no connection whatsoever to the dispute.[13] The Court disagreed, finding that the letter did not expressly threaten to disclose Malin's alleged wrongdoings to a prosecuting agency or the public at large.[14]

The Court indicated that there were two problems with Malin's argument. First, the "secret" that would allegedly expose him and others to disgrace was "inextricably tied" to the pending complaint." Second, the Court found that, although the threatened disclosure of secrets affected third parties (his alleged sexual partners), such threat did not necessarily constitute extortion because, under Penal Code Section 519, the third party "must be a relative of the individual threatened or a member of his or her family."[15]

The *Malin* court made it clear, not only that pre-litigation demand letters are subject to, and protected by, the litigation privilege, confirming *Briggs v. Eden Council for Hope & Opportunity*,[16] but also that the litigation privilege in California was expanding as a basis for anti-SLAPP motions.

Dickinson v. Cosby

On November 21, 2017, the California Court of Appeal, Second District, published a decision entitled *Dickinson v. Cosby (Singer)*,[17] the ramifications of which could be catastrophic to the legal world. Boiled down to its essence, the case potentially puts at risk every attorney that sends a demand letter and every client for whom a demand letter is sent. Although the case arises out of a 2014 interview and an attorney's response to that interview, the facts of the case really go back to 1982.

Janice Dickinson, a reality television personality and former model, claims that she and Bill Cosby had dinner together in 1982. During the dinner, she complained to Cosby that she was having menstrual cramps. Cosby offered her a pill that he said would

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YouTubers' Fair Use Triumph...For Now?

By B. Morgan Bufkin

On August 23, 2017, YouTubers everywhere breathed a huge sigh of relief and celebrated the decision of Judge Katherine B. Forrest of the Southern District Court of New York in *Hosseinzadeh v. Klein*.[1] In her decision, Judge Forrest judicially sanctioned the popular practice of uploading "reaction videos" to YouTube as protectable fair use. But is this triumph truly the end of the matter? And did Judge Forrest correctly analyze the facts of the case presented to her?

1. How Did We Get Here?

"Reaction videos" comprise a sizeable portion of YouTube's video collection. These videos record one or more people viewing and simultaneously reviewing, critiquing, laughing, crying, and, of course, reacting to popular music videos, film clips, games, and other media. Their viewers reflecting their popularity, uploaders have created channels dedicated to the practice of recording reaction videos, such as the "REACT" channel by Fine Brothers Entertainment™.

Morgan Bufkin is a 3L at SMU Dedman School of Law, and currently works for Darrell W. Cook & Associates, P.C.. This article was inspired by her passion for copyright law and how evolving new media has impacted its application to current caselaw.

In the case decided by Judge Forrest, a popular YouTube channel's creator, Matt Hosseinzadeh, created a video called "Bold Guy." "Bold Guy" was a scripted video that starred the creator, "Matt Hoss," and a girl who he pursued. The video features cheesy, wooden dialogue and a shallow plotline, both of which merely set up the characters to perform a choreographed chase sequence.

Another YouTube channel dedicated to reaction videos, H3H3 Productions, owned by husband and wife team, Ethan and Hila Klein, included a reaction video to "Bold Guy" called "The Big, The Bold, The Beautiful." H3H3 Productions' reaction video featured the Kleins critiquing, commenting, and joking about "Bold Guy." "The Big, the Bold, the Beautiful" displayed more than half of Hosseinzadeh's original video to provide visual references to H3H3 Productions' critical points.

Hosseinzadeh, offended by H3H3 Productions' critiques, issued a takedown request to YouTube pursuant to the Digital Millennium Copyright Act against H3H3 Productions on the grounds of copyright infringement. YouTube complied with Hosseinzadeh's request and ordered H3H3 Productions to remove "The Big, the Bold, the Beautiful" from YouTube. While H3H3 Productions' hosts, the Kleins, complied with the takedown notice, in response they uploaded another video informing their viewers about the situation. In their second video, the Kleins opined that Hosseinzadeh's successful takedown request violated their free speech rights. Hosseinzadeh responded by filing a lawsuit for copyright infringement and defamation, naming both of H3H3 Productions' hosts as defendants. The Kleins countered that their use of Hosseinzadeh's video constituted permissible fair use.

2. The Court's Analysis of the Fair Use Defense

The statutory section governing the legal concept of fair use lists four governing factors.[2] In determining whether one's use of a copyrighted work constitutes fair use, those four factors must be balanced. The factors are: (1) the nature of the use, or the overall "transformative" nature of the use; (2) the nature of the original work, with fictional works pointing towards impermissible copyright infringement, while factual works favor fair use; (3) the amount and substantiality of the original work used in the new work; and (4) the new use's potential and actual market value substitution of the original work.[3]

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In reaching her decision, Judge Forrest cited and balanced these four factors. In weighing the first factor, the nature of the copyrighted work, she noted that permissible use exists when the use adds something "transformative" to the original work, for example by changing its underlying purpose and character.[4] Judge Forrest also cited precedent that mandated that any allegedly infringing use with an overall commentary or critical purpose is a transformative use, and thus weighs in favor of fair use.[5] In this case, Judge Forrest explained that the defendants' video included commentary and criticism that made the first factor weigh in favor of a finding of fair use.

As for the second factor, the court relied on precedent indicating that fictional original works should be granted greater protection from copyright infringement than factual original works.[6] Since Hosseinzadeh created a fictional original video, the court found the second factor to disfavor a finding of fair use.

The third factor—the amount and substantiality of the original work used in the new work—depends not only on how much of the original work the alleged infringers use, but also on whether the amount used reflected core, qualitative substances of the original work.[7] Here, Judge Forrest reasoned that while the defendants used most of the plaintiff's original work, this amount was necessary to fulfill the purposes of the new use: criticism and commentary. As a result, Judge Forrest deemed the third factor neutral in this case.

Finally, the court weighed the fourth factor, the potential for market value substitution and whether the new work would negatively impact the market for the original work.[8] Judge Forrest found this factor to weigh in favor of fair use due to viewers' different experiences while watching the new and original videos. Judge Forrest reasoned that the defendants' commentary and criticism transformed the original video enough to create different experiences for viewers watching the two videos.[9] Relying on case precedent, she said this transformative experience thus created no threat of substitution of the original video.[10]

Weighing all the factors, the court ultimately found for the defendants, holding that their video did not infringe the plaintiff's copyright based on the fair use doctrine.

3. Great! But Did the Court Get It Right?

H3H3 Productions, and a great portion of the YouTube community, won this round of the ongoing series of disputes between content creators and their critics. But this victory, while profoundly advantageous for those who seek to provide critical commentary online, does not necessarily signal coming victories for every critic on YouTube.

While Judge Forrest saw the defendants' video as an example of fair use, she cautioned that not all "reaction videos" should be classified as fair use. Specifically, she distinguished between permissible reaction videos showing active, purposeful commentary that create transformative viewing experiences of the featured original content from impermissible videos merely featuring passive viewers providing minimal input that fail to transform the original work's viewing experience. While this distinction may become a new standard of determining what constitutes fair use, future lawsuits with facts similar to those of *Hosseinzadeh v. Klein* will be decided on a case-by-case basis rather than using any categorical rule.

Furthermore, Judge Forrest's conclusion primarily rested on her opinion that the fourth fair use factor weighed in favor of fair use because the reaction video's commentary purpose automatically negated any threat of substituting the original work's market.[11] Yet, this may be an error—H3H3 Productions' video may have indeed have become a market substitute for the plaintiff's original video. In particular, one might argue that the market value substitution factor should be directly tied to the new video's viewership in comparison to the original video's contemporaneous total views because these statistics account for a YouTube channel's monetary value.[12] Furthermore, one might argue that the prominence of a YouTube channel, reflected by the channel's number of subscribers, should be evaluated against the prominence of the channel of the original video's creator.

First, the viewership of the videos at issue in this case highlights a significant contrast in public exposure on the online market. The total number of views of H3H3 Productions' reaction video prior to the lawsuit is unknown, but the defendants re-uploaded

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RECENT ENTERTAINMENT AND SPORTS LAW PUBLICATIONS

Compiled by ALI GHAZA

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Recent Publications

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help with her discomfort. According to Dickinson, however, the pill was actually a narcotic, which heavily sedated her. She further claims that, later the same evening, after she was drugged, Cosby raped her vaginally and anally.

Dickinson claims that she did not report the rape or the drugging when it occurred because of her fear of retaliation by Cosby, who was "a wealthy, powerful celebrity." However, she did tell some close friends about the incident at the time.

In 2002, Dickinson wrote an autobiography titled "No Lifeguard On Duty," which was to be published by HarperCollins. She disclosed the rape incident to her ghostwriter, and wanted to include it in the book. However, HarperCollins's legal department refused to allow any reference to the rape unless it could be independently corroborated. Dickinson's ghostwriter then wrote a "sanitized version of the encounter," in which Dickinson "rebuffed Cosby's sexual advances and retreated to her room." The book stated that, when Dickinson turned Cosby down, "he gave [her] the dirtiest, meanest look in the world, stepped into his suite, and slammed the door in [her] face."

In September 2002, shortly after the autobiography was published, the *New York Observer* published an interview with Dickinson about the book. The article began with a discussion of "highlights" from the book, which included Cosby telling Dickinson that she had a good singing voice, which Dickinson believed, "that is, until she didn't want to go to bed with him and he blew her off." When the interviewer asked Dickinson about the reference to Cosby in her book, she is quoted as responding, "Oh, he's so sad." She never mentioned the alleged rape, at least in the published portion of the interview.

However, in 2014, after several women had publicly come out against Bill Cosby, accusing him of drugging and raping them, Dickinson revealed to *Entertainment Tonight* that Cosby had raped her as well.

After the *Entertainment Tonight* interview was aired, many media outlets contacted Cosby's representatives, indicating that they were going to run follow-up stories, and seeking Cosby's comment. Singer, on Cosby's behalf, immediately sent almost identical demand letters to *Good Morning America* and several other media outlets that were planning to run stories about Dickinson's accusation. The demand letter started with the following:

> **CONFIDENTIAL LEGAL NOTICE**
>
> **PUBLICATION OR DISSEMINATION IS PROHIBITED**
>
> We are litigation counsel to Bill Cosby. We are writing regarding the planned Good Morning America segment interviewing Janice Dickinson regarding the false and outlandish claims she made about Mr. Cosby in an Entertainment Tonight interview, asserting that he raped her in 1982 (the 'Story'). That Story is fabricated and is an outrageous defamatory lie. In the past, Ms. Dickinson repeatedly confirmed, both in her own book and in an interview she gave to the New York Observer in 2002, that back in 1982 my client 'blew her off' after dinner because she did not sleep with him. Her new Story claiming that she had been sexually assaulted is a defamatory fabrication, and she is attempting to justify this new false Story with yet another fabrication, claiming that Mr. Cosby and his lawyers had supposedly pressured her publisher to remove the sexual assault story from her 2002 book. That never happened, just like the alleged rape never happened. Prior to broadcasting any interview of Ms. Dickinson concerning my client, you should contact HarperCollins to confirm that Ms. Dickinson is lying.[18]

Later in the letter, Singer repeated that both the rape allegation and allegation of interference with HarperCollins were false—and asserting that all of it could be confirmed by HarperCollins. He then stated the following:

> If you proceed with the planned segment with Janice Dickinson and if you disseminate her Story when you can check the facts with independent sources at HarperCollins who will provide you with facts demonstrating that the Story is false and fabricated, you will be acting recklessly and with Constitutional malice.[19]

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He then claimed that Dickinson was only making up the rape story "to bolster her fading career." He then threatened:

> If *Good Morning America* proceeds with its planned segment with Ms. Dickinson and recklessly disseminates it instead of checking available information demonstrating its falsity, all those involved will be exposed to very substantial liability. You proceed at your peril.[20]

The next day, Singer issued a press release, which was headed "STATEMENT OF MARTIN D. SINGER, ATTORNEY FOR BILL COSBY," and stated the following:

> Janice Dickinson's story accusing Bill Cosby of rape is a lie. There is a glaring contradiction between what she is claiming now for the first time and what she wrote in her own book and what she told the media back in 2002. Ms. Dickinson did an interview with the New York Observer in 2002 entitled 'Interview With a Vamp' completely contradicting her new story about Mr. Cosby. That interview a dozen years ago said 'she didn't want to go to bed with him and he blew her off.' Her publisher HarperCollins can confirm that no attorney representing Mr. Cosby tried to kill the alleged rape story (since there was no such story) or tried to prevent her from saying whatever she wanted about Bill Cosby in her book. The only story she gave 12 years ago to the media and in her autobiography was that she refused to sleep with Mr. Cosby and he blew her off. Documentary proof and Ms. Dickinson's own words show that her new story about something she now claims happened back in 1982 is a fabricated lie.[21]

Seven months later, after demanding a retraction, Dickinson sued Cosby in Superior Court, asserting causes of action for defamation, false light, and intentional infliction of emotional distress. In the complaint, she alleged that Cosby had drugged and raped her, and that she had recently disclosed this publicly. The complaint goes on to say that:

> In retaliation, Cosby, through an attorney, publicly branded her a liar and called her rape disclosure a lie with the intent and effect of revictimizing her and destroying the professional reputation she's spent decades building.[22]

Cosby filed an anti-SLAPP motion in response to the Complaint. He argued that the demand letter was a pre-litigation communication, which was protected by the absolute litigation privilege in accordance with Civil Code Section 47. He also claimed that both the demand letter and the press release constituted privileged "opinion." He further argued that there were no damages because the crux of the statements was that Dickinson was a liar, and that there was no dispute that she was a liar.

According to Cosby, the statement that she is a liar was not actionable because she was either lying about the rape or she was lying in her book and the subsequent interview about the book; one way or another, she was lying. Cosby further argued that, having already cultivated the professional reputation of a liar, she could not have been harmed by the accusation, and therefore there were no damages.

While the Anti-SLAPP motion was pending, Dickinson filed an amended complaint, adding Singer as a defendant, based upon the same demand letter and press release. Cosby and Singer filed a motion to strike the amended complaint on the ground that the Anti-SLAPP statute prohibits the amendment of a complaint while an anti-SLAPP motion is pending. The trial court granted the motion, and dismissed Singer from the suit.

The trial court ultimately granted the Anti-SLAPP motion as to the demand letter, ruling that the letter was sent in contemplation of litigation. However, the motion was denied as to the press release. Dickinson appealed both orders.

The California Court of Appeal reversed the Dickinson trial court on both orders. With respect to the dismissal of the first amended complaint, the Court determined that the rule precluding the amendment of a complaint after an anti-SLAPP motion is filed did not apply to the addition of a new party, who did not file an anti-SLAPP motion, *i.e.*, Singer, and the Court reversed the trial court's order dismissing Singer from the case.

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With respect to the anti-SLAPP motion itself, the Court first discussed the litigation privilege in the context of pre-litigation communication, noting that press releases can never be protected by the privilege. The Court went on to acknowledge that a pre-litigation demand letter may be privileged, but only "when it relates to litigation that is contemplated in good faith and under serious consideration."

The Court, citing *Edwards v. Centex Real Estate Corp.*,[23] stated that "even a threat to commence litigation will be insufficient to trigger application of the privilege if it is actually made as a means of inducing settlement of a claim, and not in good faith contemplation of a lawsuit."[24] The Court goes on to quote *Action Apartment Assn., Inc. v. City of Santa Monica*:[25] "No public policy supports extending a privilege to persons who attempt to profit from hollow threats of litigation."

The Court goes on to state that: "[w]hether litigation was contemplated in good faith and under serious consideration are questions of fact . . . . The good faith inquiry is not a question of whether the statement was made with a good faith belief in its truth, but rather, whether the statement was made with a good faith intention to bring a lawsuit." The Court then cites two cases in which the litigation privilege was extended to demand letters, one in which the attorney ultimately did commence litigation, and one in which the recipients of the demand letters "largely complied with the demand."

The Court ultimately ruled that, because the demand letter was only sent to media outlets that had not yet run the story, and because Cosby never sued any of the recipients of the letter, there was an "inference that the demand letter was not sent in connection with litigation contemplated in good faith and under serious consideration."[26] The Court found that the letter was a "bluff . . . with no intention to go through with the threat of litigation if they were uncowed. Hence the letters were, in the words of the California Supreme Court, 'hollow threats of litigation.'"[27]

The Court therefore held that Dickinson had made a *prima facie* showing that the litigation privilege did not apply, and, therefore, she had satisfied the second prong of SLAPP. Specifically, the Court stated the following:

> As the evidence supports a prima facie inference that Cosby sent the demand letter without a good faith contemplation of litigation seriously considered, Dickinson made a showing of a probability of prevailing on the merits of the litigation privilege affirmative defense under the second prong of the anti-SLAPP statute. Accordingly, the trial court erred in granting the motion as to the demand letter.[28]

Although the Court's ruling in that regard did not directly bind Singer (because he had not yet filed an anti-SLAPP motion), it is quite clear that Singer's anticipated anti-SLAPP motion (on remand) will fare no better. Either there is an inference that the letter is privileged or there is not. If it is not privileged vis-a-vis Cosby, it is highly doubtful that any litigation privilege will attach to Singer.

One could argue that the *Malin* demand letter was much, much worse than the *Dickinson* letter. The *Malin* letter was clearly designed to elicit a speedy settlement, with the extortionate threat of exposure, not only of *Malin*, himself, but also of third parties, including a retired Superior Court judge. That the ultimate complaint, when filed, did not include the name of the judge could certainly be construed as evidence that the letter was written "as a means of inducing settlement of a claim, and not in good faith contemplation of a lawsuit."

Yet, it is the *Malin* letter that was protected, and not the *Dickinson* letter, which could have been written by any number of attorneys in response to a claim such as that made by Dickinson. It is the *Malin* letter that the Court decided, as a matter of law, was sent in contemplation of litigation "in good faith and under serious consideration," and the *Dickinson* letter that the Court decided was *not* "in good faith and under serious consideration," at least for the purposes of SLAPP.

A reasonable argument could be made for protecting *both* letters, or even *neither* letter (though that would be a wrong decision), but it does not seem reasonable to rule that one letter is subject to the litigation privilege, and not the other—particularly in light of the fact that the *Malin* letter is seemingly so much more extortionate in nature. This is especially so in light of prior

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case law that mandates that the litigation privilege is "interpreted broadly in order to further its principal purpose of affording litigants and witnesses the utmost freedom of access to the courts without fear of harassment in derivative tort actions."[29] The privilege is absolute and applies regardless of malice.[30]

The undercurrent of the Dickinson Court may very well have been more related to the identity of the defendant than anything else. Perhaps very telling, the Court, at page 39 of the opinion, cites to a declaration by Dickinson's attorney, in which she states that Cosby "has not sued any of these media outlets. Nor has he ever sued any of the *thousands of media outlets* who have published stories about *the over fifty women who have now accused him of attempted or actual sexual assault over the last decade*."

The Court very well may have reasoned that, because there were so many accusers, and because Dickinson's accusation was therefore likely true, there was no way that Cosby ever intended to sue. However, if the Court really wanted simply to punish Cosby (and his attorney) for sending a threatening letter without intending to sue, it could have done so without publishing the opinion. Instead, every attorney (and client) in California is now bound by it, and substantially at risk.

The *Dickinson* decision, which suggests that attorneys (and their clients) may be held liable for defamatory statements contained in pre-litigation demand letters, is extremely dangerous, and sets a potentially floodgate-opening precedent. In virtually every demand letter that is sent in a potential defamation action, the author is accusing either the recipient or the source of the recipient of lying, whether or not that word is used. In fact, even in non-defamation actions, the author often expresses or implies that the recipient is lying.

One might ask if every demand letter is now going to be met with a defamation action, or the threat of one, and if, in fact, that demand letter, *i.e.*, the one threatening the original author of the original demand letter, might be met with another defamation action. The ramifications of this decision are monumental.

The only "rule" that can be inferred from these two cases is that, if an attorney does not follow through with a lawsuit, everything that he or she says in a demand letter can be the subject of a defamation suit. If that is the case, then attorneys are going to be forced to file litigation even if they think that a claim can be settled, just to avoid personal liability. One would think that public policy would dictate against such an encouragement of litigation.

Although the Court was clear that it was not making the determination, as a matter of law, that the defense of litigation privilege was not available to Cosby (and therefore Singer), that determination will therefore be left to the trial court or the jury, *i.e.*, was the demand letter just a "bluff," or truly "in contemplation of litigation." Even getting past the unsavory concept of putting that question in the hands of a jury, it is difficult to imagine how an attorney or client can possibly defend him/herself.

The obvious question to be asked is: "How can an attorney or party prove that he or she was serious about commencing litigation if he or she does not ultimately file that litigation?" It appears that anything short of a declaration from an attorney service stating that the attorney told them to file the complaint the next day would require privileged information. Certainly, an attorney would not be allowed to produce an e-mail from a client instructing him or her to file the complaint if the demand letter is unsuccessful; nor would he or she be allowed to produce an e-mail from the attorney to the client suggesting the same.

An attorney is therefore placed in the unenviable position of being held liable for damages for defamation if his/her client is not telling the truth or revealing privileged communication to prove that litigation was seriously intended (which may get him/her disbarred). No attorney should be put in this position, and it is doubtful that the Court of Appeal has thought through the horrendous ramifications of this decision.

ENDNOTES

[1] Section 47 provides as follows: "A privileged publication or broadcast is one made: (a) In the proper discharge of an official duty. (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section

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1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows: (1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action. (2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Chapter 14 (commencing with Section 2031.010) of Title 4 of Part 4 of the Code of Civil Procedure. (3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies. (4) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law. (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law. (d) (1) By a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued. (2) Nothing in paragraph (1) shall make privileged any communication to a public journal that does any of the following: (A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct. (B) Breaches a court order. (C) Violates any requirement of confidentiality imposed by law. (e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit."

2 The litigation privilege applies "to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson*, 50 Cal.3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365 (1990).

3 217 Cal. App. 4th 1283 (2013).

4 *Id.* at 1289.

5 *Id.* at 1289.

6 *Id.* at 1289, n.6.

7 Singer and his client denied any involvement in the computer hacking and wiretapping that was alleged in Malin's complaint, but argued in the alternative that the computer hacking and wiretapping constituted "pre-litigation information-gathering . . . which are clearly protected activities."

8 39 Cal.4th 299 (2006).

9 In *Flatley*, an attorney represented a client that allegedly was raped by the plaintiff, who was "a well-known 'performer and dance impresario.'" The attorney and his client made television appearances in which the client described the rape "in extremely lurid detail." *Id.* at 306, fn. omitted. After the lawyer sent a demand letter to the plaintiff, he (the attorney) telephoned the plaintiff's attorney to warn that he would "go public" with the rape allegations, which would be "publicized every place [the plaintiff] goes for the rest of his life..." *Id.* at 330. In subsequent phone calls, the attorney continued to threaten to "'go public'" with a story that "would follow [the plaintiff] wherever he or his groups performed and would ruin him." The attorney indicated that "it would take seven figures" to "avoid this." Flatley then sued the client and the attorney for "civil extortion, defamation, fraud, intentional infliction of emotional distress, and wrongful interference with prospective economic advantage." *Id.* at 306. The attorney filed an anti-SLAPP motion, which was denied, such denial being affirmed by the Court of Appeal and the California Supreme Court. The Supreme Court noted that "[e]xtortion is not a constitutionally protected form of speech," (*Id.* at 328), ruling that, when the speech is "illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." *Id.* at 320.

10 *Id.* at 1292.

11 *Id.*

12 *Id.*

13 *Id.* at 1298. Penal Code Section 518 defines "extortion" as "the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear . . . ." Penal Code Section 519 provides that "fear, such as will constitute extortion, may be induced by a threat of any of the following: (1) To do an unlawful injury to the person or property of the individual threatened or of a third person; (2) To accuse the individual threatened, or a relative of his or her, or a member of his or her family, of a crime; (3) To expose, or to impute to him, her, or them a deformity, disgrace, or crime; (4) To expose a secret affecting him, her, or them; and (5) To report his, her, or their immigration status or suspected immigration status."

14 There is nothing in Section 518 or 519 that requires the accusation of a crime to be "to a prosecuting agency." It is difficult to imagine how much more "public" it could be than to file a lawsuit in Superior Court with such allegations, with literally the world having access to it.

15 Citing *People v. Umana*, 138 Cal.App.4th 625 (2006) (only threats that fall within one of the four [now five] categories of Section 519 will support a charge of extortion).

16 19 Cal.4th 1106, 1115, 81 Cal. Rptr. 2d 471, 969 P.2d 564 (1999) ("[J]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) . . . such statements are equally entitled to the benefits of section 425.16.") *Id.* at 1115.

17 Case No. B271470.

18 *Id.* at 5–6.

19 *Id.* at 6.

20 *Id.* at 6.

21 *Id.* at 7–8.

22 *Id.* at 10.

23 53 Cal.App.4th 15 (1997).

24 It is difficult to imagine why one would write a demand letter if it is not calculated to induce the settlement of a claim. Certainly, a demand letter that is calculated to induce the settlement of a claim, and one that is written "in good faith contemplation of a lawsuit," is not mutually exclusive. In fact, one could argue that most demand letters are both. It would certainly be a rare event that someone who sent a demand letter that was "in good faith contemplation of a lawsuit" would reject a settlement if enough money was offered. One could also argue that the *Malin* demand let-

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ter was much closer to one that was "made as a means of inducing a settlement of a claim, and not in good faith contemplation of a lawsuit" than the *Cosby* letter.

25 41 Cal.4th 1232 (2007).

26 *Id.* at 39.

27 *Id.* at 39–40.

28 *Id.* at 40. The Court stated in a footnote that it was not finding that Cosby could not prevail on the litigation privilege defense, "only that Dickinson has shown a probability of prevailing at this juncture." *Id.* n.13.

29 *Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal.4th 1232, 1241, 63 Cal. Rptr. 3d 398, 163 P.3d 89 (2007); *Digerati Holdings, LLC v. Young Money Entertainment, LLC*, 194 Cal.App.4th 873, 889, 123 Cal. Rptr. 3d 736 (2011).

30 *Id.*

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their video at the lawsuit's conclusion. As of September 24, 2017, the video had over four million views, and H3H3 Production's channel likewise has subscribers totaling over four million.

In contrast, Hosseinzadeh's channel has only 171,000 subscribers. Furthermore, when Hosseinzadeh first uploaded "Bold Guy," his video garnered over 10 million views. Currently, "Bold Guy" no longer exists on his channel—it now exists only on the defendant's channel in the choppy, truncated form of H3H3 Productions' "The Big, the Bold, the Beautiful." The only way to access "Bold Guy" now is on a channel other than the original creator's channel. This limited accessibility thus usurps the original video's market by being replaced by the new use. Although "Bold Guy" accrued over 10 million views on Hosseinzadeh's channel before the lawsuit, "The Brave, the Bold, the Beautiful" has accrued 4 million views since H3H3 Productions re-uploaded it to YouTube. While 4 million is smaller than the original video's initial views, the currently limited access to the original video makes the reaction video's rising 4 million views a considerable threat of usurping the original video's market. Hence, the market value substitution factor in this case may actually favor Hosseinzadeh rather than the Kleins.

Another example of this phenomenon—a new use of an original video gaining more views and generating more money, and thus substituting the market value of the original work—comes from the massive YouTube channel, "REACT," which has over eight million subscribers. REACT often features reaction video compilations known as the "Don't Laugh Challenge." These reaction video compilations feature viewers seated in front of screens playing multiple videos. The viewers' goal is to not laugh or smile at any of the videos they see. Content creators around the world submit videos to the REACT channel in order to be featured in one of the "Laugh Challenge" videos. One particular video, called "Try To Watch This Without Laughing or Grinning #58 (REACT)," was posted on September 15, 2017, and, as of September 25, 2017, had 1,695,376 views.[13] This particular compilation video features an entire 10-second clip of a dog sneezing multiple times, with the video quickly cutting to a nuclear explosion after the dog's final sneeze.[14] The original "sneezing dog" video was posted to Instagram on May 24, 2017, and as of September 15, 2017, the original video had only 3,311 views on Instagram.[15]

REACT, and this particular example, highlights how a new use can overtake an original work to the detriment of the original creator, and thus the fourth fair use factor should weigh against a finding of fair use. Even though the original video's creators (supposedly) submitted their videos voluntarily to the REACT channel, the fact remains that the secondary use surpasses the original video's views and interest. Hence, such secondary use should be viewed as substituting the original's market value and thus should weigh against a finding of fair use. Furthermore, despite REACT's disclaimer that "users around the world submit videos" to REACT for the "Don't Laugh" challenges, it is unclear as to whether the submitted videos' original creators personally submitted their videos, or if other users submitted them without the owners' knowledge or permission. These unanswered questions produce problems that future court cases may have to address.

4. Conclusion

Only time will tell if Judge Forrest got it right in *Hosseinzadeh v. Klein*. For now, YouTubers everywhere can take some comfort knowing that their (permissibly active) reactions to their counterparts' content are protected by new precedent applying older concepts of copyright law and fair use to the millennial technological age.

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[1] *Hosseinzadeh v. Klein*, 2017 WL 3668846 (S.D.N.Y. 2017).

[2] 17 U.S.C. § 107.

[3] 17 U.S.C. § 107.

[4] *Hosseinzadeh v. Klein*, 2017 WL 3668846, at *3 (S.D.N.Y. 2017) (citing *On Davis v. Gap, Inc*., 246 F.3d 152, 174 (2d Cir. 2001)).

[5] *NXIVM Corp. v. Ross Inst.*, 364 F.3d 482 (2d Cir. 2004).

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[6] *On Davis*, 246 F.3d at 174.

[7] *TCA Television Corp. v. McCollum*, 839 F.3d 168, 185 (2d Cir. 2016).

[8] *Id. Id.* at 186 (citing *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 592 (1994)).

[9] *Hosseinzadeh v. Klein*, 2017 WL 3668846, at *7 (S.D.N.Y. 2017)

[10] *Id.* (citing *McCollum*, 839 F.3d at 185; *Campbell,* 510 U.S. at 592).

[11] *Id.*

12 Werner Geyser, How To Make Money On YouTube: 9 Ways Influencers Monetize Their YouTube Channels, Influencer Marketing Hub, **https://influencermarketinghub.com/how-to-make-money-on-youtube/** (last visited Dec. 23, 2017).

[13] REACT, *Try to Watch This Without Laughing or Grinning #58,* YouTube (Nov. 25, 2017). **https://www.youtube.com/watch?v=15TtbFiTP2Y**.

[14] illiterate_pupper, *Rip,* Instagram (Nov. 25, 2017), **https://www.instagram.com/p/BUfYnBdDKsB/**.

[15] *Id.*