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To: MLRC Membership  
From: MLRC  
Re: MLRC London Conference, Sponsorship Opportunities

April 29, 2010

Dear Member:

The [MLRC London Conference](#) on International Developments in Media Libel, Privacy, Newsgathering and IP Law will be held on September 19-20, 2011. (With an extra breakfast meeting for in-house lawyers on September 21st). The MLRC London Conference is a unique gathering of media lawyers from around the world for two days of discussion and debate on media law and policy.

We are looking for organizations to help sponsor the Conference, and hope you will consider it. General sponsorship for the conference is \$2,500. Sponsors will receive credit on the conference website and the program distributed at the conference. Sponsors can also provide firm brochures or small promotional items for distribution at the conference itself.

Please [send me a note](#) or give me a call if you are interested.

Sincerely,

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MLRC Staff Attorney  
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[dheller@medialaw.org](mailto:dheller@medialaw.org)

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**MEDIA LAW LETTER**

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Reporting Developments Through April 28, 2011

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# A Bridge Too Far—The Google Books Settlement

By Devereux Chatillon

At the time that the proposed settlement of the Google Books litigation was revealed in October of 2008, it was hailed as a visionary break through. Richard Sarnoff, then President of the Association of American Publishers and an architect of the settlement [described](#) the proposed settlement's benefits:

"From our perspective, the agreement creates an innovative framework for the use of copyrighted material in a rapidly digitizing world, serves readers by enabling broader access to a huge trove of hard-to-find books, and benefits the publishing community by establishing an attractive commercial model that offers both control and choice to the rightsholder."

In the years following the announcement, however, over 6800 potential participants rejected it and the settlement was the target of an extraordinary number of formal objections filed with the court—over 500 submissions, most of them critical. A full day Fairness Hearing in February 2010 was filled mainly with objections to the settlement

So, it was not a huge surprise when on March 22, 2011, Judge Denny Chin, sitting as a United States District Court Judge for the Southern District of New York, rejected the proposed settlement in the Google Books case. [The Authors Guild v. Google Inc.](#), No. 05-8136 (March 22, 2011) ("Opinion").

The only surprise was that it took the judge over a year to reach that decision. The rejected settlement itself while a brilliant legal construct had stretched both copyright and class action law well beyond the breaking point. And it was that conclusion that the judge reached.

## Background

The Google Books case was the result of Google's Library Project. In 2004, Google announced that it had decided to digitize the entire collections of major university libraries, including books in copyright, without asking permission or paying the rights holders. (Opinion at 2-3) The digitized volumes would then be available as snippets in

Google's search results. Although Google initially said that it would not gain any revenue from the Library Project, as it was called, search results including those of digitized books are now included in regular Google search results and ads are shown against those search results.

And so five major publishers and the AAP, as well as the Authors Guild on behalf of a class of authors, sued Google in federal court in New York claiming copyright infringement in 2005. Less predictable perhaps was the 2008 announcement of a settlement, one that included publishers, authors, and the libraries whose collections were the source of the digitized volumes.

The actions were structured as class actions against Google, with one class including book publishers and one including book authors. Briefly, the settlement allowed Google to include all books that had been digitized in search results and other non-display uses. It also allowed Google to sell certain products based upon the digitized books, including ebooks to consumers, digital library subscriptions, etc.

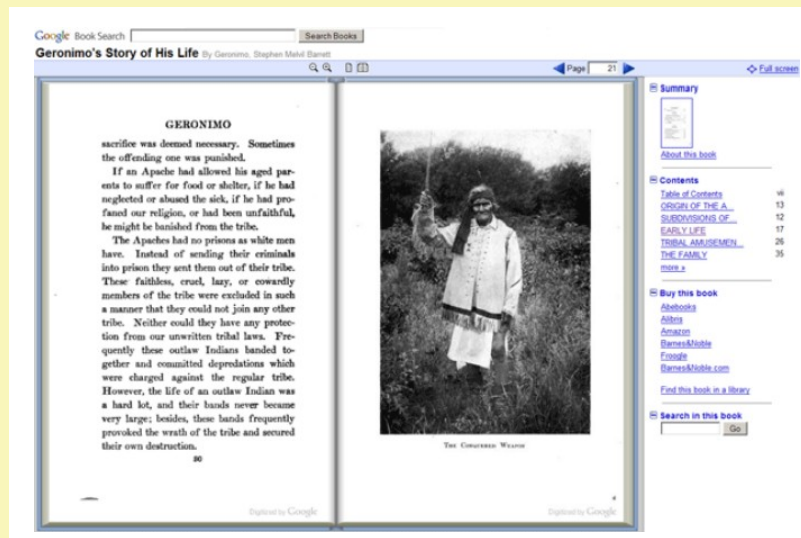
Authors, publishers, and other rights holders could opt out of all or some of these uses. But significantly, if the opt out mechanism was not invoked, Google could make all these expansive uses of the digitized works without ever having received the author's or publisher's permission. (Opinion at 2-5)

Needless to say, this was as controversial as it was brilliant and for the same reasons. The proposed settlement neatly solved some fairly knotty problems. There are several major obstacles to creating a universal or near universal digital library – the biggest are getting agreement between interested parties on who can grant permission (whether the publisher or author has ebook rights under old contracts, for example) and finding all the parties who might be rights holders.

The solution to the first problem is what doomed the settlement. It was also probably the only easily administered solution to the problem of getting rights when thousands of parties dispute which person or company has them. Under the rejected settlement, all authors and publishers were members of either an authors class or a publishers class. Both the author class and the publisher class granted Google (and only Google) the right to use the digitized books in the various ways described above.

(Continued on page 4)

**“The question of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among private, self-interested parties.”**



*(Continued from page 3)*

The legal fiction of a class action is that absent opting out – filing something with the court saying I’m not agreeing and I’m taking my rights and going home – the class member has legally consented to whatever is in the settlement. As a result, both the author and publisher granted ebook rights to Google unless they took action to withdraw. (One of the unanswered questions under the now rejected settlement was what would happen if an author opted out of the settlement altogether, but the publisher did not and the contract between them wasn’t crystal clear about whether the publisher could exercise ebook rights without further consent from the author.)

Because both publishers and authors would be deemed to legally consent to the settlement provisions and because the legal settlement would override any private contracts between them, it didn’t matter that publishers and authors in many instances are disputing who has the digital book rights under the contracts in place. Both are deemed to consent.

In addition, and this has been written about extensively, Google would have obtained the rights to use the digital editions of books it had created unless someone stepped forward to object. Thus under the proposed settlement, Google and Google alone would have been able to make use of the “orphaned works,” that is works that are still in copyright but whose rights holder can’t be located or don’t respond to permission requests. Under normal copyright rules, if permission isn’t granted, the user is at legal peril in proceeding even if extensive efforts have been made to try to locate the rights holder. Had the settlement been approved,

this provision of copyright law would have been altered for Google, but only for Google. That was also at the heart of the Court’s rejection of the settlement.

### **The Court’s Decision**

The several hundred objections that were filed to the settlement with the court came from a dazzling array of interested parties – authors from all over the world, agents, the Republics of France and Germany, Microsoft, Amazon, and many others (but no US publishers). The United States filed comments that among other issues identified significant problems under Rule 23 of the Federal Rules of Civil Procedure that governs class actions, as well as the antitrust laws. In his decision, Judge Chin considered and relied on many of the objections as the basis for his rejection of the settlement.

The court’s opinion reveals that the overriding reason for the settlement’s rejection was the forward-looking nature of the settlement. That led the court to conclude, correctly in my view, that approval of it would exceed the court’s power under Rule 23, that it usurped congressional authority to make new copyright law, that it was contrary to existing copyright law, and that it raised antitrust concerns.

The court commented that “The question of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more

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appropriately decided by Congress than through an agreement among private, self-interested parties.” (Opinion at 23). The Court went to the heart of the copyright concerns about the settlement – that by requiring copyright owners to come forward and take affirmative action to protect their rights, and not requiring the user, Google, to seek permission first, copyright law’s most fundamental precepts are upended: “[I]t is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission.” (*Id.* at 35).

The unclaimed or orphan work issue was also at the heart of the court’s antitrust concerns. Because of the settlement’s clever use of the class action device coupled with the normal copyright law’s requirement to seek permission first, only Google would have been able to use works whose owners can’t be found to grant permission, a number that in the United States alone is estimated to be around 5 million books. (Fairness Hearing Transcript 2/18/10 at 57). That, according to the court, “would arguably give Google control over the search market.... Google’s ability to deny competitors the ability to search orphan books would further entrench Google’s market power in the online search market.” (*Id.* at 37). The Court also echoed concerns raised by libraries (other than those involved in the original scanning project) and the United States that Google’s subscription product for libraries would have been an effective monopoly because only Google could include the orphan works. (*Id.* at 36).

At the end of his opinion, Judge Chin said that if the settlement were changed to opt-in for the forward-looking arrangements, as opposed to opt-out, that would go a long way towards alleviating his concerns.

### What it Means and What’s Next

In the aftermath of the court’s decision, the most pressing question is whether Google will continue along the settlement path and go along with the opt-in rather than opt-out option suggested by the court. At the fairness hearing in February 2010, the possibility of changing the settlement from an opt-

out settlement to one requiring opt-in was raised repeatedly, both by the objectors and by the court. (E.g., Fairness Hearing Transcript 2/18/10 at 93, 125, 138).

Google’s counsel rejected the possibility outright and argued that the transaction costs of making out-of-print books available if rights had to be cleared were prohibitive. (*Id.* at 146). If all participants in all parts of the settlement were required to opt-in, one of the major advantages to Google of the settlement – the exclusive ability to include these millions of work in Google’s search engine and to serve up brief portions of them as search results would be lost. In a search market that is beginning to look competitive for the first time since it began, an advantage like this could be significant for Google. (A recent [report](#) concluded that Microsoft’s search engine, Bing, had 30% of the US search market with Google at 66%.)

What hasn’t been explicitly discussed is the possibility that a revised settlement could be a combination of opt-out and opt-in. Such a settlement could require any class member to opt out or otherwise release any claim for all books digitized by Google for use as part of Google’s search engine – exactly the conduct that was the basis for the original lawsuit – with any more extensive use on an opt-in basis. What this would mean is that any unclaimed works could be included in Google’s

search results.

Such a solution would avoid many of the issues that the court saw with the rejected settlement proposal, including avoiding the question of the court’s power to approve such a settlement because it would focus on the specific conduct at the heart of the original lawsuit.

Presumably some kind of fund would still need to be set up to look for absent rights holders and authors. What would be missing is the forward looking and elaborate business arrangements allowing for database subscriptions to all the books for libraries and ebook sales to consumers. Whether the authors, publishers, and libraries would agree to such an arrangement is unclear. Equally unclear is whether Google would agree to this. And there would still be major objections given the anti-competitive impact such an arrangement might have on the search market, a factor that worried the Court as well as the Anti-Trust Division of the Justice Department.

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**In the aftermath of the court’s decision, the most pressing question is whether Google will continue along the settlement path and go along with the opt-in rather than opt-out option suggested by the court.**

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But given the legal fees racked up by the publishers and authors that were to be paid by the settlement fund, the pressure to reach some kind of agreement is huge.

If a revised settlement can't be negotiated, then presumably the parties must go back to litigation, a litigation that seems even less relevant now than it did six years ago when all this started. Since the original settlement was announced three years ago, ebooks have exploded, reaching 9% percent of the overall book market for 2010, up from 3% in 2009 and increasing 115% in the early months of this year according to [recent estimates](#). Regular print publishers, ebook houses such as Open Road and Rosetta Books, and even Google have advanced arrangements that cover much of the same territory as the now rejected settlement.

If the parties do end up litigating, the core issue will be whether Google's act of digitizing millions and millions of books is fair use under the US Copyright law. Google will argue that it is fair use because while the entire work is copied (customarily a no-no under the fair use caselaw), only small portions of the works are shown to the public as the results of searches – the so called snippets, usually about 3 to 10 words in length.

How, Google will argue, can the use of a few words from a full-length book be copyright infringement. (Testimony of David Drummond, General Counsel of Google at a Hearing Before The Committee On The Judiciary, House of Representatives September 10, 2009, at 5.) Google can cite to other cases, many of them won not surprisingly by Google, to support its position. *E.g.*, *Perfect 10, Inc. v Google Inc.*, 487 F3D 701 (9<sup>th</sup> Cir 2007).

The publishers and authors have a number of arguments on their side as well. First, Google has copied the entirety of millions of books without anyone's permission. That sure feels like copyright infringement. It has converted these books, many of them for the first time, to another medium entirely, again without the author's or publisher's permission. It seeks to use these works to make its search engine more valuable to its users, and therefore to its advertisers and therefore to Google.

Google, after all, derives 66% percent of its revenue, some \$29 billion in 2010, from the advertising it sells on its websites, including its search engine. Others would be

willing, the argument goes, to license works for this purpose. In one of the key tests under fair use caselaw, if Google is allowed to continue this behavior, it will destroy that potential market.

The rejected settlement injected many interesting and visionary concepts into core public discourse. One of the many wonderful aspects of the proposed settlement was the Book Rights Registry that would have been given life by the settlement. Google would have paid for the establishment of a separate entity, a not for profit company, with publishers and authors on its board. The Registry would have been the repository of the rights information for all of the books digitized by Google. It was to have used funds from licensing to search for unreachable rights holders and it was authorized to license entities other than Google to use books for which it had received explicit permission from the author or publisher.

Various alternative projects to create such a rights registry have been discussed since the settlement got bogged down in court proceedings. Not for profit entities such as the Internet Archives and the Book Industry Study Group are likely candidates that are well situated. Given the need that all who are part of digital publishing recognize to have a central rights

clearance or at least information depository, the public interest in having such an entity seems clear. Perhaps ironically, this was one of the original purposes of the US Copyright Office – to maintain public records relating to the ownership of copyright. (Copyright Office, Circular 1a)

Which brings us to a core problem of modern copyright law that isn't discussed very much, but should be. When the United States rewrote its copyright statute in the late 1970's and when it joined the major international copyright treaties in the late 1980s, it changed a key aspect of the law that avoided a lot of the mess that we're now dealing with. Under the "old" copyright law, the 1909 Act, federal copyright existed only for published works and only if they were registered properly for federal copyright. Under the old copyright statute, the copyright lasted for 28 years unless it was formally renewed, i.e., the proper renewal papers were filed with the Copyright Office.

While this resulted in certain injustices (and many seasons of an omnipresent "It's a Wonderful Life," because someone

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**The rejected settlement itself while a brilliant legal construct had stretched both copyright and class action law well beyond the breaking point.**

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forgot to renew the copyright), it did avoid at least some of the orphan work problem. If no one came forward to renew the copyright, the work lost its copyright and became entirely publicly available – it became public domain material.

While formalities are forbidden by the Berne Convention, which is one of the major international copyright treaties, it should be possible to fix this problem at least in part. Congress has considered several approaches over the past few years to address the orphan works issues. Most of those approaches provide for limited damages and safe harbors for any uses of copyrighted material that follow rigorous and unsuccessful efforts to locate rights holders. As perhaps an additional safeguard, it might be possible to add a provision that after a set period of years, parties holding rights to copyrighted material need to sign up somehow with the Copyright Office or risk expanded fair use in their work and/or a presumption that searches for them under the orphan works safe harbor will not succeed. In other words, put some common sense mechanism back into the law to make it worth people's time to make sure that they can be found.

Another possibility that has been discussed is digital deposit of new works so that the Copyright Office and the Library of Congress can begin to compile the true universal digital library. Or perhaps Congress could allow Google or Microsoft or some consortium of public and private entities to collaborate with the Copyright Office to digitize the current collection, which could then be used for some research and other not for profit purposes. Other interesting proposals for possible legislative solutions can be found in the [very recent article](#) by Professor Pamela Samuelson, who also filed objections to the settlement on behalf of academic authors that were cited in the Court's opinion.

The balancing of public and private concerns that are necessary for an undertaking of this scope clearly requires government involvement – that is what we have a government for. But that doesn't necessarily mean that there is no proper role for private entities as well. The Google Books Settlement was indeed a bridge too far, as the court said. But that doesn't mean that many of the great ideas contained in it should go down with the ship.

*Devereux Chatillon is a Digital Content and IP attorney in private practice in New York and is part time Counsel for Callaway Digital Arts. She teaches in the NYU Publishing graduate program and has written frequently about, among other things, the Google Book settlement.*



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# Appropriation Artist's Million Dollar Works Deemed Copyright Infringements

## *Federal Judge Denies Fair Use Defense to Controversial Art Form*

By Itai Maytal

Is it permissible under copyright law for an artist to appropriate a protected image of another and then alter it for commercial sale? Or is appropriation art by definition misappropriation?

These questions surfaced, but were ultimately left unresolved, in the settled lawsuit between the Associated Press and Shepard Fairey – the street artist responsible for turning an AP photo into the iconic red-white-and-blue Obama “HOPE” poster. Now, one Manhattan federal judge has offered some clarity to this hot button issue, holding in a recent decision that the legality of appropriation art depends in large part on whether the artist’s work specifically “comments” on the original image appropriated.

In a decision handed down on March 18, 2011, U.S. District Court Judge Deborah A. Batts ruled that the well-known appropriation artist Richard Prince (“Prince”) had infringed the copyright of French photographer Patrick Cariou (“Cariou”) when Prince incorporated 41 photographs shot by Cariou into his art gallery exhibition in New York. [\*Patrick Cariou v. Richard Prince, et. al.\*](#), No. 08 Civ. 11327, 2011 WL 1044915 (S.D.N.Y. March 18, 2011).

More importantly, the judge rejected Prince’s claim that his use of Cariou’s photographs in his art was fair, mainly

because Prince admitted that he did not comment on the photographs in any manner. The judge also held that the Gagosian Gallery and its owner, which exhibited and sold Prince’s art for more than \$10 million, were directly, vicariously and contributorily liable for copyright infringement. According to the decision, they had failed to meet their burden to inquire with Prince as to whether he had acquired a license from Cariou to use his photographs in the artwork that they sold.

Judge Batts made her ruling after the parties filed cross-motions for summary judgment. According to court filings, the decision is now the subject of an appeal by Prince to the Second Circuit, who is seeking to avoid having to surrender all of his exhibition works that include Cariou’s photographs and to pay Cariou any potential monetary damages.

### Background

The plaintiff in this case, Patrick Cariou, is a professional photographer who has

authored several books on photography and sold commercial photographs to various fashion and travel magazines. For six years, Cariou took photographs of Rastafarians in the tropical jungles of Jamaica and then published them in the book, “Yes, Rasta” (PowerHouse Books, 2000). According to his filed deposition excerpts, Cariou generated these images after

*(Continued on page 9)*



**The judge rejected Prince’s claim that his use of Cariou’s photographs in his art was fair, mainly because Prince admitted that he did not comment on the photographs in any manner.**

(Continued from page 8)

scouting locations, gaining the trust of his subjects, and then posing the vast majority of his subjects for periods ranging fifteen minutes to hours. He also made creative decisions in taking and developing the 100 black-and-white photographs featured in his book, which included selecting cameras, lenses, film, depth of field, background, lighting, time of day, exposures and waiting for meteorological events such as an approaching tropical storm to unfold. Cariou asserted in his moving papers that his purpose for his photographs, which included portraits and landscapes, was to capture the Rastafarians in their tropical habitat in an aesthetic way.

The lead defendant in this case is Richard Prince, a prominent appropriation artist. While artists generally draw on the works of other artists, appropriation artists take this practice further by leaving what they take largely intact, absent some minor alterations. The art involves, as defined by Prince and other appropriation artists like Jeff Koons, the “taking of an original work for the purpose of transforming [it] into a new expressive meaning and purpose.” *See also Rogers v. Koons*, 960 F.2d 301, 303 (2d Cir. 1992) (defining appropriation art, as follows: “when the artist finishes his work, the meaning of the original object has been extracted and an entirely new meaning set in its place.”) Prince has exhibited his work at numerous museums and other institutions, including a solo show at the Guggenheim Museum in New York, created an album cover for Sonic Youth and sold paintings for millions. He is most famous for having taken pictures of Marlboro Man magazine advertisements and then re-photographing and enlarging them without their logos and texts.

According to Cariou’s complaint, on or about November 8 through December 20, 2008, Prince displayed a series of artworks called “Canal Zone” that incorporated 41 images from Cariou’s book, “Yes, Rasta.” The artwork was featured in a location belonging to the Gagosian Gallery. Prince’s mural-sized works incorporated Rastafarians from Cariou’s photographs, which were altered through tinting, additions of paint, the placement of oval shapes over their eyes and mouths, and the inclusion of guitars. Several photographs were added into collages of appropriated pornographic female nudes not taken by Cariou. According to the decision, 28 of Prince’s 29 paintings in his exhibition included images appropriated from Cariou.

On December 11, 2008, Cariou sent the Defendants a cease and desist letter. However, it had no impact on the show, which continued to run without interruption. Cariou then filed his copyright infringement lawsuit against Prince, the Gagosian Gallery, Lawrence Gagosian, the owner of the gallery, and Rizzoli International Publications, the publisher of Prince’s exhibition’s catalogue.

### Legal Analysis

As a preliminary matter, the Defendants asserted that Cariou’s photographs were not protected by copyright law because they were “mere compilations of fact,” and “arranged with minimum creativity in a manner typical of their genre.” Judge Batts rejected this argument, pointing out that “it has been a matter of settled law for well over one hundred years that creative photographs are worthy of copyright protection even when they depict real people and natural environments.” After rejecting the Defendants’ claim that the photographs were not copyright protectable, the judge examined plaintiff’s fair use argument and found that all four fair use factors enumerated in 17 U.S.C. 107 weighed against a finding of fair use.

#### *Purpose and Character of Use*

Judge Batts found that the first factor weighed in favor of Cariou because Prince’s use was only “minimally transformative” of Cariou’s photos, because the use was “substantially though not exclusively commercial”, and because the Defendants acted in bad faith.

#### Transformativeness

In their moving papers, the Defendants’ invited the judge to find that appropriation art is per se fair use, regardless of whether or not the new artwork in any way comments on the original works appropriated. The judge declined the invitation. Relying on the *Rogers v. Koons* decision – involving fellow appropriation artist Jeff Koons and his *String of Puppies* sculpture copied from a postcard photo – the judge noted that there would be “no practicable boundary to the fair use defense” if a defendant’s infringement could be excused by pointing to “a higher or different artistic use.” In other words, it is not enough for a work to transform a prior work to be transformative. Instead, all the precedents Judge Batts could identify imposed a requirement that a new work

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must in some way “comment on, relate to the historical context of, or critically refer back to the original work.”

After examining the record, Judge Batts concluded that Prince’s own testimony showed “his intent was not transformative within the meaning of Section 107.” According to the decision, Prince testified that he had no interest in the original meaning of the photographs he uses and did not intend to comment on any aspect of the original works (a.k.a. his “raw ingredients”) from his Paintings, or on the broader culture associated with Cariou or his photos. Instead, Prince indicated he was intending to pay homage or tribute to other painters, including Picasso, Cezanne, Warhol and de Kooning and to create beautiful artworks with related music themes and for a post-apocalyptic screenplay he was writing featuring a reggae band. Moreover, Prince testified that his purpose for using Cariou’s portraits was be as truthful to the Rastafarians and their culture as possible.

#### Commerciality

Judge Batts concluded the Defendants’ use of Cariou’s photographs was substantially commercial, based on the fact that the Gagosian Gallery sold eight of defendant’s collages for over \$10 million, with 60 percent going to Prince and 40 percent going to the gallery. Another seven “Canal Zone” paintings were exchanged by the gallery for art that was valued as much as \$8 million. As such, the judge found that the commerciality prong of the first §107 factor weighed against a finding of fair use.

#### Bad faith

Turning to the bad faith prong, Judge Batts found that Prince’s bad faith was “evident.” The fact that neither Prince nor his employee sought permission to use Cariou’s photographs, but did contact the publisher of “Yes, Rasta” to purchase additional copies of the book, weighed against a finding of fair use. The judge also found that the Gagosian Gallery acted in bad faith because it neither inquired with Prince as to whether he had a license to use Cariou’s photos, nor ceased to commercially exploit Prince’s paintings after receiving Cariou’s cease-and-desist letter.

#### *Nature of the Copyrighted Work*

The judge held this factor weighed against a finding of fair use because Cariou’s photographs are “highly original and creative artistic works and ... fall within the core of the copyright’s protective purposes.”

#### *Amount and Substantiality of the Portion Used*

As to the third factor, the judge noted that this too weighed against a finding of fair use because the amount of Prince’s taking was “substantially greater than necessary” to further the purpose and character of his use. Judge Batts observed that Prince appropriated entire photographs from Cariou in several of his collages. Moreover, the majority of them appropriated the central figures depicted in Cariou’s photographs.

#### *Effect on the Market*

Finally, Judge Batts found the Gagosian show’s effect upon Cariou’s market weighed in Cariou’s favor and against fair use. According to the decision, the photographer had planned to show his “Yes, Rasta” pictures at a New York gallery of Christiane Celle. But, as the gallery owner testified, she cancelled the show because it had been “done already” by the Gagosian Gallery and because she didn’t want to be seen as capitalizing on Prince’s reputation.

After concluding her aggregate fair use analysis in favor of Cariou, the judge turned to the Gagosian Gallery defendants. Judge Batts found they were directly, vicariously, and contributorily liable for copyright infringement because they exhibited and sold Prince’s unauthorized works in violation of Cariou’s exclusive rights as a copyright owner; they supervised Prince’s work, “or at the very least [had] the right and ability (and perhaps even responsibility) to ensure that Prince obtained” licenses from Cariou; and they were “well aware of (and capitalized on) Prince’s reputation as an appropriate artist who rejects the constricts of copyright law”, but did nothing to evaluate the legality of his use of Cariou’s photographs.

Judge Batts issued a permanent injunction requiring that all works and materials relating to Prince’s “Canal Zone” be “delivered up for impounding, destruction, or other disposition, as Plaintiff determines,” and that the Defendants “notify in writing any current or future owners of the Paintings of whom they are or become aware that the Paintings infringe the copyright in the Photographs, that the Paintings were not lawfully made under the Copyright Act of 1976, and that the Paintings cannot lawfully be displayed.” The judge also scheduled a status conference regarding damages between the parties for May 6, denying a request by the Defendants for a stay of the proceedings pending appeal.

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### Considerations for Appeal

Judge Batts' decision has prompted heated commentary within the media, photography and artistic communities, and may lead to *amici curiae* participation on both sides of the case when it reaches the Second Circuit. It also may also be questioned on several procedural and substantive grounds.

For example, Judge Batts failed to analyze separately each of the 28 paintings at issue by Prince under the four statutory fair use factors. The Copyright Act instructs that such analysis take place before a use can be considered or denied as fair: "In determining whether the use made of a work in any particular case is fair use the factors to be considered shall include . . . [four factors]." 17 U.S.C. §107. Instead, the judge made global assessments about the paintings, noting, for example, a transformative spectrum among the paintings that appeared "minimal at best" and "not consistent."

In addition, Judge Batts did not apply the *eBay v. MercExchange* four-part test before granting a permanent injunction to the plaintiff upon finding copyright infringement. *See e.g., Pearson Educ., Inc. v. Vergara*, 09 Civ. 6832, 2010 WL 3744033 (S.D.N.Y. Sept. 27, 2010) (applying eBay test to grant permanent injunction in copyright infringement action); *Warner Bros. Entm't Inc. v. RDR Books*, 575 F.Supp.2d 513, 551 (S.D.N.Y.2008) (same). Specifically, "[a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay v. MercExchange*, 547 U.S. 338, 391 (2006).

Finally, Judge Batts' decision raises the substantive question as to whether the commenting requirement for fair use must be met by the artist himself or can be articulated by others, such as art historians or scholars. It seems debatable to

expect all artists to articulate the purpose of their art when they very often do not consider its narrative thread when they create it. Moreover, they may not be the best judges of their own works.

Just as a psychoanalyst may be in a better position to understand the motivations of a patient, so too may an art scholar or historian better understand the creative impetus of an artist. In this case, Prince may have understood, but intentionally did not want to meet, the commenting requirement for fair use because he was defending the essence of appropriation art, which is its transgressiveness. As such, it seems that no expert would have aided the judge in her determination. Other cases, however, may merit a different approach to addressing the first factor of fair use.

### Conclusion

The late President Richard Nixon once said, "When the President does it, that means that it is not illegal." It seems like Richard Prince would want the same special rationale to apply under copyright law to appropriation artists when they exploit without permission the works of others. It appears he would have their art be deemed transformative even when they denied the relevance of the original

works appropriated to their art's meaning. Perhaps Prince will have better luck than his contemporary Jeff Koons in making this "high art exception to fair use" argument to the Second Circuit.

But for now, it appears that appropriation art cannot exist legally under our copyright law regime unless its creator can articulate how the art comments on the so-called "raw ingredients" it appropriates.

*Itai Maytal is an associate attorney at Miller Korzenik Sommers LLP. The plaintiff in Cariou v. Prince et. al. is represented by Daniel J. Brooks and Eric A. Boden of Schnader Harrison Segal & Lewis LLP. The defendant was represented by Steven M. Hayes of Hanley, Conroy Bierstein Sheridan Fisher & Hayes LLP. On appeal, the defendant will be represented by George Carpinello and Eric Maurer of Boies, Schiller & Flexner LLP.*

**Richard Nixon once said, "When the President does it, that means that it is not illegal." It seems like Richard Prince would want the same special rationale to apply under copyright law to appropriation artists.**

# U.S. District Court Denies Preliminary Injunction Against Photo-Sharing Website

## *DMCA Safe Harbor Protections Apply*

By Michael A. Norwick

A New York federal district court denied a motion for a preliminary injunction in a copyright infringement suit brought by a *pro se* visual artist, Sheila Wolk, against the photo-sharing website, Photobucket. [\*Wolk v. Kodak Imaging Network, Inc. et al.\*](#), 2011 U.S. Dist. LEXIS 27541 (S.D.N.Y. March 17, 2011) (Sweet, J.).

### Background

Photobucket allows users to upload and edit images, add special effects, and share photos on social networking sites. The site also allows users to order hard copies (and other products) containing any image on the site from Photobucket's business partner, Kodak Imaging Network. Photobucket's users have uploaded more than eight billion photos to the website.

The plaintiff claimed that copies of her copyrighted images had been uploaded to Photobucket without her permission and that she provided notices to Photobucket requesting that these images be taken down. Photobucket removed all images that were identified by the plaintiff in notices complying with the Digital Millennium Copyright Act ("DMCA"), which provides sites like Photobucket – which display content uploaded by users – "safe harbor" from financial copyright liability if they promptly remove allegedly infringing material pursuant to compliant notices.

### DMCA Analysis

Notwithstanding the removal of these allegedly infringing images, the plaintiff complained that more infringing images remained on the site. Plaintiff's motion for a preliminary injunction argued "that her past notices also serve as DMCA-compliant notice of other present and future alleged

infringements of the same copyrighted works posted at different times and at different locations." *Id.* at \*11. The court explained: "[i]n essence, Plaintiff contends that Photobucket is now aware that her copyrights are being infringed on its site, and it must now police its [site] to uncover current infringements and prevent future infringements, without her providing DMCA-compliant notice in each instance." *Id.*

Photobucket argued that its operation of the website was protected under the DMCA's § 512(c) safe harbor and that it had no duty to police its site for other materials that might infringe the plaintiff's copyrights.

The court agreed with Photobucket, holding that the plaintiff sought to place a burden on the site beyond what is required by the DMCA. Relying in part upon the decision in *Viacom International, Inc. v. Youtube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (Stanton, J.), Judge Sweet held that DMCA-compliant notices "must identify and reasonably locate the infringing activity in *each instance*" (*Id.* at \*11; emphasis added)

and cited to the *Viacom* court's example of sufficient location information: "a copy or description of the allegedly infringing material and the so-called 'uniform resource locator' (URL) (i.e., the web site address) which allegedly contains the material." *Id.* at \*11-12 (citing 718 F. Supp. 2d at 529). As the court explained:

The requirement that DMCA-compliant notices identify and locate specific acts of infringement undermines Plaintiff's position, as her past notices do not identify and locate other, and future, infringing activity. The Court does not accept her invitation to shift the burden from her to Photobucket, as the underlying purpose

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**Judge Sweet's opinion in *Wolk* is the first known decision to interpret the parameters of the limited injunctive relief available under § 512(j).**

(Continued from page 12)

of the notice requirements is to place the burden of policing copyright infringement - identifying the potentially infringing material and adequately documenting infringement - squarely on the owners of the copyright. *Id.* at \*12-13 (citations omitted).

Finding that Photobucket met all of the criteria necessary to enjoy the protection of the § 512(c) safe harbor, the court addressed the limited injunctive relief available under Section 512(j), which is available to plaintiffs even where a site qualifies for a safe harbor under Sections 512 (b), (c) or (d) of the DMCA. While the plaintiff essentially sought a court order requiring Photobucket to search for all infringing activity on its site, the court held that none of the relief available under § 512 (j) provides such a burdensome remedy. The court held that Section 512(j)(i), which provides for an “order restraining the service provider from providing access to infringing material or activity” does no more than require the defendant to block access to infringing material when given proper notice, something Photobucket was already doing. *See id.* at \*20. The court also analyzed § 512(j)(iii), a catch-all provision permitting the court to fashion other injunctive relief, but only when “such relief is the least burdensome to the service provider.” The court found that the plaintiff had not satisfied this criteria. Significantly, Judge Sweet’s opinion in *Wolk* is the first known decision to interpret the parameters of the limited injunctive relief available under § 512(j).

In denying the plaintiff’s motion for a preliminary injunction, the court also cited to 1) her failure to demonstrate irreparable harm (which, under the Second Circuit’s recent decision in *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010), is no longer to be presumed even if infringement is found), 2) her delay in bringing the motion, and 3) the burden that would be placed on website operators if required to police their websites for copyright infringements. As the court stated, “[p]lacing such a debilitating burden on ISPs would defy the purpose of the DMCA, which was to facilitate the growth of electronic commerce, not squelch it.” *Id.* at \*25 (citations omitted).

*Michael A. Norwick, is an MLRC Staff Attorney. Prior to joining MLRC he represented Photobucket.com, Inc. in this case with Kenneth P. Norwick, Norwick, Schad & Goering; and Mark Lerner and Meghan H. Sullivan, Satterlee Stephens Burke & Burke LLP. The plaintiff, Sheila Wolk, appeared pro se.*



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# Ninth Circuit Debates the Contours of Protected Speech in Overturning the Stolen Valor Act

## *Are Lies Worth Saving?*

By Tom Clyde

In an exchange of sharply worded opinions, a divided Ninth Circuit Court of Appeals refused to rehear en banc the panel decision that struck down the Stolen Valor Act. [\*United States v. Alvarez\*, Case No. 08-50345 \(9<sup>th</sup> Cir. March 21, 2011\)](#).

Relying on distinctly different interpretations of seminal defamation cases such as *Sullivan*, *Gertz* and *Hepps*, the divided Court debated the constitutional value that is afforded to false speech under First Amendment jurisprudence.

*Alvarez* is considered by many commentators as strong candidates for a grant of certiorari by the U.S. Supreme Court. If cert. is ultimately granted, the resolution of the constitutional challenge will likely turn on how much protection, if any, our system should afford to admittedly false speech.

### Case Prompted by Lies Shout Congressional Medal of Honor

*Alvarez* presents a “clean” challenge to the Stolen Valor Act, 18 U.S.C. § 704(b). In 2007, Xavier Alvarez was an official on his regional water district board of directors who had a “hobby” of telling outrageous – and untrue – tales about himself. At a meeting with a neighboring district water board, Alvarez introduced himself by stating that he was “retired marine of 25 years” and that “back in 1987 I was awarded the Congressional Medal of Honor.”

In fact, these statements were, in the words of the Court, “a series of bizarre lies.” Alvarez had never been in the military and the accolade he awarded himself was hardly an obscure one. The Congressional Medal of Honor is the nation’s most prestigious military decoration.

Alvarez was indicted and thereafter pled guilty to a violation of the Stolen Valor Act, which makes it a crime for a person to “falsely represent[] himself or herself” as having “been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . .” In entering his plea, Alvarez reserved his right to appeal on First

Amendment grounds.

On appeal, a divided panel reversed Alvarez’s conviction and struck down the Act. Judges Thomas G. Nelson and Milan D. Smith, Jr., found that the speech criminalized by the Act was not “sufficiently proscribed to fit among the narrow categories of false speech previously held to be beyond the First Amendment’s protect sweep.” Applying strict scrutiny, the majority found that the Act was not narrowly tailored.

Judge Jay S. Bybee, however, dissented, arguing that a litany of Supreme Court decisions had stated in various linguistic formulations that false statements of fact have “no constitutional value,” so are unworthy of strict scrutiny. Under a less demanding scrutiny, Judge Bybee asserted that the Stolen Valor Act was not unconstitutionally overbroad.

### Petition for Rehearing En Banc Draws Sharply Divergent Views

Not surprisingly, the government petitioned for rehearing en banc. In denying the petition, the Ninth Circuit judges brought an even sharper focus to the debate that had taken place in the panel decision.

Judge Smith, concurring in the denial of rehearing en banc, emphasized that ever since *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court had emphasized that speech does not forfeit its constitutionally protected status merely because it is determined to be false. Judge Smith emphasized, for example, the statement in *Sullivan* that “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’” *Id.* at 279 n.19 (quoting J.S. Mill, *On Liberty* 15 (Oxford: Blackwell, 1947)).

Chief Judge Alex Kozinski, concurring in the denial of rehearing en banc and writing separately, dramatically illustrated the sweeping array of speech that could be subject to penalty if falsity were deemed to preclude constitutional protection.

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So what, exactly, does the dissenters' ever-truthful utopia look like? In a word: terrifying. . . . [T]he white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as "rational basis."

Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy ("No, I don't live around here"); to avoid hurt feelings ("Friday is my study night"); to make others feel better ("Gee you've gotten skinny"); to avoid recriminations ("I only lost \$10 at poker") . . . . to avoid taking out the trash ("My back hurts"); to duck an obligation ("I've got a headache"); to maintain a public image ("I go to church every Sunday"); to make a point ("Ich bin ein Berliner"); to save face ("I had too much to drink"); to humor ("Correct as usual, King Friday"); to avoid embarrassment ("That wasn't me"); to curry favor ("I've read all your books"); to get a clerkship ("You're the greatest living jurist"); to save a dollar ("I gave at the office"); or to maintain innocence ("There are eight tiny reindeer on the rooftop").

Notwithstanding Judge Kozinski's concerns about a "terrifying" world, seven judges dissented from the denial of rehearing, joining an opinion written by Judge Diarmuid O'Scannlain. The dissenters emphasized that in case after case, the Supreme Court has indicated that false speech is outside of constitutional protections, characterizing it as "particularly valueless," "not immunized by the First Amendment," and "carry[ing] no First Amendment credentials." The dissenters focused on the statements in *Gertz* that "the erroneous statement of fact is not worthy of constitutional protection." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

In the dissenters' view, the proper analysis is to consider false speech as unprotected, but then determine whether some other interest – such as "the presence of robust and functional news media" – nonetheless requires protection against liability for publishing erroneous facts. In this way, false speech, like that at issue in the Stolen Valor Act, should only

warrant protection if necessary to create a "breathing space" for other "speech that matters."

### Petition for Certiorari Likely

Given the sharply divergent approaches, *Alvarez* is considered by many as a good candidate for certiorari. The chances of this issue reaching the Supreme Court will improve further if the Tenth Circuit reaches a contrary decision on the constitutional validity of the Stolen Valor Act in an appeal now pending before it. *U.S. v. Strandlof*, Case No. 10-01358 (10th Cir. August 13, 2010).

If either or both of these cases go up, it is likely that the Court will be closely scrutinizing *Sullivan* and its progeny, but in a very different and potentially less sympathetic – context than a defamation claim.

*Tom Clyde is a partner with Dow Lohnes PLLC in Atlanta*

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# California Appeals Court Dismisses “Libel in Fiction” Suit Over CSI Episode

## *Anti-SLAPP Public Interest Requirement Applies Broadly*

By David Fink, Tami Kameda, and Randa Soudah

On March 1, 2011, in [\*Tamkin v. CBS Broadcasting Inc.\*](#), the California Court of Appeal clarified the standards under California Civil Code § 425.16, California’s anti-SLAPP statute, by reaffirming that the statute’s public interest requirement should be applied broadly. *Tamkin* and other recent cases establish a bright line rule that an issue of public interest is “any issue in which the public is interested.”

For media defendants, satisfying the public interest requirement is often crucial to anti-SLAPP protection. Under the anti-SLAPP statute, a defendant carries the initial burden to show it was engaged in an act in furtherance of its right of petition or free speech; the burden then shifts to the plaintiff to show a reasonable probability of success on the merits of the claims to avoid dismissal.

Protected activity under the statute includes “a statement made . . . in a public forum, in connection with an issue of public interest” or “any other conduct in furtherance of the right to free speech, in connection with . . . an issue of public interest.” Every day, those in the businesses of informing and entertaining the public produce content in public fora and create expressive works, such as “[t]he creation of a television show,” which constitute “an exercise of free speech.” Because such activities are undisputedly connected with the right of free speech, often, the real battle is whether the conduct is connected to an issue of “public interest.”

### Public Interest In The Creation Of A Television Show

*Tamkin* involved the creation and broadcast of episode 913 (season 9, 13<sup>th</sup> episode) of the television series *CSI: Crime Scene Investigation* (“*CSI*”) that included a story of a “married couple in the real estate and/or mortgage business, one of whom would commit suicide by overdosing on fluoride.” One of *CSI*’s writers used the plaintiffs’ full real names as placeholders for the fictional married couple in preliminary drafts of the episode’s script.

Before the episode was produced or broadcast, the surname of the fictional couple was changed, but not before a preliminary draft of the script containing the plaintiffs’ names was used to create character synopses for casting purposes. The defendants authorized the casting synopses to be released to talent representatives, but despite strict security procedures to protect confidentiality, the synopses were improperly “leaked onto the internet and posted on various Internet Web sites, including some ‘spoiler’ Web sites discussing *CSI*.”

The *Tamkin* court found that the defendants’ activities of writing, casting, and broadcasting the *CSI* episode gave rise to the plaintiffs’ lawsuit and were in furtherance of the defendants’ exercise of free speech in creating *CSI*. Indeed, the exercise of the defendants’ free speech rights was hardly in dispute. The application of the anti-SLAPP statute depended primarily upon whether the defendants’ acts were in connection with a matter of public interest.

Unfortunately, the anti-SLAPP statute does not define “public interest.” Consequently, many court decisions prior to *Tamkin* have grappled with how to define the public interest requirement. In *Dyer v. Childress*, which was heavily relied upon by the *Tamkin* plaintiffs, the court narrowly defined the public interest requirement. There, the screenplay writer of *Reality Bites* had used the name of the plaintiff, her former film school classmate, for a fictional character in the film. The plaintiff sued the defendants for the alleged misuse of his persona in the tenth anniversary DVD of *Reality Bites*. The *Dyer* court held that the defendants’ conduct in releasing the DVD was not protected activity because the defendants failed to show that the persona of plaintiff, a private figure, was connected to an issue of

particular “public significance.”

Following *Dyer*, several Court of Appeal decisions applied, in marked contrast to *Dyer*, a broad interpretation of the public interest requirement. These cases held that defendants’ activities relating to entertainment were connected to matters of public interest, after the defendants demonstrated that an appreciable number of people had an interest in those topics, regardless of whether the issues were of public significance.

Against this backdrop, the *Tamkin* court reaffirmed that “an issue of public interest . . . is *any issue in which the public is interested*” and “need not be significant to be protected by the anti-SLAPP statute.” In so holding, the *Tamkin* court expressly rejected the *Dyer* court’s “focus[] on the lack of a ‘discernable public interest in Dyer’s persona’” in evaluating the applicability of the statute. Rather, the statute’s express “statutory language compels [a court] to focus on the conduct of the defendants and to inquire whether that conduct furthered such defendants’ exercise of their free speech rights concerning a matter of public interest.” The court rejected any suggestion that the anti-SLAPP statute requires that “the plaintiff’s persona be a matter of public interest.”

Applying this standard, the *Tamkin* court held that “the creation and broadcasting of *CSI* episode 913 is an issue of public interest because the public was demonstrably interested in the creation and broadcasting of that episode, as shown by the posting of the casting synopses on various Web sites and the ratings for the episode.” The *Tamkin* court distinguished *Dyer* because it “never addressed the issue of whether there was any public interest in the creative process underlying the production of the film,” whereas, in *Tamkin*, the defendants “showed that there was a public interest in the writing, casting and broadcasting of *CSI* episode 913.”

Notably, *Tamkin* is the first case in which the underlying creative process of an entertainment work, in addition to the resulting broadcast, was found to constitute a topic of public interest. In prior cases, the defendant’s pre-broadcast activities constituted protected activities because they were sufficiently connected to a broadcast of public interest. In *Tamkin*, however, the defendants demonstrated a public interest in the *creative process itself*, by presenting evidence that numerous Internet websites devoted to *CSI* where fans discuss all aspects of the show, including upcoming plot lines, had posted the casting synopses.

Of particular note for entertainment defendants, the *Tamkin* court emphasized that the creative process should not be subject to court scrutiny. The *Tamkin* plaintiffs argued that the anti-SLAPP statute did not apply “because it was not necessary for [the defendant writer] to use real names as placeholders for guest characters when she could have created fictional names.”

The court rejected this argument, noting that a court “must not permit juries to dissect the creative process in order to determine what was necessary to achieve the final product and what was not, and to impose liability . . . for that portion deemed unnecessary. Creativity is . . . unpredictable. Much that is not obvious can be necessary to the creative process.” In that regard, “[f]iction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs.”

In applying the second prong of the anti-SLAPP statute, the *Tamkin* court held that the plaintiffs could not show a probability of prevailing on their claims for defamation and false light of invasion of privacy because they could not show that the statements in the character synopses or episode 913 specifically referred to, *i.e.* were of and concerning, the plaintiffs. The defendants’ fictional characters did not have physical descriptions, biographical references, or other identifying characteristics that would allow a reasonable person to conclude that the fictional characters were, in fact, the plaintiffs. Thus, the court held that the plaintiffs’ claims should be dismissed.

### What Does This Mean For Media Defendants?

The *Tamkin* decision reaffirms that defendants need not demonstrate that their speech relates to a matter of “public significance” to avail themselves of the protection of the anti-SLAPP statute. Rather, a defendant need only show that

the public is interested in its speech.

In the case of media defendants, such speech can extend to the creation and broadcast of entertainment programming. The *Tamkin* court's clarification of the public interest standard is clearly a positive development for media defendants, but the decision should not be construed as providing blanket protection for the act of creating and disseminating entertainment.

First, even if a media defendant can satisfy the public interest prong of the anti-SLAPP statute, a plaintiff will avoid dismissal of his or her lawsuit by demonstrating a reasonable probability of success on the underlying claims. Second, in the *Tamkin* case, the focus was on a highly popular, long-running television series, *CSI*, which has millions of viewers worldwide, spawned two spinoff shows, and inspired several unauthorized Internet websites and communities created by the show's fans to discuss and dissect the show, the creative process, and rumored and actual upcoming developments.

The defendants were therefore able to demonstrate easily the overwhelming public interest in all things *CSI* by providing ratings information, news articles, and evidence of popular online fan sites. Such an analysis is highly factual, and it is not clear that in all cases a media defendant would be able to meet its burden of establishing that its creation and broadcast of programming is an issue of public interest.

Ultimately, both the *Tamkin* lawsuit and the court's decision provide a compelling example of how developments in this area of the law may be shaped and influenced by new and evolving media. In this case, in the absence of the online fan sites, it is unlikely that the plaintiffs would have ever learned of the inadvertent use of their names in connection with the casting of the show. The allegedly defamatory statements – the character synopses – were placed on a protected website for limited dissemination among casting professionals, but subsequently leaked to unauthorized fan “spoiler” websites.

Further, the use of new media as a measure of the public's interest also raises potential challenges for media defendants. While these fan websites can stoke the viewing public's interest in programming, they can also usurp the studio or network's control over the promotion and marketing of its entertainment when plot, creative details, or other show developments are prematurely revealed to the viewing public without authorization. Yet, the fan websites, as well as social media and networking sites, also provide evidence of what currently appears to be a seemingly insatiable interest in entertainment and celebrity culture. In *Tamkin*, these online sites were an important tool in quantifying and establishing the public interest in the creation of *CSI* for purposes of satisfying the anti-SLAPP statute. Therefore, among other things, this case illustrates the tension between the benefits of fan-driven publicity and interest in programming and a media defendant's desire for control over its content and protecting its brand and intellectual property.

*CBS was represented by Andy White, David Fink and Tami Kameda of Kelley Drye / White O'Connor, Los Angeles, as well as Randa Soudah, Vice President & Assistant General Counsel, Litigation, CBS Broadcasting. Plaintiff was represented by Anthony Glassman and Rebecca Kaufman, Glassman, Browning, Saltsman & Jacobs, Inc., in Los Angeles, CA.*

### Notes

1. “SLAPP” is an acronym for “strategic lawsuit against public participation.”
2. *Tamkin v. CBS Broadcasting, Inc.*, 193 Cal. App. 4th 133, 142-45 (2011).
3. *Id.* at 143 (emphasis in original); *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (same); *Rivera v. First DataBank, Inc.*, 187 Cal. App. 4th 709, 716 (2010) (same); see also *Hall v. Time Warner, Inc.*, 153 Cal. App. 4th 1337, 1346-47 (2007); *Kronemyer v. Internet Movie Database Inc.*, 150 Cal. App. 4th 941, 945, 949 (2007); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 677-7 (2010).

4. See *Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798, 807 (2002)
5. Cal. Code Civ. Proc. § 425.16(b)(1), (e)(3) & (4).
6. *Metabolife Int'l, Inc. v. Wornick*, 72 F. Supp. 2d 1160, 1165 (S.D. Cal. 1999) *aff'd in part, rev'd in part on other grounds*, 264 F.3d 832 (9th Cir. 2001) (television broadcast is a public forum); *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1006-07 (2001) (website is a public forum); *Nygard, Inc.*, 159 Cal. App. 4th at 1036-39 (magazines and newspapers are public fora).
7. *Tamkin*, 193 Cal. App. at 143.
8. See, e.g., *Hall v. Time Warner, Inc.*, 153 Cal. App. 4th 1337, 1346-47 (2007); *Dyer v. Childress*, 147 Cal. App. 4th 1273, 1277 (2007); *Tamkin*, 193 Cal. App. 4th at 143-45.
9. *Id.* at 138.
10. *Id.* at 137-38.
11. *Id.* at 138.
12. *Id.* at 138, 141.
13. *Id.* at 143.
14. *Id.*
15. See, e.g., *Zhao v. Wong*, 48 Cal. App. 4th 1114, 1121-22 (1996); *Briggs v. Eden Council For Hope & Opportunity*, 19 Cal. 4th 1106, 1119 (1999); *Nygard*, 159 Cal. App. 4th at 1039-44.
16. *Dyer*, 147 Cal. App. 4th at 1277.
17. *Id.* at 1276-77.
18. *Id.*
19. *Id.* at 1280-83.
20. See *Nygard*, 159 Cal. App. 4th at 1042 (article on a celebrity in whom there was “extensive interest” met the public interest requirement); *Hall*, 153 Cal. App. 4th at 1347 (disposition of a celebrity’s will was an issue of public interest based on the “public’s fascination” with the celebrity); *Kronemyer*, 150 Cal. App. 4th at 948-50 (finding that the “motion picture *My Big Fat Greek Wedding* was [itself] a topic of widespread public”); *Stewart*, 181 Cal. App. 4th at 677-78 (holding a magazine feature on a popular music genre satisfied the public interest requirement).
21. *Tamkin*, 193 Cal. App. 4th at 143 (quoting *Nygard*, 159 Cal. App. 4th at 1042).
22. *Id.* at 144 (quoting *Dyer*, 147 Cal. App. 4th at 1280).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 144.
27. *Id.*
28. See *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 166 (2003); *Ingels v. Westwood One Broad. Servs., Inc.*, 129 Cal. App. 4th 1050, 1062-64 (2005); *Hall*, 153 Cal. App. 4th at 1346-48.
29. *Tamkin*, 193 Cal. App. at 138, 144.
30. *Id.* at 144.
31. *Id.* at 143-44 (quoting *Lyle v. Warner Brothers Television Productions*, 38 Cal. 4th 264, 298 (2006) (conc. opn. of Chin, J.) (addressing the creative process in the context of a workplace sexual harassment claim)).
32. *Id.* at 144 (quoting *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 869 (1979) (conc. opn. of Bird, C. J.), *fn. omitted*)).
33. *Id.* at 146-50.
34. *Id.* at 147-149.
35. *Id.* at 150.

# Defamation, Section 1983 Claims Over *Dateline NBC* Investigation Dismissed With Prejudice

## *Statements About Annuity Sales to Seniors Were True; No State Action*

By Gayle Sproul and Lucas Tanglen

A federal judge in Colorado has dismissed with prejudice defamation and section 1983 claims relating to a *Dateline NBC* (“*Dateline*”) investigation of insurance annuity sales. [\*Broker’s Choice of America, Inc. v. NBC Universal, Inc.\*](#), 2011 WL 97236 (D. Colo. Jan. 11, 2011) (Arguello, J.). In rejecting the defamation claims, the judge found, relying on plaintiffs’ own words, that plaintiffs taught sales agents to “scare” senior citizens into purchasing annuities and that defendants’ statements about plaintiffs’ recommended sales pitches were substantially true. The judge also concluded that defendants did not become state actors for purposes of Section 1983 when the State of Alabama provided insurance licenses to NBC’s journalists to facilitate undercover access to plaintiffs’ sales seminar.

### The Investigation

Beginning in 2007, *Dateline* correspondent Chris Hansen and two producers began an investigation into the practice of selling equity-indexed annuities to senior citizens, vulnerable consumers who were generally not well served by purchasing annuities. The investigation included the use of volunteer seniors, who posed as potential customers. Agents who came to pitch annuities were recorded on hidden cameras in the senior’s “homes” in Alabama and Arizona.

In addition, *Dateline* interviewed several state law enforcement authorities, including those in Alabama, who were working to halt or regulate the sale of these annuities to seniors by companies such as Brokers Choice of America (“BCA”), which was run by Tyrone Clark. Clark and BCA offered sales agents a sales pitch training session called “Annuity University” – a two-day session in which Clark and his colleagues taught agents the art of selling seniors annuities by frightening them into thinking, among other things, that their money was not safe in banks or from the grasping hands of nursing homes and children.

Instead, Clark taught agents to persuade seniors that the only appropriate alternative for them was to invest in annuities. In order to attend the training session, the producers needed insurance licenses, which were provided to

them by the Alabama Department of Insurance pursuant to their promise that they would not use the licenses to sell insurance and that they would promptly return them. The producers attended the training session in October 2007.

### The Broadcast

The results of the investigation were reported by NBC in its *Dateline* broadcast on April 13, 2008 (“the Broadcast”). Most of the hour-long program focused on the pitches made by agents to the senior citizen volunteers. The Broadcast also included excerpts of interviews with a senior who had lost money in the purchase of an annuity, state officials critical of annuity sales to seniors and the hidden camera footage taken at Annuity University.

Hansen noted that BCA asserts “it’s become ‘an industry leader’ in promoting ethical conduct” and invited viewers to observe hidden camera footage shot at Annuity University and “see if you agree.” This portion of the Broadcast included footage of statements made by Clark describing the scare tactics that sell annuities. For example, Clark is shown in the Broadcast explaining to attendees that “I’m bringing these things up that disturb the hell out of them” and “I bring out the stuff that – where they can’t sleep at night.” Clark also stated that the “FDIC is insolvent,” and that he helps his clients “protect their life savings from the nursing home” and avoid “Medicaid seizure of their assets.” Clark said, “that’s scary, and it should be scary.” Clark is shown telling his audience, “That’s fear. The presentation should have that impact

Clark is also depicted instructing agents to stress to seniors the liquidity of annuities. Hansen then introduced a state Attorney General who says that Clark is “not telling the truth when he tells those agents that an annuity is the most liquid place a senior citizen can put their money. It is simply not true.”

Hansen explained that Clark would not comment on camera. “When I went to Clark’s office, a lawyer met us in the parking lot and told us to leave.” A portion of that encounter was shown in the Broadcast, followed by excerpts

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from letters from Clark's lawyers, who took issue with the fairness of the Broadcast, emphasizing that Clark encourages salesmen to act ethically.

### The Lawsuit

Approximately one year later, Clark and BCA sued Hansen, the producers and NBC and GE for defamation, trespass, invasion of privacy, fraud and 42 U.S.C. § 1983 violations. In particular, they alleged that Clark's remarks had been taken out of context, and mischaracterized in the *Dateline* report and in a *Today* show preview. They claimed that Clark's remarks, taken in context, did not urge agents to deceive or frighten seniors, but simply to inform them of the investment value of annuities. They also claimed that the producers entered Annuity University under false pretenses, thus invading plaintiffs' privacy, trespassing and committing fraud. Plaintiffs also contended that defendants and the State of Alabama had agreed to a *quid pro quo*, in which Alabama assisted the producers with obtaining licenses in exchange for a review of the footage obtained in Annuity University. (This allegation, among many others, was untrue.) On this basis, and less material contentions regarding the State's assistance, plaintiffs pleaded that defendants were state actors who were liable for violations of the Fourth, Fifth and Fourteenth Amendments for unlawful search and seizure, invasion of privacy, taking of property and stigmatization.

Defendants filed a motion to dismiss and a motion to stay discovery. Plaintiffs asserted in opposition to the motion to stay that they needed all of the outtakes shot at Annuity University in order to demonstrate that Clark's remarks were taken out of context and mischaracterized in the report. Defendants countered that plaintiffs could easily demonstrate context without the outtakes, since they were well aware of the contents of the session because Clark repeated it several times each year. The motion to stay was granted.

The motion to dismiss was also granted in October 2009, but plaintiffs were given leave to amend. In her decision at oral argument, Judge Arguello, citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2007) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 1937 (2009), held that the statements at issue, discussed more fully below, were all substantially true on the face of the complaint. The court also applied Colorado law, which provides that, where a matter of public concern is at issue, the plaintiff must prove material falsity by clear and convincing evidence. The court held that the allegedly defamatory statements involved an issue of public concern and that

plaintiffs had failed to plead material falsity. Under the rule of *Hustler v. Falwell*, 485 U.S. 46 (1988), all of plaintiffs' claims were defeated by substantial truth, including all of the claims based on section 1983.

Plaintiffs then amended their complaint, this time bringing only claims for defamation and section 1983 violations, restating all of the original constitutional claims except for the original Fifth Amendment-based taking claim. Plaintiffs again contended that they required the outtakes of the secretly recorded training sessions in order to properly state their claims. But, since the outtakes were unavailable (and the subject of an unsuccessful motion to compel), plaintiffs provided the Court with excerpts from a March 2007 Annuity University session, which they claimed was substantially similar to the one recorded by defendants.

Defendants then filed a motion to dismiss the amended complaint. That motion was granted on January 11, 2011, this time, with prejudice.

### Dismissal of the Defamation Claim

The court found that each of the allegedly defamatory statements challenged by plaintiffs – eleven in the *Dateline* broadcast and two in the preview – were substantially true. In a nutshell, plaintiffs could not demonstrate, even on the face of their complaint, that *Dateline's* characterizations of Clark's teachings or the editing of his remarks created any materially false impressions.

For example, plaintiffs contended that the Broadcast falsely stated that plaintiffs taught agents "to scare seniors." Plaintiffs characterized Clark's remarks instead as an attempt to explain sound financial management. However, the Court concluded, in light of Clark's recorded statement, shown in the broadcast, that when he sells annuities, he raises issues with seniors that "disturb the hell out of them" and that he "brings out the stuff that – where they can't sleep at night," that *Dateline's* characterization of the remarks are substantially true.

Although plaintiffs admitted that Clark made these and other comments, they contended that *Dateline* had taken them out of context and given them an unduly negative spin, asserting that they were simply intended, as the Court put it, "to describe how a 'good agent' makes prospective clients aware of problems." But the Court concluded that these words and others were intended "to prey on the concerns seniors may have," and found that *Dateline* did not alter the true context of Clark's remarks.

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*Dateline* also stated that Clark taught agents that annuities “have no risk,” but plaintiffs claimed he made no such assertion. However, the Court noted that plaintiffs did not dispute that Clark told agents to sell “peace of mind,” a distinction that the court found was without any material difference.

The Broadcast also stated that agents were taught to make potential customers worry by suggesting that “their money may not be safe, even in a bank,” and then showed Clark saying, “FDIC is insolvent.” Although plaintiffs argued this was an unfair juxtaposition, and that Clark was simply contrasting the reserves of the FDIC with those of the insurance industry, the court noted that the purpose of raising the “contrast” was “to raise doubts in seniors’ minds about whether their money is safe in a bank.” Thus, it concluded, the gist of *Dateline*’s characterization was substantially true.

*Dateline* also showed Clark telling agents that he “help[s] his] clients to protect their life savings from the nursing home and Medicaid seizure of their assets. See, that is scary and it should be scary.” *Dateline* led in to this quote by referring to Clark’s advice to agents “to mention a senior’s natural fear of nursing homes.” Plaintiffs maintained that Clark’s statement was intended to instruct agents to “discuss[] the financial implications of nursing homes, a discussion which helps seniors effectively plan their finances.” Again, the Court concluded that, based on Clark’s own words, this part of the pitch was meant to exploit seniors’ “natural fear of nursing homes,” just as *Dateline* had described it.

Plaintiffs also took issue with portions of the Broadcast and preview that displayed a book entitled “Alligator Proofing Your Estate” accompanied by voiceover stating that the book was marketed at the sales seminar and that for a fee an agent could be listed as the exclusive author of the ghost-written book. Plaintiffs asserted, among other things, that the book had not been marketed at their seminars for more than five years and that the book was not “ghost-written.” The Court found, however, that “the way the book is presented . . . suggests that insurance agents had much more involvement than they actually had in writing the book” and concluded that the “gist” of *Dateline*’s “characterization of the book as a marketing device that misleadingly bolsters an agent’s credibility is substantially true.”

The Court separately analyzed each of the remaining allegedly defamatory statements and found each to be substantially true.

### Dismissal of the Section 1983 Claim

In support of their argument for “joint action and a shared purpose” between the media defendants and state authorities, plaintiffs cited the signed agreements pursuant to which the *Dateline* producers received insurance licenses. They also pointed out that a senior volunteer who posed as a potential customer was a social acquaintance of the director of the Alabama Securities Commission, which was involved in the state’s pursuit of annuities regulations.

The court relied to a great extent on the Tenth Circuit’s opinion in *Anderson v. Suiter*, 499 F.3d 1228 (10th Cir. 2007), in which the court held that to support a claim based on state action, a plaintiff must plead facts sufficient to show, as summarized by Judge Arguello, “joint action and a shared purpose between state authorities and the media entity.” In *Anderson*, a police officer authorized a television station to broadcast a videotape in the custody of police that showed the plaintiff being raped by her estranged husband, ostensibly for the purpose of only showing a “head shot” of the husband. The officer also telephoned the plaintiff on behalf of the media entity, encouraging her to speak with the media and then putting a television reporter on the line. *Anderson* rejected the argument that the media defendants there were state actors, highlighting the “separate goals” of the police officer and the media and the fact that the television station, not the police officer, retained editorial control over the use of the tape.

Judge Arguello concluded the defendants and the Alabama Department of Insurance had similarly separate goals: *Dateline*’s goal was to obtain information and footage for its report, and the Department’s goal was to learn more about predatory sales practices toward seniors. Thus, the narrow and temporary agreement regarding the licenses did not demonstrate a “joint relationship,” nor did the alleged relationship between one of the volunteer “customers” and a state official.

Concluding that further pleading would be futile, the court dismissed the amended complaint with prejudice. The plaintiffs have appealed the ruling to the Tenth Circuit.

*Defendants are represented by Hilary Lane of NBC Universal in New York, Thomas B. Kelley of Levine Sullivan Koch & Schulz in Denver and Gayle Sproul in the firm’s Philadelphia office. Plaintiffs are represented by Thomas Edward Downey, Jr. of Downey & Murray in Englewood, CO, and John J. Walsh and Joshua E. Abraham of Carter Ledyard & Milburn in New York.*

# Oklahoma Court of Appeals Reinstates False Light Claim Over News Broadcast

## *Court Holds Lead-in Could Imply Plaintiff Is a “Terrorist”*

By Jon Epstein and Bob Nelon

Former Macomb, Oklahoma high school basketball coach Bill Grogan sued KOKH (the Oklahoma City FOX affiliate), its reporter, and two of its anchors for defamation and false light following a news report about parents' complaints that he had threatened to have students shot after a minor disturbance at a basketball game. The trial court granted summary judgment to the KOKH defendants because Grogan could not satisfy the actual malice element.

The Oklahoma Court of Civil Appeals affirmed summary judgment on the defamation claim; however, the Court reversed summary judgment on the coach's false light claim. [\*Grogan v. KOKH, LLC\*](#), No. 107642, 2011 OK CIV APP 34 (Mar. 16, 2011).

The KOKH defendants successfully petitioned for rehearing. However, three days after granting the rehearing petition, the Court of Appeals entered a new opinion that used slightly different reasoning to reach the same result of reversing summary judgment on the false light claim and remanding for further proceedings in the trial court. The KOKH defendants petitioned the Oklahoma Supreme Court for certiorari review regarding the COCA's decision on the false light claim, but that petition was denied.

### Background

On the evening of February 22, 2008, KOKH's anchors began a news report with the following lead-in:

A teacher is accused of threatening to shoot students and parents say the school is doing nothing about it. ... The school says this is all just a misunderstanding.

Grogan, the subject of that news report, alleged that he was defamed by statements made by parents of students attending the school where he taught and by the KOKH broadcast that reported the allegations made by those parents.

The parents' accusations arose from events that occurred during and after a high school basketball game on February 5, 2008. According to Grogan, at the conclusion of the game, a group of students gathered to confront the referee who during the game had ordered that a student's cowbell be removed from the gym. Grogan said that when a student questioned the referee's authority, Grogan told the student that the referee could do whatever he believed was necessary to control the gym and that the deputy on duty at the game could shoot someone if he had to.

Grogan admitted that some parents accused him of threatening to shoot students and that the parents and students made formal complaints to the school district about him and his statement. The parents then complained to KOKH about his conduct and what they perceived to be the school district's inadequate response to their complaints. KOKH gave Grogan an opportunity to tell his side of the story. It also reported accurately the high school principal's statement that "some statements were misunderstood or misheard or taken out of context" and reported that the Sheriff's office believed that the parents took his statement out of context. In essence, KOKH reported about a public controversy initiated by concerned parents and then reported how Grogan, the principal, and law enforcement officials disagreed with the parents about the context and severity of the incident and Grogan's role in it.

Grogan identified only two statements in the report that he claimed are false: (1) one of the anchors, said "a teacher is accused of threatening to shoot students," and (2) KOKH purportedly implied that he was a terrorist by using the word "terrorist" while his picture was shown. Grogan admitted that the parents did, in fact, accuse him of threatening to shoot students.

### Court Reinstates False Light Claim

Accordingly, the Court affirmed summary judgment for

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the KOKH defendants on Grogan's claim regarding the first statement. However, the Court reversed summary judgment and determined that there was a dispute of fact whether he could support a false light claim with respect to his allegation that the broadcast accused plaintiff of being a "terrorist." Grogan admitted that the only reference to "terrorism" was in a contextual lead-in during which the reporter stated:

[ON CAMERA/BACKGROUND PHOTO OF BILL GROGAN AND GRAPHIC: "THREAT OR MISUNDERSTANDING?"] Well guys, on the heels of terrorist threats at local schools and a shooting at NIU, some parents in Macomb are fuming. They say a teacher threatened their children and he should be punished like anyone else.

Grogan argued that KOKH implied that he is a terrorist because it used the word terrorist at the same time that Grogan's picture was shown under the heading "Threat or Misunderstanding?"

The Court reasoned that there was evidence of record that this one comment in KOKH's broadcast implied Grogan was a terrorist; that implication is false because Grogan is not a terrorist; and KOKH's reporter knew Grogan was not a terrorist. It concluded, therefore, that Grogan had satisfied the actual malice element as well as the other elements of the false light tort.

The KOKH defendants denied that the lead-in was intended to suggest that Grogan is a terrorist and asserted that saying that the events in Macomb came "on the heels" of terrorist threats at local schools and a shooting at a college – several students had died in a shooting just a few days before at Northern Illinois University – is not a reference to Grogan at all but is merely an accurate statement of the temporal context in which events occurred, a context to help inform viewers why the parents were upset. They also contend that by focusing only on the question whether the implication drawn by the plaintiff from one sentence in the broadcast—that he was a terrorist—was false, the Court improperly failed to consider whether the publisher *intended* the implication Grogan claimed can be drawn from the broadcast or recklessly disregarded that the proposed implication would be

drawn by viewers.

The KOKH defendants argued that the implication that Grogan was a terrorist could not reasonably be drawn from the broadcast as a whole. To the contrary, they argued that implication could be rational only if one isolated words and images, disregarded all language in the broadcast inconsistent with the proposed implication, and ignored the context in which the words about which the plaintiff complained appeared (including the immediately preceding comment that "the school says this is all a misunderstanding" and the caption inquiring whether the encounter was a "Threat or Misunderstanding?" that was shown above Grogan's picture when the subject comment was made). They argued that in *Rinsley v. Brandt*, 700 F.2d 1304 (10th Cir. 1983) (affirming summary judgment granted to the defendant), the circuit court talked of reviewing the "particular false statements" about which the plaintiff complained "in context," and said:

In a false light invasion of privacy action, as in a defamation action, a court should not consider words or elements in isolation, but should view them in the context of the whole article to determine if they constitute an invasion of privacy.

Citing *Woods v. Evansville Press Co.*, 791 F.2d 480, 487 (7th Cir. 1986), the KOKH defendants argued that the Court's decision to view the lead-in by itself imposed on them "the intolerable burden of guessing what inferences a [viewer] might draw from a [broadcast] and ruling out all possible false [ ] innuendoes that could be drawn from the [broadcast]." Nevertheless, the Court rejected the defendants' publication-as-a-whole contextual argument, relying primarily on Restatement (Second) Torts, §563, cmt. d to conclude that the lead-in to the broadcast need not be construed in the context of the broadcast as a whole.

The Court rejected the defendants' argument that this conclusion is contrary to the precedential teachings of *Price v. Walters*, 1996 OK 63, 918 P.2d 1370 (in determining whether press release was privileged, court construed allegedly defamatory headlines not in isolation but in context of text of press release); *Hodges v. Oklahoma Journal Pub. Co.*, 1980 OK 102, 617 P.2d 191 (in public figure case,

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headline susceptible to multiple meanings must be construed in context of whole article); and *Wiley v. Oklahoma Press Pub. Co.*, 1924 OK 350, 233 P. 224 (“The article must be construed as an entirety, including the headlines as they may enlarge, explain, or restrict, or be enlarged, explained, or restricted by the context.”).

The Court concluded as matter of law that the isolated statement—“on the heels of terrorist threats at local schools and a shooting at NIU, some parents in Macomb are fuming”—can reasonably be interpreted to associate Grogan with terrorists or terrorism. The Court treated the rest of the broadcast (which it concluded is factually accurate) as containing “unrelated” or “true but unrelated” statements.

The KOKH defendants argued that the Court’s conclusion that the plaintiff had presented sufficient evidence to satisfy the actual malice element makes a leap from the undisputed fact that the reporter did not believe Grogan to be a terrorist to the conclusion that there was sufficient evidence of actual malice because the broadcast supposedly could be interpreted to say that he was. They argued that leap of logic can be made only on the *assumption* that KOKH’s reporter either intended to portray Grogan as a terrorist or had a high degree of awareness that his choice of language would probably do so.

The KOKH defendants argued unsuccessfully that the Court’s Opinion may “permit liability to be imposed not only for what was not said but also for what was not intended to be said,” *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662, 681 (9th Cir. 1990), and that the reasoning of *Woods v. Evansville Press Co.*, 791 F.2d 480, 487 (7th Cir. 1986), remained cogent:

There is a missing link, however, in the plaintiff’s reasoning. Simply because a statement reasonably can be read to [make a false implication] does not mean, as is the case here, that this inference is the only reasonable one that can be drawn from the article. Nor does it mean that the publisher of the statement either intended the statement to contain such a [false implication] or even knew that readers could reasonably interpret the statement to contain the [false implication]. \* \* \* [R]equiring a publisher to

guarantee the truth of all the inferences a reader might reasonably draw from a publication would undermine the uninhibited, open discussion of matters of public concern.

The Court concluded that the lead-in was capable of implying that Grogan was a terrorist; and it held that, because the reporter knew Grogan was not a terrorist, Grogan had met (for summary judgment purposes) his burden to show the existence of facts from which a jury could conclude that the broadcast was made with “actual malice.” It then determined that proof of reckless disregard is only required if the false portrayal is dependent on extrinsic facts. Accordingly, it held that, for purposes of summary judgment, because Grogan is entitled to the inference of the reporter’s knowledge of falsity, it was not necessary to decide whether the reporter recklessly disregarded the falsity of the implication.

In their certiorari petition, the KOKH defendants argued that the Court of Appeals’ opinion writes the constitutionally-imposed “actual malice” element out of the false light tort at the summary judgment stage, by concluding that “the absence of the need to rely on extrinsic facts [to determine that implying that someone is a terrorist is offensive] renders unnecessary at the summary judgment stage an investigation into whether the KOKH reporter knew or recklessly disregarded whether the broadcast would portray Grogan as a terrorist.”

They argued that the Court’s conclusion conflicts with important free speech and press decisions of the Oklahoma Supreme Court and the United States Supreme Court and is directly contrary to *Hodges v. Oklahoma Journal Pub. Co.*, 1980 OK 102, ¶25, 617 P.2d 191, 196, in which the court held in affirming summary judgment, that “where there is no evidence that the publisher intended or was aware of the potentially [offensive] meaning of a [broadcast], which meaning was admittedly at variance with the known truth, ‘malice’ as required by New York Times, *supra*, could not be inferred.”

In a Minute Order, the Oklahoma Supreme Court refused to accept certiorari review and the case has been remanded to the trial court on the false light claim.

*Jon Epstein and Bob Nelon of Hall Estill, Oklahoma City, represent the KOKH defendants. Steven Parker of Tecumseh, Oklahoma represents plaintiff.*

# Statements about Criminal Investigation Too Speculative to Support Defamation Liability

By Laura Handman and Rory Eastburg

The U.S. District Court for the District of Columbia ruled on March 30 that a Georgia poultry processor's defamation claims against the CBS television program *60 Minutes* and one of its interview subjects could not go forward. *Mar-Jac Poultry, Inc. v. Katz*, No. 03-cv-02422, 2011 WL 1140447, at \*15 (D.D.C. Mar. 30, 2011).

The order granting summary judgment to the defendants ended, for the moment, a long-running dispute over coverage of a sprawling government investigation into terrorist financing. But while the case was tied up for eight years as a crucial witness refused to answer questions about a complex web of international money transfers, the court's ultimate decision was simple. Judge Rosemary M. Collyer ruled that statements that investigators were "trying to find out" whether money was flowing to terrorist organizations were not actionable because they were "clearly hyperbolic, speculative, and as surmise did not imply a verifiably false fact." *Id.* at \*15.

## "Terrorist Hunter"

On May 4, 2003, *60 Minutes* aired a news report, entitled "Terrorist Hunter," about efforts to track U.S. money being funneled to Islamic extremists. The segment featured an interview with a disguised source later identified as Rita Katz, the author of a book by the same name published by HarperCollins. The broadcast discussed in depth Katz's role as a "tipster government officials say has been especially valuable." Correspondent Bob Simon noted that Katz had provided information to several federal agencies as well as the White House – for example, that a Texas charity that received federal funding also provided support to the children of suicide bombers. *Id.* at \*2-3.

After the Texas find, the broadcast noted, Katz discovered that "most radical mosques" were owned by an organization whose founders now had offices at 555 Grove Street in Herndon, Virginia. The building "housed nearly 100 organizations owned by Muslims, most of them run by the same small group of people," and Katz "was convinced she'd

stumbled upon the heart of a terrorist financing ring" funded by wealthy Saudis. *Id.* at \*3-4.

Simon said that "one especially inventive idea the Saudis came up with according to [Katz] was chickens. They bought a chicken farm in Georgia." Katz told Simon that "Chicken – I see it as the best cover for money laundering," because "chicken is one of the things that no one really can track it down. If you say in one year that you lost 10 million chickens, no one can prove it." Simon asked whether any money from the chicken farm "has gone down the line to Hamas or Islamic Jihad or al-Qaida," to which Katz responded, "That's what we're trying to find out." *Id.* at \*4.

Simon noted that, with Katz's help, federal officials gathered enough information to raid 555 Grove and 28 other locations in 2002, including the chicken farm. He said that the organizations mentioned or shown in the story denied any wrongdoing, and that the federal investigations continued. *Id.* at \*4-5.

## "A Critical Witness"

Mar-Jac Poultry Inc. sued Katz, CBS, and related individuals and entities in 2003. Mar-Jac is a large Georgia-based chicken processor. From 1984 to 1996, the company was owned in whole or in part by the Saar Foundation, a charity established by a wealthy Saudi family and a target of government scrutiny. *Id.* at \*1-2.

Mar-Jac sued in Georgia federal court for defamation, negligence, product disparagement, and related claims. A case by related charitable organizations against CBS and Katz – later voluntarily dismissed – was pending in the U.S. District Court for the District of Columbia. Thus, the Mar-Jac action was transferred to the District of Columbia in November 2003. *Id.* at \*5. Ms. Katz was also sued by an employee of one of the related charitable organizations for constitutional tort. Dismissal of that suit was affirmed in *Unus v. Kane*, 565 F.3d 103 (4th Cir. 2009).

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**Statements that investigators were "trying to find out" whether money was flowing to terrorist organizations were not actionable because they were "clearly hyperbolic, speculative, and as surmise did not imply a verifiably false fact."**

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But the *Mar-Jac* case soon hit a roadblock when Mar-Jac principal Dr. M. Yaqub Mirza – whom the court would later call a “critical witness” due to his knowledge of the complex web of financial transactions involving Mar-Jac and related entities – declared that he intended to assert his Fifth Amendment right to avoid self-incrimination rather than be deposed. The court stayed the case for five years, pending resolution of the criminal investigations of Mar-Jac and related individuals. *Id.*

Mirza finally was deposed in May 2010. But the court stayed further discovery until motions for summary judgment could be heard, noting the D.C. Circuit’s instruction that “a district court may limit discovery to the ‘threshold issue of falsity’ before engaging in ‘the more burdensome discovery surrounding evidence of’ actual malice.” *Id.* at \*10 (quoting *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 625 (D.C. Cir. 2001)). Mar-Jac challenged this decision to sequence discovery in an appeal and petition for writ of mandamus, but the D.C. Circuit rejected these attempts. *See Mar-Jac Poultry, Inc. v. Katz, et al.*, No. 10-7035 (D.C. Cir. July 27, 2010) (*per curiam*); *In re Mar-Jac Poultry, Inc.*, No. 10-5073 (D.C. Cir. July 27, 2010) (*per curiam*).

In July 2010, CBS and Katz moved for summary judgment on the ground that the broadcast was not capable of defamatory meaning because the challenged statements were not “of and concerning” Mar-Jac, and that the speculative and uncertain nature of Katz’s comments foreclosed any finding that those remarks give rise to an actionable defamatory implication. CBS separately moved for summary judgment on the grounds that its broadcast did not endorse the accuracy of statements made by Ms. Katz, was a privileged fair report of a governmental investigation, and constituted a privileged neutral report. *Mar-Jac Poultry, Inc.*, 2011 WL 1140447, at \*11.

Mar-Jac claimed in opposition that the broadcast asserted that it “engaged in money laundering activities . . . as part of a knowing effort to support terrorists and/or terrorist organizations.” Mar-Jac also sought partial summary judgment on three elements of its defamation claim – that the statements were “of and concerning” Mar-Jac, that they were defamatory, and that they were false. *Id.* at \*10.

### **“Speculation, Surmise or Hyperbole”**

The court first considered whether a defamation claim

could be sustained under Georgia state law. Under Georgia law, the court concluded, the defendants could prevail only if the broadcast was not “reasonably capable of conveying the defamatory meaning proffered by Mar-Jac.” *Id.* at \*11.

The court saw no real dispute that Mar-Jac was the “chicken farm” referenced in the broadcast. However, “the question remain[ed] whether the proffered allegation of intentional money laundering was ‘of and concerning’ Mar-Jac itself.” *Id.* at \*12. Defendants argued that, at most, the broadcast suggested that Mar-Jac was an unknowing conduit for terrorist financing. They submitted four volumes of financial records and documents to support the truth of this alleged implication, and the court observed that defendants “appear ready to offer evidence to counter a defense of falsity as to whether Mar-Jac was an unknowing ‘conduit’” for terrorist financing. *Id.* at \*11 n.7. But it could not “conclude as a matter of law that no reasonable viewer could interpret the Broadcast to imply that Mar-Jac *knowingly* engaged in money laundering to aide terrorists.” *Id.* at \*13 (emphasis added). It added that “[s]ummary judgment cannot be granted to Defendants that the complained-of statements were not defamatory under Georgia law; since the Broadcast is somewhat ambiguous, a jury would have to decide its meaning.” *Id.*

But liability under Georgia law only began the inquiry, because the court was still required to “determine whether the Broadcast was nonetheless protected by the First Amendment.” *Id.* at \*14. This presented a heavier burden for Mar-Jac because of the constitutional protection afforded to opinion and speculation. Citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) and its progeny, the court noted that expressions of opinion are actionable only “when a reasonable trier of fact could interpret the statement to imply an assertion of objective fact that is defamatory.” *Id.* Thus, the court considered “whether the Broadcast contained such ‘loose, figurative, or hyperbolic language which would negate the impression that [Ms. Katz] was seriously maintaining that [Mar-Jac] committed the crime’ of money laundering to aide terrorists or terrorism groups.” *Id.* at \*14-15.

Applying this standard, the court concluded that “no reasonable jury could find that Ms. Katz’s statements about laundering money through misreporting dead chickens were anything but rank speculation, surmise or hyperbole.” It noted that “Ms. Katz did not say that Mar-Jac ever reported

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## Conclusion

or announced that Mar-Jac had lost ten million chickens in any given year, only that ‘if you [were to] say that you lost 10 million chickens, no one [could] prove it.’” *Id.* at \*14. It explained that “Ms. Katz’s statement that *if* one wanted, one could report ten million dead chickens a year, was clearly hyperbolic, speculative, and as surmise did not imply a verifiably false fact. Her further statement ‘[t]hat’s what we’re trying to find out,’ . . . also negated the possibility that a reasonable juror would conclude that Ms. Katz implied a factual assertion that Mar-Jac had knowingly laundered money to assist terrorists.” *Id.* at \*15. It added that “[a]ny further implication that Mar-Jac acted *knowingly* in laundering money to assist terrorists or terrorist groups remained so unspoken that it, too, could only be – at best – speculation and surmise.” *Id.* at \*15-16 (citing *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280 (4th Cir. 2008)).

The court quickly disposed of the remaining claims as derivative or otherwise improper. *Id.* at \*16-17. It denied Mar-Jac’s own motion for summary judgment without significant comment, and noted that it need not address CBS’s separate motion for summary judgment “except to say that it raises very serious defenses under the fair report privilege, at a minimum.” *Id.* at \*11 n.8.

Over the course of eight years, the *Mar-Jac* case raised complex legal issues as to whether a plaintiff can maintain a libel action when a key officer and director asserts the Fifth Amendment and refuses to answer questions, whether an accurate report about a government investigation is “true” regardless of whether allegations made in the investigation are true, and the ability of the courts to sequence discovery in order to protect First Amendment interests. But for the district court, the key was the simple proposition that saying investigators are “trying to find out” if conduct occurred does not amount to an accusation that it *did* occur. Mar-Jac’s appeal is pending.

*Defendant CBS Broadcasting Inc. is represented by Anthony Bongiorno and Naomi Waltman of the CBS Law Department, and Lee Levine, Gayle Sproul and Tom Curley of Levine Sullivan Koch & Schulz, L.L.P. Defendants Rita Katz, SITE Institute, and IG, LLC are represented by Laura R. Handman, Robert Scott, and Rory Eastburg of Davis Wright Tremaine LLP. Plaintiff is represented by Nancy Luque and Daniel Marino of Luque Marino LLP, John J. Walsh of Carter Ledyard & Milburn LLP, and Wilmer Parker of Maloy Jenkins Parker.*

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# Court Reverses \$310,000 Jury Damage Award Over “Communist Sympathizer” Label

Citing to the Supreme Court’s recent decision in *Snyder v. Phelps*, the Washington Court of Appeals reversed a \$310,000 jury damage award to a Vietnamese-American plaintiff and community organization, over statements accusing them of being Communist sympathizers. *Tan v. Le, et al.*, No. 39447-2-II, 2011 Wash. App. LEXIS 915 (Wash. App. April 19, 2011) (Armstrong, Quinn-Brintrial, Penoyar, J.J.).

The court recognized that the Vietnamese-American community takes seriously allegations of Communist support, but reasoned that the statements were made in the context of political debate and were protected by the First Amendment. In addition, to the extent the allegations constituted statements of fact, the court held that the damage award could not stand because of insufficient proof of actual malice.

## Background

Plaintiff Duc Tan and defendants are all members of the Vietnamese-American community in Thurston County, Washington. The plaintiff is the educational director of the Vietnamese Community Association of Thurston County (VCTC). At issue were an email message and newsletter articles published by the defendants that accused plaintiff and his organization of repeatedly displaying Viet Cong symbols and being “under-cover agents” for the Viet Cong while disguising themselves as anti-Communist nationalists.

In 2004, Tan and the VCTC sued for defamation. Both were held to be public figures and the case went to trial in 2009. At trial, plaintiffs’ counsel argued that “[t]here could be nothing more odious, nothing more hateful, and nothing more hurtful than calling my client a communist -- adding in closing that being called a Communist is not just an insult, “it is *the* insult.” After an 11-day trial, the jury found that the defendants had defamed Tan and the VCTC; the jury awarded Tan damages of \$225,000 and the VCTC damages of \$85,000.

Defendants appealed, arguing 1) that their statements were matters of opinion; and 2) were made without actual malice. Plaintiffs argued that they were accused of “taking tangible steps to support the Communist party” based on false underlying facts.

## Protection for Political Debate

The Court of Appeals first addressed the opinion issue, noting that “generally, audiences should expect statements of opinion in contexts such as political debates.” Citing *Dunlap v. Wayne*, 105 Wn.2d 529, 538, 716 P.2d 842 (1986) (setting out a three factor analysis for opinion looking at 1) the medium and context in which the statement was published, 2) the audience to whom it was published, and 3) whether the statement implied undisclosed facts).

Here the parties were all community leaders engaged in a protracted debate over how best to achieve the political goals of the Vietnamese refugee community. Thus “the audience was prepared for mischaracterizations, exaggerations, rhetoric, hyperbole, and biased speakers.” And all three of the *Dunlap* factors supported the conclusion that defendants’ allegations were protected political opinions. “That labeling Tan a Communist is inflammatory is precisely the reason the First Amendment affords it near perfect protection.” Citing to *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

## Lack of Actual Malice

Finally the court considered the sufficiency of plaintiffs’ actual malice evidence and concluded that even if it considered any underlying statements to be factual, plaintiffs’ claims would still fail.

Citing to *St. Amant v. Thompson*, 390 U.S. 727, 731, (1968) and *Harte-Hanks Comm’n, Inc. v. Connaughton*, 491 U.S. 657, 689 n.35 (1989), the court reasoned that the history of acrimony between the parties, the failure to contact plaintiff before publication or investigate the underlying incidents failed to prove actual malice.

“The defendants may also have been overly quick to build a conspiracy theory from facts too scant and equivocal to persuade a jury that the conspiracy existed in fact. Nonetheless, the defendants’ mischaracterizations, exaggerations, and seemingly improbable inferences took place in an ongoing political discussion protected by the First Amendment.”

# Sixth Circuit Affirms Summary Judgment for Cleveland Scene in Public Official Libel Suit

## *Article Mocking “Bizarre Boy Mayor” Was Protected Opinion*

The Sixth Circuit this month affirmed summary judgment for *Cleveland Scene* magazine, holding that an article mocking the Mayor of Seven Hills, Ohio was clearly protected opinion. [Bentkowski v. Scene Magazine, aka Cleveland Scene, et al.](#), No. 09-4547, 2011 U.S. App. LEXIS 7912 (6<sup>th</sup> Cir. April 19, 2011) (Martin, Suhrheinrich, Kethledge, JJ.). Relying on federal and Ohio cases, the Court concluded that an “ordinary reader would accept the article as opinion.”

At issue was an article published in 2007 entitled “The Bizarre Boy Mayor” which mocked and criticized Mayor David Bentkowski for a letter he wrote to young residents of the town, touting Seven Hills as a “hip” place with “rad” schools; and asking for emails and MySpace pages to keep in touch. Among other things, the magazine wrote:

The letter, which reads like a student-council campaign speech, is vintage Bentkowski. This, after all, is a 34-year-old mayor who brags about his youth, proudly wears Superman tights, and routinely tries to pull off stunts like limiting residents’ feedback at meetings and barring government employees from running for office. Bentkowski, it’s safe to say, has the political IQ of Quiznos’ lettuce..... The letter also includes a lengthy questionnaire that asks residents to provide the ages and names of “everyone living in your household.” This, Bentkowski writes, “will help us notify you of various things that may be of interest to you. For example, if you have an 18-year-old daughter we can invite her to participate in the Miss Seven Hills Pageant,” an event the mayor has insisted he emcee.

The magazine had been a regular critic of the mayor, frequently referring to him as “The Bizarre Boy Mayor,” “Mayor MySpace” and “The Big Bentkowsi,” and stating of his administration: “Think of your teenage niece suddenly running a suburb.”

In 2008, the Mayor sued the magazine for libel, arguing the reference to “limiting residents’ feedback at meetings and barring government employees from running for office” was defamatory. He also alleged that criticism of his request for emails in connection with a beauty pageant falsely implied he was seeking the information for “illicit purposes.” In 2009, the federal district court granted summary judgment in favor of the magazine on the libel claims. The district court also sanctioned plaintiff for failure to prosecute the case and comply with discovery and conferencing schedules by striking out an amended complaint seeking to add additional parties.

### Sixth Circuit Decision

The Sixth Circuit affirmed both rulings. First, the article did not clearly state or imply that the Mayor had an illicit motive in sending the letter. Second, while the statement about open meetings and employees appeared to be verifiable, in context it was hyperbole. Looking at the article as a whole, the court noted its use of phrases such as “super-duper cool, rad, killer, student-council campaign speech and political IQ of Quiznos’ lettuce.” The court noted that the article used “simile, hyperbole, and other figurative language” and was “ridden with humor and sarcasm.” Moreover, the article made no attempt to hide its bias and it could not reasonably be read as “impartial reporting.” Thus looking at the totality of circumstances the ordinary reader would understand the article as opinion.

Finally, the court affirmed – under an abuse of discretion standard – the striking of the amended complaint. *Plaintiff was represented by Brent L. English, Cleveland, OH. Defendants were represented by Kenneth Zirm and Kate E. Ryan, Ulmer & Berne LLP, Cleveland, OH.*

# CBS and NBC Win Summary Judgment in Texas Defamation Case

By Sean Kelly and Amanda Bush

A Texas state court judge granted summary judgment to CBS and NBC in a lawsuit brought by the owner of a horse boarding facility who claimed she and her ranch were defamed by a series of news broadcasts reporting on allegations, investigative and official proceedings, and a public controversy concerning the care and condition of some Fort Worth Police Department mounted patrol horses boarded at the ranch.

The Honorable Melody Wilkinson granted summary judgment on February 25, 2011 to CBS Stations Group of Texas L.P., NBC Subsidiary KXAS-TV, a division of Station Venture Operations L.P., and two other defendants. The broadcasts at issue aired on the Dallas-Fort Worth network stations in June 2008. The defamation action was filed in March 2009 by Betty Wills and The Wills Ranch, Inc. (collectively “Wills” or “Plaintiffs”). See *Betty Wills and The Wills Ranch, Inc. v. James “Jim” Lane, William C. Anderson DVM, NBC Subsidiary KXAS-TV, a Division of Station Venture Operations L.P., and CBS Stations Group of Texas, L.P.*, No. 017-236774-09 (17th Dist. Ct., Tarrant County, Tex.).

The media defendants argued on summary judgment that, among other things, the broadcasts were substantially true accounts of various third-party allegations, opinions, and investigative and official proceedings. The media defendants also argued that their broadcasts were privileged under the official proceeding and fair comment privileges, that Wills was a limited-purpose public figure, and that they did not act with actual malice. NBC further argued that its broadcasts were not “of and concerning” Wills because the broadcasts only referenced “a privately owned stable.” In addition, CBS argued that some of Plaintiffs’ claims, concerning additional CBS broadcasts on the controversy, were time-barred under Texas’ one-year statute of limitations on libel claims.

After a two hour summary judgment hearing, the court

granted all Defendants’ motions. The court entered final judgment on March 9, 2011.

## Background

The broadcasts at issue reported on allegations and controversies surrounding three Fort Worth police horses that were sent to Wills Ranch in May 2008 for “turnout.” Police removed the horses seventeen days later amid concerns over their care and condition after officers noticed fly bites, kick and bite marks, weight loss, and skin infections on the mounted patrol horses. A police sergeant photographed the horses to document their condition upon their return to the

Fort Worth police stables, and a veterinarian examined the horses, concluding, among other things, that the horses suffered a severe weight loss of 100 to 150 pounds each. An ongoing preliminary police investigation into the treatment of the horses found no evidence of abuse or neglect at the stables, findings that were reported at a Fort Worth City Council meeting.

NBC 5-KXAS broke the story on its 4 p.m. newscast on June 4, 2008 and aired follow up versions on subsequent newscasts. NBC did not name Wills or the ranch, but reported on the comments of officials after the horses were removed, including a police official and a former city councilman who served as spokesman for the mounted patrol’s volunteer Citizens Support Group. The NBC broadcast also reported on the contents of a letter authored by the veterinarian who examined the horses after their removal from the ranch.

CBS 11-KTVT first reported on the controversy during its 10 p.m. newscast on June 4, 2008 and aired shorter versions the next day. On June 10 and 11, 2008, CBS also reported on the city council meeting at which the initial findings of the preliminary investigation into the horses’ care were discussed. Both stations also published internet versions of

**The media defendants argued on summary judgment that, among other things, the broadcasts were substantially true accounts of various third-party allegations, opinions, and investigative and official proceedings.**

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their initial broadcasts.

Wills alleged that the broadcasts falsely accused her and the ranch of neglecting or abusing the horses and challenged numerous specific statements as false. Wills further claimed that the broadcasts omitted material facts that rendered them false and defamatory.

In addition to the two television stations, Plaintiffs also sued the former city councilman and the veterinarian for defamation, business disparagement, and conspiracy. Plaintiffs initially named the city of Fort Worth and the mounted patrol's horse trainer as defendants, but those claims were dismissed earlier in the lawsuit. In total, Plaintiffs filed five amended petitions in the lawsuit.

### **Motion for Summary Judgment**

After extensive discovery, CBS and NBC both moved for traditional summary judgment on several different, independent grounds, including: (1) substantial truth, (2) statutory privilege, and (3) limited purpose public figure and no actual malice. NBC also moved on the ground that its broadcasts were not "of or concerning" the Plaintiffs, and both broadcasters moved for summary judgment on no-evidence grounds. The court did not specify which ground or grounds it relied upon in granting the motions.

### **Substantial Truth**

CBS and NBC argued that the broadcasts satisfied the substantial truth test in Texas. With respect to the reporting on the third-party allegations, the media defendants argued that, under well-established precedent in Texas, the truth of underlying allegations made by third parties is not relevant to the summary judgment motion and that media defendants need only show that the allegations were made and accurately reported, not that the underlying allegations themselves are true. *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990); *Neely v. Wilson*, No. 03-08-00495-CV, 2011 WL 477041 (Tex. App.—Austin Feb. 9, 2011, no pet. h.); *Grotti v. Belo Corp.*, 188 S.W.3d 768 (Tex. App.—Fort Worth 2006, pet. denied); *Dolcefino v. Turner*, 987 S.W.2d 100 (Tex. App.—Houston [14th Dist.] 1998), *aff'd*, 38 S.W.3d 103 (Tex. 2000); *see also Green v. CBS, Inc.*, 286 F.3d 281 (5th Cir. 2002).

In response, plaintiffs contended that the media may republish allegations by third parties, but only when those allegations are "under investigation." Texas courts, however,

recognize the media's right to publish third-party allegations in a variety of circumstances and do not require the allegations to be "under investigation." *See Green* 286 F.3d 281; *McIlvain*, 794 S.W.2d 14; *Associated Press v. Boyd*, 2005 WL 1140369 (Tex. App.—Dallas 2005, no pet.); *KTRK Television v. Felder*, 950 S.W.2d 100 (Tex. App.—Houston [14th Dist.] 1997, no writ). In any event, as the media defendants argued, plaintiffs' "under investigation" argument is a red herring because the Fort Worth police indisputably began an investigation two days prior to the initial broadcasts.

### **Texas Statutory Privileges**

The media defendants also argued they were entitled to summary judgment because the broadcasts are privileged. Texas's statutory privileges protect media reports on (1) allegations that are fair, true, and impartial accounts of official proceedings or (2) if the accounts are a "reasonable and fair comment on or criticism of [a] . . . matter of public concern published for general information." TEX. CIV. PRAC. & REM. CODE § 73.002(b)(1) and (2). Here, CBS and NBC argued the broadcasts were privileged because they reported on, among other things, official allegations, a preliminary and ongoing police investigation, and the public controversy concerning the care and condition of the mounted patrol horses.

### **Limited Purpose Public Figure Status/No Malice**

CBS and NBC also argued they were entitled to summary judgment because Wills and Wills Ranch are limited purpose public figures and failed to show that the broadcasters acted with actual malice. Texas follows a standard three prong test in determining whether a libel plaintiff is a limited purpose public figure: (1) the pre-existing controversy at issue was public in the sense that people were discussing it and that people, other than the immediate participants in the controversy, were likely to feel the impact of it; (2) the plaintiffs had more than a trivial or tangential role in the controversy; and (3) the alleged defamation was germane to their participation in the controversy. *See, e.g., WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568 (Tex. 1998).

With respect to the first prong, plaintiffs argued that there was no public controversy, merely a matter of private concern. On the second prong, plaintiffs argued that they did

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not voluntarily inject themselves into the controversies, that they did not seek out publicity, and that there was no prior publicity before the broadcasts. Plaintiffs did not challenge the third prong of the test.

In response, the media defendants contended that the broadcasts involved a host of public controversies, including the already existing controversy over the horses' care and condition, general animal welfare concerns, and city budget shortfalls. Furthermore, the broadcasters argued that Plaintiffs' role was more than trivial or tangential. Wills herself admitted she was caught up in several of the controversies. The broadcasters further pointed out that Wills voluntarily invited public scrutiny on this issue by caring for police horses—indeed police horses that are an iconic symbol of the city of Fort Worth—and being paid by taxpayer dollars.

Finally, on the issue of actual malice, CBS and NBC submitted detailed, uncontroverted affidavits by reporters and editors to establish as a matter of law that the media defendants believed the broadcasts were true and did not have any awareness of probable falsity. See *HBO, L.P. v. Harrison*, 983 S.W.2d 31, 40-44 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

One additional question that arose during the summary judgment hearing was whether Texas's interlocutory appeal

right pursuant to Texas Civil Practice and Remedies Code § 51.014(6) extends to sources who are sued for defamation along with the media defendants. After the hearing, defendants and plaintiffs submitted a letter brief to the court agreeing that sources have the same statutory right as the media to an interlocutory appeal from the denial of a summary judgment motion based in whole or in part on a free speech claim or defense, citing *Delta Air Lines v. Norris*, 949 S.W.2d 422, 429 (Tex. App.—Waco 1997, no pet.).

*Sean Kelly is an attorney with Vinson & Elkins L.L.P. in Dallas, Texas. Amanda Bush is a partner at Jackson Walker L.L.P. in Fort Worth, Texas. Anthony Bongiorno, Senior Vice President, Associate General Counsel, Litigation, and Hazel-Ann Mayers, Senior Vice President, Assistant General Counsel, Litigation, represent CBS. CBS is represented in the Texas lawsuit by Tom Leatherbury, Dan Kelly, and Sean Kelly, attorneys at Vinson & Elkins L.L.P., and was represented by former Vinson & Elkins partner Michael Raiff. Tania Hoff, Litigation Counsel, represents NBC. NBC is represented in the Texas lawsuit by Bob Latham and Amanda Bush, attorneys at Jackson Walker L.L.P. Bob Latham and Dan Kelly argued the summary judgment motions for the media defendants. Wills and The Wills Ranch are represented by Alison Rowe of Alison Rowe Equine Legal Services and Gary Richardson of Richardson Richardson Boudreaux Keesling, PLLC.*

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# Missouri Court Quashes Registration of Canadian Defamation Judgment Under SPEECH Act

By Michael Nepple

In *Pontigon v. Lord*, No. ED 95677, 2011 WL 1522565 (Mo. Ct. App., Apr. 19, 2011), the Missouri Court of Appeals quashed the registration of a Canadian defamation judgment based upon the trial court's failure to make the necessary factual findings required by the SPEECH Act, 28 U.S.C. §4101-05 (2010). This appears to be one of the first appellate decisions to apply the protections embodied in the Act.

## Background

The registration and enforcement action arose out of a lawsuit between Leodegaria Sanchez Pontigon ("Sanchez") and Udis Lord ("Lord"). Sanchez and Lord are cousins and both were born in the Philippines. At the time of the underlying lawsuit, Lord was an American citizen and resident of Missouri; Sanchez a resident of Ontario.

Sanchez brought a defamation suit in Canada against Lord, based upon statements Lord made in her autobiography, *From Fieldhand to Ph.D., Ms. Asia International*. In her book, Lord discussed a separate pending lawsuit that Lord and her sister brought against Sanchez in the Philippines, seeking to set aside a deed, because of fraud allegedly committed by Sanchez. Sanchez downloaded Lord's book in Canada, and then sued Lord for defamation. Sanchez apparently obtained service upon Lord in the Canada action "by email and a fax from Ms. Sanchez's lawyer." Lord did not personally appear in Canada, and default judgment was entered against her for \$51,216.46.

## The Enforcement Action and Appeal

The Missouri appeal arose out of Sanchez's registration of the Canadian judgment in St. Charles County, Missouri, where Lord resides. Sanchez registered the judgment after notice to Lord, and the trial court issued a garnishment. Lord filed a motion for relief from enforcement of the Canadian judgment, which was denied by the trial court. Lord appealed.

On appeal, the Missouri appellate court reversed the registration and garnishment because Sanchez had failed to attach a properly certified and authenticated copy of the

Canadian judgment to her filings. In addition, the appellate court held that the trial court had failed to determine whether Sanchez's service upon Lord in Canada complied with a Missouri statute that, in the absence of specifically defined acts that provide for automatic recognition, otherwise requires that a foreign judgment be rendered under circumstances "consistent with fairness and substantial justice in the context of international commerce or relations." RSMo 511.783.2.

## The SPEECH Act

Additionally, and more importantly, the appellate court found that the SPEECH Act's protections impacted Missouri's statutory foreign judgment registration and enforcement procedures. The appellate court directed the trial court on remand to consider and apply the SPEECH Act in the event that the procedural errors noted above were corrected on remand.

The appellate court specifically noted that before registration and enforcement proceedings could proceed, the trial court must first make the factual determinations set forth in the SPEECH Act. This would require the trial court to find either that Canadian defamation law provided "at least as much protection for freedom of speech and press in that case as would be provided by" the First Amendment or, in the alternative, that Lord "would have been found liable for defamation by a domestic court" applying the First Amendment. See 28 U.S.C. § 4102(a)(1)(A) & (B).

In addition, although the Missouri statutes on recognition and enforcement of foreign judgments are silent on the issue, the appellate court held that upon remand Sanchez had the burden of proof in establishing that the Canadian court had provided Constitutional due process in exercising personal jurisdiction ("the party seeking recognition or enforcement of the foreign judgment shall bear the burden of making the showing that the foreign court's exercise of personal jurisdiction comported with the [Constitution's] due process requirements . . ."). See 28 U.S.C. § 4102(b).

*Michael Nepple is a partner at Thompson Coburn, LLP in St. Louis, Missouri.*

# Court Quashes Libel Plaintiff's Subpoena to Non-Party Reporter

## *Discovery About Accurate Report Sought to Show Fault of Broadcaster*

By Robert C. Clothier

A federal judge in the Eastern District of Pennsylvania upheld the First Amendment reporter's privilege and quashed a subpoena seeking testimony from a Philadelphia television station's executive producer. A libel plaintiff sought the producer's testimony about the station's own reporting of an FBI raid that was allegedly inaccurately reported by the competitor Philadelphia radio station sued by the plaintiff. The court held that such evidence showing how the television station "got it right" was not "crucial" to showing that the defendant radio station "got it wrong."

### The Libel Lawsuit and Plaintiff's Subpoena

The subpoena arose in the context of a defamation lawsuit that was brought by plaintiff Edward J. McBride, a local union official, against CBS Radio East, which owns KYW Newsradio, a radio station in Philadelphia ("KYW").

Plaintiff alleged that KYW defamed him by reporting that his home was one of several locations raided by the FBI. Subsequent to that reporting, a communications consultant for the union where plaintiff worked sent an email blast to the news media saying that plaintiff's home was not raided. An executive producer at WPVI-TV/6ABC ("WPVI"), a television station in Philadelphia owned by ABC, Inc., responded that WPVI had not reported that plaintiff's home was among those raided by the FBI. WPVI, he explained, was unable to get independent confirmation.

During discovery, the plaintiff subpoenaed the executive producer seeking his testimony, but not any documents. Plaintiff's counsel said that he wanted the testimony to show that WPVI had followed the standard of care by declining to publish information from a confidential source that could not be independently confirmed.

Such an argument praising WPVI's reporting was a bit unusual coming from plaintiff's law firm, which regularly

represents libel plaintiffs against the media and whose name partner, Richard Sprague, remains the winner of what is considered the largest defamation verdict (\$34 million, later reduced to \$24 million) against a media company (The Philadelphia Inquirer) upheld on appeal.

These efforts to resolve the matter were unsuccessful, and the executive producer and ABC, Inc. filed a motion to quash.

### The Motion to Quash

In the papers, the plaintiff argued the motion was premature and that the witness should appear for his deposition and respond on a question by question basis. He also tried to weaken the legal test under the First Amendment, arguing

that he need show only that the subpoenaed testimony was "relevant and important," not that it was "crucial" as held in numerous Pennsylvania and Third Circuit court decisions. He maintained that the executive producer's testimony was "relevant and important" for two reasons. First, he claimed the executive producer's emails suggested that he knew that defendant KYW was incorrect in reporting that plaintiff's home was raided.

Second, he claimed the emails suggested that he knew that KYW had failed to corroborate a confidential source's information and would have determined that plaintiff's home had not been raided if it had tried to do so. Lastly, he argued that the executive producer was the only source of information showing what he "meant and implied" in his emails.

In response, ABC and the executive producer argued that there was no reason for the witness to appear when virtually every question likely to be asked would implicate the First Amendment reporter's privilege. They also argued that the First Amendment test required that plaintiff establish the information was "crucial," not simply relevant and important,

*(Continued on page 36)*

**The court held that such evidence showing how the television station "got it right" was not "crucial" to showing that the defendant radio station "got it wrong."**

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and that plaintiff failed to satisfy his burden under the First Amendment. They asserted that there was no basis for the plaintiff to believe that the executive producer had any personal knowledge about how KYW reported the story, and that testimony about how WPVI reported the story was irrelevant to plaintiff's claims, especially if plaintiff were deemed a public figure. They also asserted that the executive producer was hardly the only source of information going to the falsity of defendant KYW's reporting (indeed, plaintiff revealed in his sur-reply brief that the Department of Justice stated that his home was not raided) nor of information going to defendant KYW's negligence (the plaintiff could depose defendant's reporters and editors and retain an expert). Lastly, they asserted that merely saying that only the executive producer knows what he "meant and implied" misunderstands the First Amendment test. By that standard, virtually every witness would be the "only source" of subpoenaed information.

### The Court's Decision

The court held that the plaintiff bore the burden of showing that (1) he "attempted to obtain the information from other sources, (2) the information can only be acquired through the journalist or the journalist's sources, and (3) the information is 'crucial' to the party's claim." It found that one factor was "whether the case is civil or criminal, because 'the privilege assumes greater importance in civil than in criminal cases.'" For these principles, the court relied on *Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003) as well as two Third Circuit decisions (*United States v. Criden*, 633 F.2d 346 (3d Cir. 1980) and *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979)).

Applying the test, the court first found that the plaintiff's argument – that only the executive producer can explain what his emails meant – "frames the dispute too narrowly." The court said that the plaintiff "can prove [defendant KYW] was negligent in numerous ways without producing evidence of the investigations and editorial decisions of other news organizations." Given these alternative sources, the court found that the subpoenaed testimony was not "crucial" to plaintiff's claims and thereby rejected the plaintiff's contention that he need show only that the subpoenaed information was "relevant and necessary."

The court found it significant that the plaintiff was seeking testimony about "6ABC's newsgathering practices and policies." Among the information plaintiff sought was "(1) whether 6ABC received an anonymous tip which was also given to [KYW], (2) what research 6ABC engaged in after receiving this tip, and (3) why 6ABC elected not to broadcast [the plaintiff's] name as part of its story about the FBI raids." The court stressed that the plaintiff was seeking "editorial decisions and newsgathering activities that are at the core of what the reporter's privilege protects." Noting that the privilege is "especially important in this type of civil case, where the media entity from whom information is sought is not a party to the litigation," the court concluded that the privilege was "properly invoked" and quashed the subpoena.

Lastly, the court rejected the plaintiff's contention that the motion to quash was premature, holding that "[w]hen, as here, the information sought is wholly protected by the First Amendment reporter's privilege, a non-party media entity need not be subjected to the burden of appearing at a deposition."

It is significant the plaintiff did not argue that there is no First Amendment reporter's privilege in Pennsylvania. Because the case was a diversity case, Pennsylvania, not federal law, applied, though Pennsylvania courts heavily rely on Third Circuit cases when applying the privilege. While intermediate Pennsylvania appellate courts have uniformly adopted the privilege, the Pennsylvania Supreme Court in Bowden pointedly assumed without deciding that there was such a privilege. The court's decision is important for several reasons. It provides a strong re-affirmation and robust articulation of the First Amendment reporter's privilege in Pennsylvania at a time when courts around the nation have shown less support for the privilege generally. And it holds that the reporter's privilege fully protects newsgathering activities and editorial decisions and precludes a libel plaintiff from obtaining testimony from other media organizations merely because they reported on the same story at issue. A contrary ruling would have opened the door to more subpoenas on journalists.

*Robert C. Clothier of Fox Rothschild LLP and Indira Satyendra, Senior Counsel at ABC, Inc. represented Movants Richard Williams and ABC, Inc. Gayle C. Sproul of Levine Sullivan Koch & Schulz, L.L.P. represents defendant KYW. Plaintiff is represented by Joseph R. Podraza, Jr. of Sprague & Sprague, Philadelphia, PA.*

# S.D.N.Y. Quashes Subpoena to Reporter in Fraud Suit Against Goldman Sachs

## *Investors Sought Reporters Testimony to Prove Negligence*

By Amanda M. Leith

The Southern District of New York has quashed a subpoena served on Jesse Eisinger, a former *Wall Street Journal* reporter, seeking his testimony in a case brought by plaintiffs Janet and James Baker against Goldman Sachs & Co. (“Goldman”), arising from services Goldman provided in connection with the merger of the Bakers’ voice recognition software company, Dragon Systems, with the Belgian speech technology company Lernout & Hauspie (“L&H”) in 2000. *In re Subpoena to Jesse Eisinger*, No. 11-mc-00060 (S.D.N.Y. Apr. 12, 2011) (Jones, J.).

The Court found that Eisinger’s testimony was protected by the New York Shield Law, and determined that plaintiffs had failed to make the showing necessary to overcome the privilege

### Background

In the underlying suit pending in federal court in Massachusetts, plaintiffs brought claims against Goldman for breach of fiduciary duty, breach of contract, negligence, negligent misrepresentation and unfair trade practices. Plaintiffs had hired Goldman to be Dragon’s “exclusive financial advisor” in connection with the sale of the company, then valued at over \$600 million.

In March 2000, Plaintiffs agreed, allegedly with Goldman’s “endorsement,” to merge Dragon with L&H. The merger deal, under which plaintiffs exchanged 51% of their interest in Dragon for approximately \$300 million in L&H stock, closed in June 2000. The L&H stock became worthless shortly thereafter upon the discovery of various financial frauds perpetrated by L&H, which declared bankruptcy in November 2000.

Plaintiffs claim that Goldman breached its professional, fiduciary and contractual duties by failing to fully investigate L&H and failing to uncover, among other things, L&H’s

overstated reporting of revenue, particularly with respect to customers in Asia.

Among plaintiffs’ theories is that Goldman was negligent because it did not do what the *Journal* did to uncover L&H’s fraud. Eisinger, then a *Journal* reporter, authored and co-authored several articles about L&H, which quoted analysts who were skeptical of L&H’s claimed sales successes in Asia. One article of particular interest to the Bakers, published on August 8, 2000 and entitled “Lernout & Hauspie Surges in Korea, Raising Questions,” described the results of an inquiry by the *Journal* into L&H’s purported Korean client list, which revealed that some of the listed clients did not even do business with L&H and that others

had made far less significant contributions to L&H’s revenues than the company claimed.

The publication of the August 8 article was followed by a significant drop in L&H’s stock price, an SEC investigation and ultimately L&H’s declaration of bankruptcy.

Plaintiffs contended that they needed to depose Eisinger as “the individual who did exactly what Goldman should have done” and subpoenaed Eisinger, who filed a motion to quash. Eisinger argued that under the New York Shield Law, New York Civil Rights Law § 79-h, applicable in this diversity case, he could not be compelled to testify because plaintiffs could not meet the stringent test for discovery of non-confidential information and that confidential information, also implicated here, was absolutely protected.

Plaintiffs opposed the motion, arguing that the Shield Law protected only unpublished information and that they sought only testimony concerning published information. However, their brief made clear that they hoped to inquire into “what Eisinger did” and “what he did and what he found as he reported.” Plaintiffs also argued that they were able to satisfy

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**Among plaintiffs’ theories is that Goldman was negligent because it did not do what the *Journal* did to uncover L&H’s fraud.**

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the demanding test imposed by the Shield Law. Goldman submitted a statement objecting to plaintiffs' characterization of the underlying case and supporting the motion to quash.

### Decision

The Court first addressed whether or not the Shield Law was applicable to the subpoenaed testimony. Plaintiffs argued that the Shield Law did not apply because they sought Eisinger's testimony only to "confirm the details published" in the *Journal* articles, which by definition was published information not covered by the statutory privilege. Eisinger contended, however, that, in seeking testimony concerning "what he did," plaintiffs inevitably would ask questions concerning unpublished information. In addition, Eisinger argued on this point that plaintiffs had failed to take into account Goldman's right to cross examination.

The Court agreed. First, it found that plaintiffs' written submissions and statements at oral argument suggested that the scope of testimony would not be confined to published information. The Court noted that, despite its repeated questions to plaintiffs' counsel during oral argument, plaintiffs "could not assure the Court that they would only ask Eisinger to confirm the [published] details" and, indeed, "could not define the exact questions [they] would ask" if permitted to depose him.

The Court observed that, to make their point that a non-accountant such as Eisinger was able to learn information that Goldman did not find, "plaintiffs inevitably would have to ask questions regarding Eisinger's techniques for conducting his investigation, the backgrounds of Eisinger's co-authors, and the [*Journal's*] editorial staff, and whether he consulted with any experts or other sources in the course of the investigation." The Court held that "these topics are key parts of the newsgathering process, and as such are protected by the New York Shield Law."

Second, the Court noted that the inquiry would logically delve into unpublished details given that (1) the August 8 article was co-authored by three journalists and the article did not identify precisely who had taken which steps in the *Journal's* investigation and (2) if deposed, Eisinger would be subject to cross-examination by counsel for Goldman, who represented to the Court that he would need to conduct an in-depth examination into the circumstances of Eisinger's investigation. The Court noted that this situation was distinct

from those in cases relied upon by plaintiffs, in which all sides had agreed to restrict themselves to questions regarding published information.

The Court next considered whether plaintiffs had made the requisite showing to overcome the privilege imposed by the Shield Law. It held that the language of the statute that requires the testimony be "critical or necessary to the maintenance of the claim" in turn required that plaintiffs demonstrate that their claims "virtually rise or fall with the admission or exclusion of the evidence" sought.

Observing that it was "even doubtful Mr. Eisinger's testimony would be relevant," the Court found that plaintiffs had "not demonstrated how testimony about a journalist's investigative techniques and process of reporting are a relevant comparison to Goldman Sachs' duty of care in this situation. The fact the Wall Street Journal conducted an investigation into L&H sheds no light on the scope of Goldman's obligations to Dragon and the Plaintiffs."

The Court therefore granted the motion to quash. Plaintiffs have filed a notice of appeal to the Second Circuit.

*Mr. Eisinger was represented by Jason Conti of Dow Jones & Company and Gayle C. Sproul of the Philadelphia office of Levine Sullivan Koch & Schulz, L.L.P. and Amanda M. Leith of the firm's New York office. Plaintiffs Janet and James Baker were represented by Alan K. Cotler, Joan A. Yue and Andrew J. Soven of Reed Smith, LLP. Defendant Goldman Sachs & Co. was represented by Paul Vizcarrondo of Wachtell, Lipton, Rosen & Katz.*

## LEGAL FRONTIERS IN DIGITAL MEDIA

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# Bloomberg Wins End to “Provisional Sealing” of Filings in NJ Financial Fraud Case

By Bruce S. Rosen

A New Jersey Superior Court Judge has [vacated](#) a 2008 sealing order signed by his predecessor that allowed parties in a massive financial fraud suit to provisionally blanket seal their filings at whim for months without any judicial review. *Fairfax Financial Holdings v. S.A.C. Capital Management*, No. 2032-06 (N.J. Sup. Ct. April 15, 2011).

Superior Court Judge Stephan C. Hansbury ruled that the process in the [2008 Order](#) – which was used by parties to seal summary judgment motions and other substantive materials wholesale without any showing of confidentiality “backwards” – created a presumption of sealing rather than a presumption of public access.

## Background

In the case, Canadian insurance giants Fairfax Financial Holdings Ltd and Crum & Forster seek damages from several major hedge funds and their well-known managers, including S.A.C. Capital Management LLC and Steven Cohen and Third Point and its manager Daniel Loeb, as well as several analysts and others in an alleged conspiracy to short plaintiffs’ stock, causing a collapse in share prices in the early 2000s. Bloomberg sought to vacate the Order because the parties were using it to blanket seal filed non-discovery motions it believed should be presumptively accessible under New Jersey law.

The parties and the court agreed to the sealing order as the case took off in 2008, allowing the parties to designate their own documents as confidential – and then to “provisionally seal” the entire filing automatically for 30 days based on the confidentiality of those documents. Before the 30 days expired, a party could extend the seal by filing a motion with the Special Discovery Master (“SDM”), former federal judge Stephen Orlofsky of Blank Rome in Princeton, NJ. If Judge Orlofsky ruled against a party, that party could further extend the seal until the trial court considered an appeal – a process that could easily take six months.

Even worse, the Order permitted a party to use the same process to seal an adversary’s motions if the adversary included confidential documents produced in discovery that

the producing party felt were “irrelevant” to the motion. This was ostensibly designed to dissuade plaintiffs from filing defendants’ confidential documents in reply to defense motions in order to publicize damaging documents, a not infrequent practice by plaintiffs in complex high-visibility cases.

## Decision

Judge Hansbury ruled that in permitting attorneys to designate their documents “confidential,” then to have the power to seal entire filings based on that designation, and also to seal plaintiffs’ filings because it believed the use of their confidential documents was irrelevant, violated *Hammock v. Hoffmann-LaRoche*, 142 N.J. 356, 381 (N.J. 1995), the primary New Jersey case governing sealing of judicial documents.

Judge Hansbury said he would soon rule on whether to continue the sealing of plaintiffs’ 2700-exhibit certification filed in support of its opposition to a defense summary judgment motion. Defendants argue that because the motion was withdrawn before being decided – although it was retained in the judge’s chambers – there is no longer a presumption of public access. Bloomberg opposed that claim because the motions were filed judicial documents and remained filed with the court.

At oral argument, the judge also appeared to agree with Bloomberg’s claim that parties were being overbroad in their “confidential” designations of documents; for example, of the 2700 documents in that certification, many were already public and defendants seek sealing of only about 40 of the exhibits, yet the entire certification remains sealed.

Judge Hansbury said that he and Judge Orlofsky would quickly fashion a new process that would follow *Hammock*. Judge Orlofsky had previously ruled that under *Hammock*, if the filing is relevant to anything in the case – even beyond the motion – it should be accessible to the public. Judge Orlofsky has also made several rulings denying maintenance of seals for all but a handful of documents that reflect essentially trade secrets. However, defendants have appealed

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most, if not all of these SDM decisions to Judge Hansbury under the 2008 Order's process, keeping the disputed materials sealed in the interim.

Bloomberg originally successfully intervened in the matter in October 2008 in order to gain access to the summary judgment filings of one hedge fund. While Bloomberg objected to the procedures in the 2008 Order at

that time, the objection did not play a significant part in the access decision. Reuters America LLC intervened in the matter to join in Bloomberg's motion and other sealing issues in the case.

*Bruce S. Rosen and Kathleen A. Hirce of McCusker, Anselmi, Rosen & Carvelli, P.C. in Florham Park, NJ, a DCS Member, represented Bloomberg LP in this matter.*

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## Massachusetts High Court Holds Civil Commitment Proceedings Presumptively Open to the Press and the Public

By Michael J. Grygiel and Victoria P. Lane

Little did reporter Dennis Tatz of *The Patriot Ledger* in Quincy know that when he attempted to enter a Massachusetts hospital room temporarily serving as a courtroom to cover a civil commitment proceeding, his doing so would lead to an important decision by the Supreme Judicial Court of Massachusetts establishing a presumptive right of public access to such proceedings. [\*Kirk v. Commonwealth\*](#), 459 Mass. 67 (2011). At issue in the underlying commitment hearing was the fate of Helen Kirk, a mother who had been found not guilty by reason of mental illness for the strangulation death of her young son and who, after less than four years in confinement, sought to be released from the state mental health hospital to which she had been committed. Upon learning of the reporter's desire to attend the proceeding, Ms. Kirk's attorney filed a motion to close the commitment hearing to the public, which the lower court denied. On appeal, the Supreme Judicial Court upheld the lower court's ruling and, addressing an issue of first impression in the Commonwealth, held that civil commitment hearings are presumptively open to the press and the public under the standard established in *Waller v. Georgia*, 467 U.S. 39 (1984). Although denominated a common law right of access in *Kirk*, the governing principles are therefore substantively identical to the four-part constitutional test set forth in the U.S. Supreme Court's public access jurisprudence.

Helen Kirk was indicted in April 2005 for the tragic murder of her four-year-old son. After a bench trial in September 2007, she was found not guilty by reason of

mental illness and committed by the Bristol County Superior Court to Taunton State Hospital for care and treatment of her mental illness. She was recommitted in 2008 during an uncontested proceeding. In November 2009, however, the hospital notified the Commonwealth of its intent to discharge Ms. Kirk based on her improved condition. In opposing her release, the Commonwealth obtained an independent psychiatric evaluation of Ms. Kirk and thereafter filed a petition to continue her commitment. Prior to the hearing, Ms. Kirk's counsel moved to close the commitment proceedings to the public. After hearing oral argument on the motion, the district court, sitting at the hospital, denied plaintiff's motion without a written decision.

Ms. Kirk appealed the denial of her motion on a writ of superintendence to a single justice of the Massachusetts Supreme Judicial Court. The justice reserved decision and reported the question to the full bench. The Court allowed *The Patriot Ledger* (which opposed Ms. Kirk's position) and several mental health organizations (which supported Ms. Kirk's position) to file *Amicus Curiae* briefs. The Court held oral argument on November 1, 2010, and issued its opinion on March 7, 2011.

### The Public's Presumptive Right of Access to Civil Commitment Proceedings

Ms. Kirk argued that her commitment hearing should be closed to the public in order to protect her statutory right to privacy of records concerning her psychiatric treatment at

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Taunton State Hospital, including the highly personal information she disclosed in her therapy sessions. While acknowledging that she had been advised by the evaluator that the information she voluntarily provided would not be confidential, Ms. Kirk asserted that she had not been informed that the information would be shared with the general public and had only agreed to a limited waiver of the psychotherapist-patient privilege to share information with the court and the other participants in the proceeding. Ms. Kirk further argued that the widespread dissemination of her personal psychiatric information “may have a devastating effect on her treatment” and that, while the trial judge had discretion to decide whether to make her mental health records public, he erred by failing to undertake a careful review of all matters that would adversely impact her ongoing course of treatment.

Although the Supreme Judicial Court declined to address the broader question of whether the First Amendment-based right of public access to criminal proceedings extends to all civil proceedings and, instead, limited its inquiry to whether civil commitment proceedings under the relevant Massachusetts statutory framework should be open to the public as a matter of common law, it rejected the above arguments. The Court recognized the longstanding common law presumption that the public has the right to attend civil trials and, applying standards developed by the U.S. Supreme Court in the constitutional context, held that the presumption of openness applies to civil commitment proceedings under Massachusetts common law.

Relying on the “history and logic” test from *Press-Enterprise Co. v. Superior Court*, 278 U.S. 1, 8 (1986), the *Kirk* Court determined that the public had a presumptive right to attend civil commitment proceedings based on the tradition of accessibility to such proceedings and the significant positive role played by public access in the functioning of the proceedings. Tracing the evolution of civil commitment proceedings in Massachusetts, the Court noted that courts and lawmakers had moved away from their prior informality and now provide a range of procedural protections that are characteristic of criminal and other civil matters, such as the right to counsel and the right to appeal. The Court also found that public access to these proceedings would underscore the seriousness of the potential deprivation of liberty they implicate, combat tendencies of informality that threaten an individual’s due process rights, and allay the skepticism and

distrust among the public with respect to post-trial proceedings after a person has been acquitted by reason of mental illness. For these reasons, the Court held that civil commitment proceedings should be granted the same presumption of openness that is afforded to criminal and civil trial proceedings.

The Court adopted the rigorous constitutional standard from *Waller v. Georgia*, *supra*, in balancing the interests of the party advocating closure against the public’s interest in access to the proceeding, holding that closure of a civil commitment hearing may occur only when each of the following four requirements is met: (1) the party seeking closure demonstrates an overriding interest that is likely to be prejudiced; (2) any closure is no broader than necessary to protect that interest; (3) the trial court considers reasonable alternatives to closure of the proceeding; and (4) the court makes record findings adequate to support closure. In other words, the moving party’s position must be sufficiently compelling and supported by a particularized showing to overcome the presumption of openness, and any order of closure must be narrowly tailored to the specific circumstances and supported by specific judicial findings made on the record.

Applying these requirements, the Court held that Ms. Kirk failed to show an overriding interest that was likely to be prejudiced absent closure. While cautioning trial courts meaningfully to consider any alleged prejudice to a patient’s ongoing treatment that could occur by virtue of a public proceeding, the Court rejected Ms. Kirk’s conclusory allegation that having to disclose detailed evidence describing her therapeutic progress “may have a devastating effect on her treatment.”

The Court found that, presented in general terms without supporting expert opinion or other evidence, this interest was insufficient to overcome the presumption of access because it would likely be present in most commitment hearings would therefore allow closure on a routine basis. Accordingly, the Court upheld the trial court’s decision and denied Ms. Kirk’s motion to close her civil commitment proceeding to the press and the public.

*The Patriot Ledger*, published by the George W. Prescott Publishing Co. in Quincy, Massachusetts, was represented in the Supreme Judicial Court of Massachusetts by Michael J. Grygiel and Victoria P. Lane of Greenberg Traurig, LLP in Albany, New York, and by Zachary C. Kleinsasser of the firm’s Boston office.

# UK Government Releases Libel Reform Bill

## *What the Draft Bill Would Mean in Practice*

**By Niri Shan and Lorna Caddy**

In March, the UK Ministry of Justice released a much awaited [Draft Defamation Bill](#) to reform English libel law. This article analyzes some of the key changes that would ensue if the Bill is enacted and what those changes would mean in practice for claimants and defendants. We also analyze what is missing from the Bill, in light of current issues and when compared to Lord Lester's Private Member's Defamation Bill published last year.

### **Clause 1 of the Draft Bill**

Substantial Harm - All claimants must show that the publication has caused or is likely to cause substantial harm to the claimant's reputation. Libel is currently actionable without proof of actual damage. Recent case law has introduced a "threshold of seriousness" in what is defamatory. Following *Jameel v Dow Jones & Co* [2005] EWCA Civ 75, there is also the possibility of striking out actions where there has been no real and substantial wrong.

### **Comment**

Given the recent case law developments, the introduction of a requirement for claimants to show substantial harm will not come as a surprise to most media lawyers. What is still to emerge is how a company goes about showing substantial harm. Does it have to do this by demonstrating a drop in profits/loss of a contract or a likelihood that profits are likely to drop or a contract is likely to be lost? Some more guidance on this would assist.

### **Clause 2 of the Draft Bill**

Responsible publication on a matter of public interest - It is a defense to show that the statement complained of is, or forms part of, a statement on a matter of public interest; and the defendant acted responsibly in publishing the statement complained of.

**Comment:** Clause 2 of the Bill codifies some of the existing law on Reynolds Qualified Privilege deriving from the House of Lords' cases of *Reynolds v Times Newspapers*

Limited [1999] 3 WLR 1010 and *Jameel v Wall Street Journal (Europe)* Sprl [2007] 1 AC 359, including some of Lord Nicholl's 10 factors. As per Lord Lester's Bill, it is intended that the defense will be available regardless of whether the statement complained of is a statement of fact, an inference or an opinion. Historically, this defense has arguably related to statements of fact only.

It follows that defendants may choose to run both a responsible publication defense as well as an honest opinion defense when the statement is one of opinion. However, given the lack of a requirement to show responsible journalism for honest opinion, this would seem the more attractive route for a defendant.

Clause 2(2) lists 8 factors which the court may have regard to in deciding whether the defendant has acted responsibly. In practice, publishers have found this defense very complicated and expensive to run. The Consultation Paper stresses that the factors should not be interpreted as a checklist or set of hurdles for defendants to overcome. They should be interpreted in an illustrative and non-exhaustive way. Historically, they have been interpreted as hurdles so the inclusion of the word "may" is welcome.

In the Consultation Paper, the Government asks for views on whether "the nature of the publication and its context is more important than the other factors" and whether it should be given greater weight. We submit that it should be. Courts need to bear in mind the circumstances in which the publisher is operating. As the Consultation Paper points out, the context of a national newspaper is likely to be different from the context of a non-governmental organization or scientific journal.

Clause 2(3) helpfully clarifies the law in relation to the reportage doctrine - i.e. neutral reporting of attributed allegations - for example, the unfolding of a dispute. In instances where this doctrine applies, the defendant does not need to have verified the information reported before publication. It gives a statutory basis to the case of *Al-Fagih* [2001] All ER (D) 48. Currently, this defense is relied on infrequently. Hopefully, a statutory basis will give defendants more confidence to use it.

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### **Clause 3 of the Draft Bill**

Clause 3 renames the common law justification defense with a statutory defense of truth. "It is a defense to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true." The burden of proving truth remains on the defendant.

### **Clause 4 of the Draft Bill**

Honest Opinion - a defendant will be able to rely on this defense where: The statement is one of opinion On a matter of public interest That an honest person could have held on the basis of: a) a fact which existed at the time the statement complained of was published; b) a privileged statement which was published before the statement complained of.

**Comment:** This is hopefully a big liberalization of the defense formally known as fair comment. It has been notoriously hard to rely on and there has been confusion about what a defendant must demonstrate in terms of fact supporting the comment. Here, provided a statement is opinion on public interest, it will be sufficient if a fact existed at the time the statement complained of which support the opinion in question. It seems to follow from this that the author would not have to include details of the fact(s) within the comment.

It also appears that an author can also rely on facts which existed at the time of publication but of which he was not necessarily aware. However, the Consultation Paper muddies the waters here stating "It is envisaged that a fact may be expressed in or implied by the statement and the courts will be able to apply this in a flexible way taking account of the particular context in which the opinion was formed."

While this would be a hugely welcome development, some commentators would like to see the introduction of a single meaning rule for honest opinion whereby the meaning of the allegedly defamatory words to be defended is held to be the meaning ascribed to those words by the author.

### **Clause 5 of the Draft Bill**

Privilege - amends the provisions contained in the Defamation Act 1996 relating to the defenses of statutory absolute and qualified privilege to extend the circumstances

in which these defenses can be used.

**Comment:** Key changes which will affect journalists' ability to report proceedings and meetings are:

Section 14(3) of the Defamation Act 1996 currently provides for absolute privilege to apply to fair and accurate reports of proceedings in public before any court in the UK. This defense would be extended to cover proceedings in any court in a country or territory outside the UK.

Clause 5(3) of the Bill extends the defense of statutory qualified privilege to summaries of notices or other matter issued for the information of the public by a number of governmental bodies, and to summaries of documents made available by the courts. Summaries of material are different from copies or extracts in so far as they may involve an element of paraphrasing of the original material.

Currently, qualified privilege under Part 1 of Schedule 1 of the 1996 Act extends to fair and accurate reports of proceedings in public of a legislature; before a court; and in a number of other forums anywhere in the world. However, qualified privilege under Part 2 only applies to publications arising in the UK and EU member states. Clause 5 of the Bill would extend the scope to cover the different types of publication to which the defense extends anywhere in the world.

Clause 5(5) would also extend qualified privilege to fair and accurate reports of proceedings at general meetings and documents circulated by public companies elsewhere in the world. Currently, the privilege only extends to UK public companies.

Clause 5(7) extends qualified privilege to fair and accurate reports of proceedings of a scientific or academic conference, and to copies, extracts and summaries of matter published by such conferences.

Clause 5's extension of privilege to include a greater international dimension is welcome. The press have indicated that many instances arise where they are threatened with legal action for quoting or citing public documents, for example relating to corrupt activities in other countries.

### **Clause 6 of the Draft Bill**

Single Publication rule - where a person publishes a statement to the public and subsequently publishes that statement or a statement which is substantially the same, the limitation period for any cause of action is to be treated as

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accrued on the date of the first publication. The limitation would not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication. The first occasion on which a publication is made available to the public generally (or to any section of the public) is to be regarded for all purposes as the date of publication of each subsequent publication.

**Comment:** If enacted, Clause 6 would overturn the ruling in the case of *Loutchansky v Times Newspapers* [2001] 3 WLR 404 CA where it was held that each time an article that appeared in the Times archive was accessed, there was a fresh publication giving rise to liability and the limitation period would be open-ended. This date of first publication will be the relevant one for calculating the one year limitation period, rather than the current system whereby words are deemed as published as at the date on which they are accessed, irrespective of when they were first published.

While this would be a welcome development, Clause 6(5) may lead to some confusion. It reads:

“In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters): a) The level of prominence that a statement is given; b) The extent of the subsequent publication.”

The Consultation Paper explains the provision by giving the following example: “A possible example of this could be where a story has first appeared relatively obscurely in a section of a website where several clicks need to be gone through to access it, but has subsequently been promoted to a position where it can be directly accessed from the home page of the site, thereby increasing considerably the number of hits it receives.”

This subclause has the makings of trouble and uncertainty. What happens if a story is not in a prominent place but it suddenly gets huge profile because someone other than the defendant draws attention to it, e.g. via Twitter? Who is responsible for this new “level of prominence”?

#### **Clause 7 of the Draft Bill**

Libel Tourism - A court does not have jurisdiction to hear

and determine an action to which this section applies unless the court is satisfied that England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

**Comment:** The aim of this clause to address the issue of “libel tourism”. It is carefully worded to avoid conflict with our European obligations, particularly under the Brussels Regulation on jurisdictional matters. In summary, Clause 7 focuses on cases where action is brought against a person who is not domiciled in the UK or an EU Member State (or a party which is party to the Lugano Convention).

In practice, this is often going to rule out bringing a claim against a publisher based in the US. This complements the US’s SPEECH Act introduced in 2010 to prevent foreign libel judgments being enforced there.

The clause is intended to ensure that, in cases where a statement has been published in this jurisdiction and also abroad, the court is required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard. The example given in the Consultation Paper is where a statement is published 100,000 times in Australia and 5,000 times in England, that would be a good basis on which to conclude that the most appropriate jurisdiction would be Australia.

#### **Clause 8 of the Draft Bill**

Presumption of trial without jury

**Comment:** This would be a welcome reversal of presumption. It would mean that issues which could otherwise have been decided by a judge at an early stage (such as meaning) could be resolved before trial. For many reasons, the reversal of the presumption is very likely to reduce costs for all parties in a defamation action.

#### **What’s Not in the Bill**

Whether companies must show the publication has caused or is likely to cause substantial financial loss.

In his Private Member’s Bill, Lord Lester included a clause which stated that a body corporate which seeks to pursue an action for defamation must show that the publication of the words or matters complained of has caused, or is likely to cause, substantial financial loss to the body corporate.

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This has been abandoned by the Government. This is likely to cause some upset among publishers. However, if the Government's Bill is adopted in its current form, companies are going to have to demonstrate substantial harm. How they will demonstrate this in practice without having to point to a drop in profits/loss of contracts, will be interesting to see.

### **Safe Harbor Provisions**

While the issue of responsibility for publication on the internet is not dealt with in the current draft of the Bill, the Government is consulting on the issue and may incorporate a provision to deal with it in due course. Lord Lester's Private Member Bill set out safe harbor provisions in line with those specified in the Defamation Act 1996 and the Electronic Commerce (EC Directive) Regulations 2002. Clause 9 of the Bill specifies that for those involved in publication/broadcast (besides primary publishers who include authors, editors or a person acting as an author or editor), on receiving written notice of a complaint about defamatory material, the defendant will have a defense where within 14 days (or such other period as the court may specify), the words or matters have been removed from publication.

The Government is basing its consultation around clause 9 of Lord Lester's Bill. Clause 9 includes a provision which reads that "Any defendant in an action for defamation has a defense if the defendant shows that the defendant's only involvement in the publication of the words or matters complained of is as a facilitator." Facilitator is defined as a "person who is concerned only with the transmission or storage of the content of the publication and has no other influence or control over it."

These days, hosting is not a straight forward matter. Many publishers host their own content and then user generated content, such as message boards. Many of those publishers would hope to successfully argue under the current law that they were a facilitator in the latter situation. It would be helpful if this were clarified. What exactly is a facilitator / ISP? The Consultation Paper states "in most circumstances a blog owner or discussion board owner may be viewed in the same way as an ISP, as he or she would have editorial control over the content of the postings and hence the opportunity to remove any material considered to be potentially defamatory."

What if the blog owner purposefully did not exercise

editorial control over UGC posted to its site? In these circumstances, we would hope he would be able to rely on a safe harbor provision.

### **Procedure**

A proposal to create a new High Court procedure for defamation cases to be channelled through a process whereby key issues such as the following can be determined as early as possible:

- ◆ Whether the claim satisfies the new substantial harm test where this is disputed
- ◆ What the actual meaning of the words complained of is and whether the meaning is defamatory
- ◆ Whether the words complained of are a statement of fact or an opinion
- ◆ Whether the publication is on a matter of public interest
- ◆ Whether the publication falls within the categories of publication in Schedule 1 of the Defamation Act 1996 for which the defense of qualified privilege is available
- ◆ Consideration of costs budgeting in appropriate cases.

Currently, there are no proposals included in the Bill for a change of procedure in defamation cases. However, the Government is consulting on this and has put forward some core elements of a new procedure for discussion (shown above).

These would all be very welcome. Consideration of these issues should narrow the issues in dispute and lead to earlier settlement / cheaper litigation. It is currently envisaged that costs should be costs in the case if the claim proceeds. However, this needs to be thought through. What if the parties have tried to agree these matters themselves without success and then the judge gives a ruling which is the same or similar to one or other party's submissions? Should costs be in the case in those situations?

### **Privacy**

While the Defamation Bill will help promote freedom of speech in relation to defamation actions, it is disappointing that the Government is not actively looking at privacy reform in the same way. The current privacy law is in many ways a bigger threat to free speech especially because it is quite

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common for the court to grant pre-publication injunctions in privacy claims. This happens very rarely in defamation cases. There is a distinct possibility that, because of the additional hurdles to bringing a defamation claim introduced by the Bill, and the availability of pre-publication injunctions in privacy claims, claimants will increasingly try to shoe horn what are essentially defamation claims into privacy actions.

### **Costs**

Recent lobbying by media organizations has concerned the current costs regime whereby the conditional fee agreement system (with success fees of up to 100% and

costly after the event insurance premiums) makes it too risky for many defendants to defend claims, resulting in a chilling effect on freedom of expression. Any reform of the substantive law of defamation needs to be accompanied by a change in the costs regime. Lord Justice Jackson's consultation on civil litigation funding and costs ended last month.

The Ministry of Justice has indicated that it will introduce any necessary primary legislation in the Spring. Primary legislation is going to be necessary, following the European Court of Human Rights' ruling in the case of *MGN Limited v UK*.

*Niri Shan is a partner and Lorna Caddy a senior associate at Taylor Wessing in London.*

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## **Phone-Hacking in the UK and Damages**

### *Distinguishing the Truth from the Hyperbole*

**By Keith Mathieson**

Last September the New York Times ran a long article about illegal phone-hacking by the best-selling UK tabloid the News of the World. News International, the publisher of the newspaper, responded in characteristically combative fashion by dismissing the allegations as baseless and untrue and even accusing the New York Times of breaching its own ethical guidelines by indulging in a gratuitous attack on a commercial rival.

Eight months on, how things have changed. The trickle of litigation last September has turned into a flow of such proportions that a judge at the High Court in London has been specially assigned to manage the cases. In the last couple of weeks the News of the World has admitted liability in eight cases and appears to have made substantial offers of settlement from a multi-million pound compensation fund it has established for the purpose. Perhaps most worryingly for NI, the Metropolitan Police has reopened its criminal investigation into the affair. So far, it has arrested three senior journalists and the big question is whether certain senior NI executives might also receive the summons to attend at Scotland Yard.

The affair has gradually begun to occupy more and more space in the UK media, though it's fair to say that the bulk of the coverage has been by the Guardian, Independent and

BBC, all considered unfriendly towards Rupert Murdoch and his business empire. It is now clear that we have a significant media scandal on our hands. What was once thought to be an isolated case of a rogue reporter going off the rails now appears in fact to have been a systematic and possibly criminal enterprise that involved inexcusable invasions of personal privacy over several years.

Having said that, there is no evidence that the admitted wrongdoing at the News of the World between 2004 and 2006 has continued or has spread to other newspapers. None of the victims appears to have suffered lasting damage and the information derived from the interception of voicemails appears to have been for the most part celebrity tittle-tattle of a fairly uninteresting kind.

These considerations have not, however, put a brake on the relentless coverage of the affair or its accusatory nature. In February 2011 the coverage prompted one former editor to speak out against what he saw as a disproportionate attack on the News of the World. Donald Treford, the respected former editor of the Observer, wrote in the Independent that the phone-hacking saga was a case of "dog eats dog gone barking-mad." In his view, the agenda was driven by a combination of MPs and celebrities bent on revenge against the tabloid press, greedy lawyers and the "anti-Rupert

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Murdoch faction." The fuss about phone-hacking was "obsessive, hysterical and opportunistic."

Since Trelford's article, NI's admission of certain instances of voicemail interception may be thought to leave Trelford with a spot of egg on his face. But Trelford's observations retain some force: much of the recent discussion has been characterised by exaggeration, vindictiveness and self-interest. Yes, intercepting voicemails is a crime and it's an invasion of personal privacy, but it's not the most serious crime and nor in most cases is it even at the more serious end of the scale of possible privacy infringements.

One of the more extreme contributions has been by the Labour MP Tom Watson, a member of the House of Commons Culture, Media and Sport Committee. On the Labour Uncut blog he lays into the Murdoch empire - and indeed the Murdoch family - with unrestrained abandon. The phone-hacking affair has "pulverised careers, relationships and lives"; Murdoch's operation is about to "sink in shame" and "judgment day is round the corner"; News International's approach to "a saga of mass criminality is one of dumb insolence"; people have "had their lives turned inside out", suffering "depression, sleepless nights and fear"; they've "lost friends and loved ones" and contemplated suicide. Watson expresses the hope that "those bullies are getting a flavour of the misery they have casually meted out to people over many years."

Henry Porter has said the phone-hacking affair is "one of the most serious post-second world war scandals to affect British public life" and expressed the view that it is "hard to imagine a more dangerous breach of trust by a public corporation." A prominent London media lawyer has said that phone-hacking was "endemic on Fleet Street" with "just about every news organisation" being involved "at one level or another". Charlotte Harris, a lawyer representing a number of claimants, has said that up to 7,000 people may have had their phones hacked by the News of the World.

Lawyers are "outraged" on behalf of their clients. One lawyer's outrage has sent him spinning into a vortex of mixed metaphors. Rod Dadak, a solicitor said to be representing "potential claimants", is quoted by Reuters saying:

**Every case is different, but is it really likely that any of the victims of phone-hacking will be able to say their lives were ruined?**

This is Murdoch's Watergate because the cat is out of the bag. Two or three people have taken the rap but the powers that be must have known or turned a blind eye to what was going on. ... It's a black hole.

The lawyer who represented Max Mosley, Dominic Crossley, has called for phone-hacking claimants to be awarded exemplary damages (i.e damages of a punitive and non-compensatory nature) to reflect NI's "shocking" behaviour and to deter them from doing it again. He notes that NI's parent company, News Corporation, has a turnover of US\$33 billion. Against that figure, he suggests only eye-watering awards of damages will have any impact on the News Corp "beast." Mark Lewis, the lawyer who claims to have "devised" phone-hacking claims, is indeed seeking "huge" damages for his client Mary Ellen Field, a former confidante of the model Elle McPherson who says she lost her job, reputation and health in consequence of phone-hacking by the News of the World.

Much of this is indeed posturing and exaggeration. No-one would deny that phone-hacking is a reprehensible practice, but there's a lot of worse stuff going on. Can it really be right for claimants to expect damages of hundreds of thousands of pounds for the indignity of a tabloid hack listening to their voicemail messages?

As Dominic Crossley concedes, damages in privacy cases in the UK have been nowhere near six figures. Until Eady J awarded Max Mosley £60,000, they hadn't even reached five figures, though a few cases had been reported in which settlements involved the payment of sums in the region of £30,000 to £40,000. In Max Mosley's case (*Mosley v News Group* [2008] EWHC 1777) Eady J said:

It has to be recognised that no amount of damages can fully compensate the Claimant for the damage done. He is hardly exaggerating when he says that his life was ruined. What can be achieved by a monetary award in the circumstances is limited. Any award must be proportionate and avoid the

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appearance of arbitrariness. I have come to the conclusion that the right award, taking all these considerations into account, is £60,000.

Every case is different, but is it really likely that any of the victims of phone-hacking will be able to say their lives were ruined? To take three not particularly random examples, neither Lord Prescott (the UK's ebullient former deputy prime minister), Sienna Miller (a glamorous actress) nor Steve Coogan (a less glamorous actor), might be thought to lack those features that would normally define those whose lives had been ruined. Max Clifford, the doyen of celebrity PR advisers, who settled his claim against the News of the World some time ago, displays cheerful resilience in the face of his ordeal.

Before the current scandal emerged, NI had settled with two claimants: Mr Clifford and that of Gordon Taylor, head of the Professional Footballers' Association. Those settlements have been reported as involving payments of between £700,000 and £1 million.

We do not know the reasons why NI decided to pay these apparently lavish sums and it seems not unreasonable to suppose that the confidentiality clauses apparently contained

in the settlement agreements may have been an important factor.

Moreover, NI's own statement of admission and apology, in referring to a compensation fund, will have done little to dampen claimants' expectations of a big pay day. But it nonetheless seems unlikely that if the courts have to decide what compensation should be paid to victims of phone hacking, they will award anything like the sums the News of the World seems to have agreed to pay Clifford and Taylor (this may not, of course, be a concern for some of the claimants, who apparently just want an apology).

Instead, the courts will take a close look at all the circumstances of each case and make a reasonable and proportionate award. It is quite possible that some claimants who are able to demonstrate real harm and distress will receive payouts even greater than Max Mosley, but it is equally possible that other claimants won't get anywhere close to that sort of figure. It may be worth remembering that if you sue for personal injury in the UK, £60,000 is roughly the figure you get for the loss of an arm. Six figure damages are reserved for brain damage and quadriplegia. Do we really think phone hacking is on the same scale?

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## Ethics Corner: A Convenient Untruth

By Len Niehoff

A vast body of legal ethics scholarship addresses the dilemma faced by the lawyer who learns that her client intends to lie, or has lied, while testifying. The debate typically assumes that the lawyer harbors no uncertainties about what the client plans to do or has done. The client is committing perjury and the lawyer knows it.

A different scenario plays out much more frequently, even though it has produced less head scratching and fewer pages in law reviews. In many cases, the lawyer may suspect that the client will testify falsely (or has already done so) but will not know for sure. The client might be committing perjury—but the lawyer isn't certain.

I have elsewhere called the former scenario “hard-core perjury” and the latter “soft-core perjury.” (I am indebted to Charles Tobin of Holland & Knight for proposing these

labels during our discussions of the issue.) See Len Niehoff, *Soft-Core Perjury*, 36 LITIGATION, Spring 2010, at 8. And I have previously noted the paradox that hard-core perjury is rare but often discussed, while soft-core perjury is more common but generally ignored. *Id.*

There are two explanations for this paradox, both troubling.

The first is that lawyers believe soft-core perjury poses no ethical problem because in that scenario the attorney does not *know* the client is lying. This view finds some support in the ABA Model Rules of Professional Conduct, which prohibit a lawyer from offering evidence he “knows to be false” and impose certain remedial obligations if the lawyer later “comes to know” the evidence was false. See ABA Model Rule 3.3(a)(3). In the same vein, the Comment to Rule 3.3

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emphasizes that a lawyer's "knowledge" of falsehood triggers these obligations but a "reasonable belief" of falsehood does not. *See* ABA Model Rule 3.3, Comment 5 and 8.

Alas, things are not so simple because the rule incorporates a definition of "knowledge" that unravels whatever clarity the rule otherwise knits together. Thus, Comment 8 to Rule 3.3 observes that an attorney's knowledge "can be inferred from circumstances." And it goes on to warn that a "lawyer cannot ignore an obvious falsehood."

Think about what these principles mean when read together.

On one hand, a lawyer does not run afoul of this prohibition if she offers testimony that she reasonably believes is false. By logical extension, this forgiveness applies in cases where *all* reasonable people would agree the client was lying.

On the other hand, the attorney *does* violate the rule if he offers testimony that is obviously false. How are we to assess obviousness? Well, one way would be to ask whether, under the circumstances, all reasonable people would recognize the testimony as untrue.

Rule 3.3 thus suggests that a distinction exists between that which any reasonable person would believe to be the case and that which is obvious. This seems implausible. And it seems even more implausible that such a distinction would help a lawyer confronted with soft-core perjury figure out what she is supposed to do.

In sum, attorneys who believe that they need not worry about soft-core perjury because it cannot get them into any trouble have more confidence in the immunizing power of ignorance than it deserves. Rule 3.3 leaves room to punish

lawyers for offering testimony they should have known was false—regardless of whether they in fact knew it in some absolute and certain sense. That is the bad news. The worse news is that Rule 3.3 offers little or no guidance as to when reasonable doubts end and unreasonable ones begin.

The second explanation for our failure to worry sufficiently about soft-core perjury is even more distressing. Let's face it: sometimes a little soft-core perjury is mighty useful. It is, with apologies to Al Gore, a convenient untruth. The client manages to concoct a convincing lie that holds up under cross-examination and helps the lawyer win the case.

The lawyer knows better than to probe matters too deeply—after all, such prodding might reveal just enough information to nudge the testimony into the category of hard-core perjury. And true hard-core perjury has something in common with true hard-core pornography: we know it when we see it.

In fairness, the issue transcends mere convenience. There are ethical justifications for lawyers to leave helpful soft-core perjury alone. After all, the duty to prevent perjury exists in tension with other duties, like diligence, competence, and zealous partisanship. A lawyer has no obligation to undermine the client's story. That is the opposing lawyer's job.

So here are the competing realities: Soft-core perjury happens and sometimes we are relieved when it does. At the same time, the rules should, and must, continue to condemn all frauds upon the court. In the universe of hypocrisies this is hardly among the most intolerable. And, as La Rochefoucauld famously observed, "hypocrisy is the tribute that vice pays to virtue."

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