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MLRC Media Law Resource Center

MEDIALAWLETTER

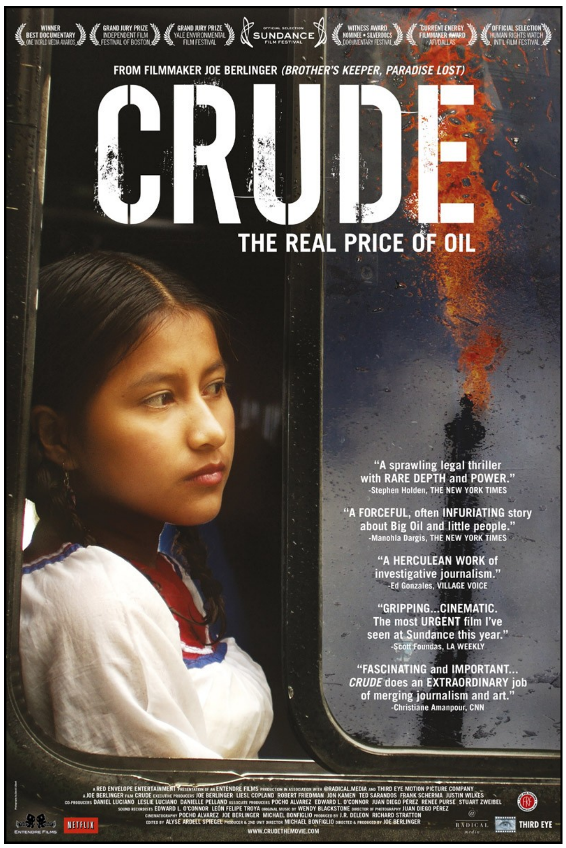
Reporting Developments Through January 26, 2011

Second Circuit Approves Court-Ordered Production of Documentary Film Outtakes

Existence of Reporter's Privilege Reaffirmed with Emphasis on Journalistic Independence

By Landis C. Best and Catherine Suvari

In January 2009, documentary filmmaker Joseph Berlinger released a film entitled "*Crude: The Real Price of Oil*." Berlinger's film details an ongoing Ecuadorian legal battle in which a group of native Ecuadorians allege that Texaco Petroleum Company, a predecessor to Chevron Corporation's wholly-owned subsidiary, Texaco, Inc., dumped billions of gallons of toxic waste into the Ecuadorian rainforest as part of an oil exploration and drilling effort begun in 1964. The plaintiffs allege that Texaco's work caused an outbreak of cancer in the area surrounding rainforest drilling sites and the decimation of local indigenous groups.



Berlinger's film details an ongoing Ecuadorian legal battle in which a group of native Ecuadorians allege that Texaco Petroleum Company, a predecessor to Chevron Corporation's wholly-owned subsidiary, Texaco, Inc., dumped billions of gallons of toxic waste into the Ecuadorian rainforest.

Background

Approximately one year after the debut of Berlinger's documentary, in April 2010, Chevron Corporation filed a petition pursuant to 28 U.S.C. §1782 in the United States District Court for the Southern District of New York, seeking production of over 600 hours of outtake footage from the film. Chevron argued that it needed the outtakes to defend the ongoing litigation in Ecuador and to pursue a related arbitration regarding the alleged denial of due process by Ecuador's government. Two individual petitioners also claimed that the outtakes would help them to defend pending criminal charges in Ecuador stemming from the same events.

On May 10, 2010, Judge Lewis A. Kaplan granted Chevron's application and authorized the subpoena of all 600 hours of unpublished footage. Judge Kaplan's opinion noted that, even assuming the existence of a qualified journalist's privilege for Berlinger's material, Chevron's petition satisfied the dual requirements of likely relevance and unavailability prescribed in *Gonzales* v. *NBC*, 194 F.3d 29 (2d Cir. 1999) for production of non-confidential materials by a non-party press entity.

Judge Kaplan took special note of *Crude*'s provenance in his review of relevance, emphasizing that because plaintiffs' counsel Stephen Donziger had "solicited Berlinger to create a documentary . . . from the perspective of his clients" and granted Berlinger "extraordinary access to players on all sides of the legal fight and beyond," there existed "considerable reason" to believe that Berlinger's outtakes were relevant to significant issues in the Ecuadorian proceedings, including whether there was improper influence of witnesses and the Government of Ecuador. *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 297

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(S.D.N.Y. 2010).

Berlinger resisted production under the May 10 order on several grounds, including that Judge Kaplan's order was overbroad, misapplied governing standards for the production of privileged material, and failed to adequately consider the existence of confidentiality agreements between Berlinger and his subjects. Berlinger's appeal, which began with an emergency motion to the Second Circuit for a stay pending accelerated appellate review, received support from several national media entities and organizations who filed a brief *amici curiae* in support of Berlinger. A panel of the Second Circuit granted Berlinger's stay application and set forth an expedited briefing schedule on the merit's of Berlinger's appeal.

The Second Circuit (Leval, Hall, Parker, JJ.) heard oral argument of the merits of Berlinger's appeal on July 14, 2010 and issued an interim order following that argument that narrowed Judge Kaplan's May 10 ruling by limiting the production of outtakes to footage in three categories: footage showing (i) counsel for plaintiffs in [the Lago Agrio litigation]; (ii) private or court-appointed experts in that proceeding; or (iii) current or former officials of the Government of Ecuador. *Chevron Corp.* v. *Berlinger,* No. 10 -1918(L) (2d Cir. July 15, 2010).

The interim order also specified that the use of any material produced under its authority should be limited exclusively to litigation, arbitration, or submission to either local or international official bodies, and it noted that a written opinion on the merits of Berlinger's appeal would follow. Berlinger complied with the narrowed order and produced the categories of outtakes required thereunder as the parties awaited the Second Circuit's written opinion. The Court issued its long-awaited opinion on January 13, 2011, reasserting the existence of a "qualified evidentiary privilege for information gathered in a journalistic investigation" but holding that, in light of Berlinger's failure to adequately demonstrate journalistic independence, the privilege either did not apply in his case at all or was so diminished that it had been overcome on the basis of plaintiffs' showing of need. *See* *Chevron Corp. v. Berlinger*, Nos. 10-1918-cv(L), 10-1966-cv(CON), slip op. (2d Cir. Jan. 13, 2011) ("*Chevron*"). Judge Pierre Leval, who had articulated the Circuit's existing standard for protection of non-confidential information gathered during a journalistic investigation eleven years earlier in *Gonzales* authored the Court's unanimous opinion.

Second Circuit's January 13 Decision

The Second Circuit reviewed the merits of Berlinger's appeal under the abuse of discretion standard and affirmed Judge Kaplan's May 10 ruling in full. *See Chevron*, slip op. at 15, 23. The Court began its opinion by restating that "[t]his Circuit has long recognized a qualified evidentiary privilege for information gathered in a journalistic investigation" but that the protection accorded by such a privilege is not absolute and varies according to the circumstances of each claim. *Id.* at 15 (citing *Gonzales*, 194 F.3d 29, *In re Petroleum Products Antitrust Litigation (Petroleum Products)*, 680 F.2d 5, 7-8 (2d Cir. 1982), and *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972)).

The Court further noted that the reporter's privilege is "intended to protect the public's interest in being informed by a 'vigorous, aggressive *and independent* press,'" and it summarized several guidelines for recognition of the privilege in Second Circuit case law: (i) the protection accorded by the privilege "is at its highest when the information sought to be protected was acquired . . . through a promise of confidentiality"; (ii) a person "need not be a credentialed reporter working for an established press entity to establish entitlement to the privilege," but "must have acted in the role . . . identified . . . as that favored by the public interest that motivates the privilege — [i.e.] the role of the *independent* press"; and, (iii) for purposes of determining the existence or relative strength of a particular privilege claim, "all forms of intention to publish or disseminate information are not on equal footing." *Id.* at 15-17 (italics in original; internal citations omitted).

In a key passage, the Court explained its reasoning as follows:

> "While freedom of speech and of the press belongs to virtually anyone who intends to publish anything (with a few narrow exceptions), all those who intend to publish do

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> not share an equal entitlement to the press privilege from compelled disclosure. Those who gather and publish information because they have been commissioned to publish in order to serve the objectives of others who have a stake in the subject of the reporting are not acting as an independent press. Those who do not retain independence as to what they will publish but are subservient to the objectives of others who have a stake in what will be published have either a weaker privilege or none at all." *Id.* at 17.

Applying these principles to Berlinger's claim, the Second Circuit concluded that "the district court's findings adequately justified its denial of the press privilege" because, "[a]lthough the court did not explicitly state a finding that Berlinger failed to show his independence, its findings that (1) [plaintiffs' attorney] Donziger 'solicited Berlinger to create a documentary of the litigation from the perspective of his clients,' and (2) 'Berlinger concededly removed at least one scene from the final version of *Crude* at their direction,' essentially assert that conclusion." *Id.* at 18. Addressing Berlinger's own written testimony regarding his intent to produce an objective film, the Court stated that, "[w]ithout doubt, . . . a journalist [solicited to investigate an issue who presents the story supporting the point of view of his solicitor] can establish entitlement to the privilege by establishing the independence of her journalistic process, for example, through evidence of editorial and financial independence." *Id.* at 19. "But the burden is on the person who claims the privilege to show entitlement;" in this instance, the Court concluded, the district court was not obligated to credit Berlinger's self-serving testimony without further corroboration and did not commit clear error when it declined to accept Berlinger's unsupported assertion of independence. *Id.*

The Second Circuit also acknowledged Berlinger's arguments regarding confidentiality and overbreadth but determined that Berlinger had failed to make any affirmative showing sufficient to render the district court's ruling erroneous. Although Berlinger personally testified in written declarations to the district court, for example, that his subjects assumed confidentiality and would never have expected Chevron to see their footage, he did not submit any corroborative evidence to establish this expectation and cited a release form in his submissions to the district court that entitled him to use such contributions freely and in perpetuity. *See id.* at 21.

Berlinger also failed to support his argument that outtake relevance could not be assessed from scenes in the published film with a proposal for distinguishing between relevant and non-relevant material. The Second Circuit remarked that: "[w]hile in general it is desirable for a district court to tailor a production order to material likely to be relevant, the district court lacked any reliable means of doing so. The court is not obligated to undertake this burden without help from the party requesting the limitation." *Id.* at 22.

Implications for the Journalist's Privilege

First, the good news: the Second Circuit's January 13 decision reasserts the continued vitality of existing First Amendment principles and suggests specific guidelines for securing protection. From a practical perspective, the decision is certain to impact the planning and execution of future investigative efforts by those members of the newsgathering and film-making communities eligible for protection from compelled disclosure of their work. But the narrow scope of the Court's review limits its precedential effect on such protection: in reaching its decision, the Court reaffirmed the existence of a qualified privilege for information gathered in a journalistic investigation and then emphasized numerous factual details unique to Berlinger's project that precluded a finding of error by Judge Kaplan.

Throughout its twenty-three page opinion, the Court cited practical defects in Berlinger's showing to the district court while simultaneously identifying specific solutions that could have buttressed a privilege claim. The Court approved Judge Kaplan's finding that Berlinger's work had been solicited by plaintiffs, for example, but it noted that even a filmmaker who has been solicited to investigate a particular story and presents a final product that supports the soliciting party's point of view can, "without doubt," "establish entitlement to the privilege" through affirmative evidence of financial and

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editorial independence. *Id.* at 19.

The Court similarly approved Judge Kaplan's findings regarding confidentiality and relevance in the *Crude* outtakes while emphasizing that Berlinger's own failure to demonstrate a confidentiality demand or to articulate a proposal for identifying irrelevant outtake footage (especially in a case presenting over 600 hours of outtakes) undermined his argument of error by the district court.

Second, the not-so-good news: the Second Circuit's focus on "independence" as an element to weigh in analyzing the reporter's privilege introduces uncertainty into the privilege. The requirement of independence gives those seeking outtakes another argument for defeating the privilege. What is worse is that the Court's opinion puts the burden of proving independence on the journalist. While successful challenge to traditional or mainstream reporters on independence grounds seems unlikely, it remains to be seen how this concept will be applied to non-traditional reporters such as amateur filmmakers, bloggers and the like.

In the end, the *Chevron* case is one that presents unusual facts and a deferential standard of review. That combination produced a poor result for Berlinger. Had Berlinger divined the Second Circuit's focus on independence ahead of time, there is little doubt that he could have presented a stronger basis for his independence and qualified for a more robust application of the privilege. And with a more robust application of the privilege, the Second Circuit may have had a harder time affirming Judge Kaplan's order in all respects. Thus there is a certain *ex post facto* nature to the Court's opinion that is unsettling. However, the basics of the reporter's privilege have been strongly endorsed by the Second Circuit, and all who would claim protection are on notice of the importance of the reporter's independence in securing the full protection of the privilege.

Landis Best is a partner and Catherine Suvari an associate at Cahill Gordon & Reindel LLP. Together with Floyd Abrams, they represented a group of media companies and organizations as amici curiae in support of Mr. Berlinger's appeal of the district court's order requiring production of outtakes. Maura Wogan, Frankfurt Kurnit Klein & Selz P.C. represented Joseph Berlinger. Randy Mastro, Gibson Dunn & Crutcher LLP, represented Chevron Corp.

Associated Press and Shepard Fairey Settle Obama "HOPE" Poster Case

Settlement Calls for Both Sides to Work Together with "HOPE" Image

By Nancy E. Wolff

The Associated Press and the street artist, Shepard Fairey, who created the Barack Obama "HOPE" poster have agreed to settle their copyright infringement claims against each other. The deal ends a dispute that began in February 2009 when Fairey brought an action in federal court seeking a court declaration that he did not violate AP's copyrights by basing his Obama "HOPE" poster on an AP image. The AP countersued for infringement, arguing that his uncredited, uncompensated use of its photograph was not fair use but an infringement. The Fairey "HOPE" poster became an unofficial image of the Obama's presidential cam-paign, never sanctioned pre-sumably due to rights issues.

As part of the settlement, Fairey agreed to not use another AP photograph in his work without obtaining a license from the AP. The settlement, as reported, calls for both sides to work together with the "HOPE" image and share rights to make posters and merchandise based on it. Fairey and the AP have agreed to collaborate on a series of images that Fairey will create based on AP photographs. The AP's copyright infringement lawsuit against Obey Clothing and One 3 Two, Inc., a company that sells clothing including the Obama "HOPE" image, is still active and unless settles, is scheduled for a March trial. The financial aspect of the settlement is confidential.

The deal ends a dispute that began in February 2009 when Fairey brought an action in federal court seeking a court declaration that he did not violate AP's copyrights by basing his Obama "HOPE" poster on an AP image.

The settlement allows each side to maintain its legal positions with respect to fair use. In the press release announcing the settlement, Tom Curley, the AP's president and CEO states "The AP will continue to vigilantly protect its copyrighted photographs against wholesale copying and commercial-ization where there is no legitimate basis for asserting fair use" Fairey statement includes: "I respect the work of photographers, as well as recognize the need to preserve opportunities for other artists to make fair use of photographic images, I often collaborate with photographers in my work, and I look forward to working with photos provided by the AP's talented photographers."

This settlement ends (except for the remaining lawsuit against Obey Clothing) a dispute that has had more twists, turns and out rights surprises over the past two years. Initially, Anthony Falzone and attorneys from The Stanford Law Center Internet and Society's Fair Use Project represented Fairey, among others against the AP.

The website for The Stanford Center for Internet and Society's "Fair Use Project" states that it "was founded in 2006 to provide legal support to a range of projects designed to clarify, and extend, the boundaries of "fair use" in order to

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enhance creative freedom."

Although Fairey admittedly used an AP image to form the bases of the HOPE poster image, Fairey steadfastly denied that it was the close-up portrait of Obama as asserted by the AP, but rather one in which Obama is photographed seated with George Clooney and his head is titled at a slightly different angle.

After discovery revealed missing files from document production, it was learned that Fairey had fabricated or destroyed or attempted to destroy relevant evidence. Fairey alleged he made a mistake, about the AP photo he used, and in October 2009 AP filed an amended Answer, Affirmative Defenses and Counterclaims based on the spoliation and fabrication of evidence. Obey Clothing, as the exclusive licensee of Fairey's trademarks and designs on clothing was added as a counterclaim defendant.

Thereafter, in November 2009, Judge Hellerstein, the federal judge hearing the case ruled that Fairey's lawyers could withdraw from the case based on Fairey's fabrication of evidence. The AP had objected over concern that the substitution of attorneys would cause additional delay and expense for the not-for-profit news agency. It was later revealed in January of 2010 that Fairey was under criminal investigation. Attorneys Jones Day were substituted as counsel for the Stanford Internet Law and Society Project and Fairey's other lawyers.

Meanwhile, in July 2009 AP photographer, Mannie Garcia intervened and made cross claims against the AP and counterclaims against the Fairey parties for copyright infringement, alleging that he, not the AP was the owner of the copyright in the now infamous image. On July 16, 2009, AP released a statement on Garcia's employment stating that "AP clearly owns the copyright in the photograph as a work for hire. Mannie Garcia was a salaried employee from whom taxes were withheld and to whom overtime was paid, among many other documented indicators providing proof that he was a staff employee at the time the photo was taken in 2006. At the same time, the AP notes that Mr. Garcia shares AP's position that the photo used by Mr. Fairey is protected by copyright. Like AP, Mr. Garcia also disputes Shepard Fairey's assertion of the Fair Use Doctrine and claims infringement of copyright."

On August 20, 2010, Garcia voluntarily withdrew his action against the parties with prejudice. The AP put out a statement noting that it pleasure that Mannie Garcia withdrew from the case with prejudice, and without any payment or consideration of any kind. AP also withdrew its claims against Garcia.

Based on the suggestion of settlement, On January 11, 2011 Judge Hellerstein filed an order severing the issues and dismissed the claims between AP and Fairey, with prejudice and without costs, subject to reinstatement by motion within 30 days.

For a case that began after a gallery owner started a search for the photo that served as the underlying art for the Fairey "HOPE" poster, no substantive decisions were made and the Fair Use doctrine has neither been clarified nor expanded.

On January 2O, 2011 Fairey and the other plaintiffs, other than the third party clothing companies, voluntarily dismissed the claims against the AP with prejudice and without costs.

It seems unlikely that the clothing companies that profit from the sale of merchandise depicting the "HOPE" poster image, will take on the Fair Use fight alone after Fairey's settlement with AP.

For a case that began after a gallery owner started a search for the photo that served as the underlying art for the Fairey "HOPE" poster, no substantive decisions were made and the Fair Use doctrine has neither been clarified nor expanded. Fairey is now working cooperatively with the AP on projects and has agreed that he will license future AP images.

The position that a license may be required from the underlying copyright owner when creating a derivative work remains an issue that must be analyzed on a case-by-case basis. What a long, strange trip this has been!

AP press releases on this case are located at http://www.ap.org/pages/about/pressreleases/pr_011211a.html

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Media Defendants All A-Twitter

Southern District Construes Twitter's Terms of Use Narrowly, to Media Entities' Chagrin

By Toby Butterfield and Ben Bartlett

The recent decision in *Agence France Presse v. Morel*, 2010 U.S. Dist. LEXIS 139103 (S.D.N.Y. Dec. 23, 2010) (Pauley, J.) highlights the dangers of reproducing or distributing online content found on a website before carefully analyzing and understanding the website's terms of use agreement. While website terms of use typically include a wide range of broadly drafted provisions aimed at insulating the website operator from legal liability, that protection does not insulate the website's users or customers from potential legal claims. As demonstrated in *Morel*, content found on another party's website, no matter how widely distributed, may need to be cleared before use by a third party, and failure to obtain such clearance may subject the user to litigation.

Photograph from Para. 41 of Morel's Amended Answer and Counterclaims.

Proving the Contents of a Terms of Use Agreement

As a preliminary matter, it is worth recapping enforceability of terms of use agreements. Such agreements are posted online and are designed to establish the terms to which users of a website and the website's operator have agreed or to which they are deemed to have agreed by virtue of their use of the site. Practices vary widely as to whether the terms simply appear as a link which a user must seek out (a "browse-wrap" agreement), terms which every user is shown each time they log in, or which they are shown once when they become a registered user of the site. Sometimes the terms disappear into a long unseen box (usually bearing a dauntingly small scrollbar symbol), and sometimes users must scroll past every word before having the opportunity to check the box indicating that they have seen and agree to all the terms.

While courts have typically enforced so-called "click-wrap" agreements, and sometimes enforce "browse-wrap" agreements, courts have been historically reluctant to assume that a consumer has agreed to specific terms, absent credible proof that they were in fact shown the actual terms in force at the time of the particular transaction. *Rappaport v. Storfer Bros., Inc., 2 Misc. 2d 395 (N.Y. App. Term 1956)* (bailee accused of losing property through negligence had burden to prove bailor was specifically aware of limitation of liability in fine print of storage receipt).

While "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing,"

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courts are quick to add that "when the writing does not appear to be a contract and the terms are not called to the attention of the recipient … no contract is formed with respect to the undisclosed term." *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 89 Cal. App. 4th 1042, 107 Cal. Rptr. 2d 645, 651 (Cal. Ct. App. 2001); Cf. *Cory v. Golden State Bank*, 95 Cal. App. 3d 360, 157 Cal. Rptr. 538, 541 (Cal. Ct. App. 1979).

So while courts have accepted the enforceability of "click-wrap" agreements generally, some have concluded that "the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms." *Bar-Ayal v. Time Warner Cable Inc,* 2006 WL 2990032, at *13 (S.D.N.Y.)(quoting *Specht v. Netscape Communications Corp.,* 306 F.3d 17, 35 (2nd Cir. 2002); *Jackson v. American plaza Corp.,* 2009 WL 1158829, at *4 (S.D.N.Y.).

Instead, when a user does not concede the point, courts consider in detail "whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site." 2007 U.S. Dist. LEXIS 96230; see also *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 20 (2d Cir. 2002); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009).

The Facts in Morel

Morel dealt with the terms of use of the social networking site Twitter, and whether these terms permitted a news organization to reproduce photographs originally posted to one of Twitter's websites by an individual photographer. In the hours following the Haiti earthquake, both the photographer Morel and someone else acting without Morel's authorization, uploaded various photographs taken by Morel to Twitter's picture sharing service, Twitpic. In the wake of the disaster, the French press agency, AFP, found both sets of Morel's photographs on Twitter, and then reproduced the photographs and distributed them to other media companies. As a result, Morel's photographs were widely used in media reports of the earthquake.

After discovering AFP's use of his photographs, Morel asserted that he had not authorized AFP to use the photographs and that such unauthorized use constituted copyright infringement. AFP responded by filing a declaratory judgment complaint against Morel, asking the court to declare that AFP had the right to use the photographs Morel had posted on Twitter. In turn, Morel filed a counterclaim for copyright infringement and various other claims against AFP, as well as Getty Images, another photography agency, and two broadcasters, CBS Broadcasting and Turner Broadcasting System, whom Morel claimed had also used his photographs without permission.

AFP and its fellow counterclaim defendants (collectively, the "Media Parties") filed a motion to dismiss Morel's claims, arguing that Morel had effectively licensed others to use his photographs by virtue of uploading them under Twitter's terms of use. The Twitpic login page explicitly advised users that "by clicking 'Allow', you continue to operate under Twitter's Terms of Service." *Morel*, 2010 U.S. Dist. LEXIS 139103 at *14.

Twitter's terms of use provided, in part:

> You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods . . .
>
> You agree that this license includes the right for Twitter to make such Content available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use. www.twitter.com/tos (Last accessed January 13, 2011).

While Twitter's general terms of use did refer to Twitter's

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and its users' intent to make uploaded content widely available, additional terms applying specifically to the Twitpic picture sharing service stated that users of the website granted a license to use their photographs "only to Twitpic.com or affiliates." *Morel*, 2010 U.S. Dist. LEXIS 139103 at *15.

The Morel Court's Analysis

The *Morel* court analyzed these terms of use and rejected the Media Parties' argument that they had a license to use Morel's photographs by virtue of Twitter's terms of use. *Id*. at *15-16. The court found that Twitter's terms of use granted a license to use Morel's photographs only to Twitter and its partners or affiliates. *Id*. Because the Media Partners were neither partners nor affiliates of Twitter, their uses were not licensed. Though Twitter's terms of use stated that "[we] encourage and permit broad re-use of Content," the court found that the terms of use made clear that, in reference to content posted by Twitter users, "what's yours is yours – you own your content." *Id*. at *15.

Accordingly, the court denied the Media Parties' motion to dismiss with respect to Morel's copyright infringement claims, leaving the Media Parties vulnerable to an award of potentially substantial damages if Morel's claims ultimately prove successful. *Id*. at *16, *32-33. (The court also denied the Media Parties' motion to dismiss with respect to Morel's additional claims based on violation of the Digital Millennium Copyright Act. The court granted the Media Parties' motion to dismiss with respect to Morel's claims of false advertising under the Lanham Act.)

While the Media Parties' heavy reliance on Twitter's terms of use left them legally vulnerable, Twitter's terms of use ensured that Twitter's operators evaded Morel's claims. Indeed, Twitter's terms of use were drafted specifically to insulate Twitter against liability in cases such as *Morel*. In particular, the terms provided:

> You [the user] are responsible for your use of the Services, for any Content you provide, and for any consequences thereof, including the use of your Content by other users and our third party partners . . . www.twitter.com/tos (Last accessed January 13, 2011).

Further limiting Twitter's potential liability, another provision states:

> TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, TWITTER . . . WILL NOT BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES . . . RESULTING FROM . . . (ii) ANY CONDUCT OR CONTENT OF ANY THIRD PARTY ON THE SERVICES, INCLUDING WITHOUT LIMITATION, ANY DEFAMATORY, OFFENSIVE OR ILLEGAL CONDUCT OF OTHER USERS OR THIRD PARTIES; (iii) ANY CONTENT OBTAINED FROM THE SERVICES; AND (iv) UNAUTHORIZED ACCESS, USE OR ALTERATION OF YOUR TRANSMISSIONS OR CONTENT . . . WHETHER OR NOT TWITTER HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGE . . . (capitalization in original) *Id.*

While the *Morel* court did not analyze this provision, website operators should review their own terms of use to ensure the terms insulate the website from liability arising from a third party's use of the website and to prevent third party users from suing the website as a contributing infringer.

The *Morel* decision may be something of a wake-up call to the dangers of using even widely available content posted online. In the past, some media entities have simply used widely disseminated images from social networking sites without a license, relying on implied license or fair use arguments, especially in news reporting contexts.

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Morel illustrates, however, that media entities and producers cannot rely on protection from a website's terms of use, even ones which seem to promote use of content found on the website. It remains to be seen what measures media entities may take to avoid similar lawsuits in the future.

Possible steps include obtaining a blanket license from social networking sites or simply refraining from using even widely available content unless it has been specifically licensed by the original content owner. The terms of use adopted by social networking sites such as Twitter and Facebook, however – along with the increased instances of claims such as *Morel's* – may make it more desirable for media entities such as newspapers, broadcasters, and photography agencies to license such rights from such social networking websites directly.

Conclusion

As the Internet has grown increasingly interactive, terms of service agreements have become a vital tool in shaping the legal relationship between websites' operators and third parties who use the websites. *Morel* demonstrates that use of content found on a website will leave website users open to lawsuits, regardless of the protections the website has devised for itself. To minimize the risk of legal liability, website users who upload content or who rely on content found online must pay careful attention to a website's terms of use and understand what rights they are being granted.

Before reproducing or distributing content found online, media entities and producers, in particular, should understand the risks of relying on an allegedly implied license or the defense of fair use, or attempt to secure a license to use the content in question.

Toby Butterfield is a litigation partner at Cowan, DeBaets, Abrahams & Sheppard LLP in New York City, Ben Bartlett is a media attorney at ION Media Networks. Daniel Morel is represented by Barbara Hoffman, The Hoffman Law Firm, New York, NY. AFP is represented by Joshua J. Kaufman, Venable LLP, Washington, D.C.

Scripts, Lies & Videogames

MLRC – Southwestern Law School Conference Explores Hot Entertainment Issues

MLRC and Southwestern Law School held their 8th Annual Entertainment and Media Law Conference in Los Angeles, California, on January 20. The Conference's three panels discussed clearance issues for motion pictures, TV programs and video games, libel in fiction cases and vetting programs, and the development and distribution of video games.

MLRC thanks the Planning Committee: Kraig Baker (Davis Wright Tremaine LLP), David Cohen (ABC), Jennifer Dominitz (NBC Universal Television Group), Steven Krone (Southwestern Law School), and Louis Petrich (Leopold, Petrich & Smith).

We also thank the conference sponsors for their generous support: Chubb; Davis Wright Tremaine LLP; Doyle & Miller LLP; Hiscox; Leopold, Petrich & Smith; Sidley Austin LLP.

And thanks to the moderators and panelists.

<u>Trademarks, Transformations, and Touchdowns</u>
Left to right: Moderator: Robert Rotstein (Mitchell Silberberg & Knupp); Panelists: Elizabeth Masterton (Twentieth Century Fox); Donald Gordon (Leopold, Petrich & Smith); and Christopher Cosby (Activision).

Ripped (Off) from Real Life?
Left to right: Moderator: Patricia Cannon (NBCU Television Group) Panelists: Robyn Aronson (MTV Networks); Stephen Rohde (Rohde & Victoroff); and Jody Zucker (Warner Bros. Television)

Issues with Development and Distribution of Video Games
Left to right: Moderator: Kraig Baker (Davis Wright Tremaine); Panelists: Heidi Holman (Microsoft); Daniel O'Connell Offner (Loeb & Loeb); Seth Steinberg (Digital Arts Law)

WDAM Successfully Sues to End Prior Restraint Enjoining Broadcast of Video Depicting Juvenile Abuse

Youth Court Order an Illegal Prior Restraint

By Jason P. Criss

WDAM, the NBC affiliate in Hattiesburg, Mississippi owned by Raycom Media, Inc., supported by an array of *amici curiae*, obtained a writ of mandamus vacating a Youth Court judge's orders prohibiting WDAM from broadcasting video of alleged physical abuse of juveniles by the guards responsible for the juveniles' safety. *Raycom Media, Inc. v. Forrest County Youth Court*, No. 2011-M-00068 (Miss. Jan. 27, 2011).

Background

Tawana Bolton, a former employee of the Forrest County Juvenile Detention Center, provided WDAM with video depicting alleged physical abuse of juvenile inmates by guards at the Detention Center. It was alleged that Bolton illegally obtained the video, but it was undisputed that WDAM was not involved in the taking of the video or in any other illegal conduct.

Forrest County Youth Prosecutor Pamela Castle filed a Motion for Injunctive Relief on December 30, 2010, after she learned that WDAM had obtained a copy of the video. That same day, Forrest County Youth Court Judge Michael McPhail entered an ex parte Order Granting Injunctive Relief. The Order stated that "any audio, video or photographic image that depicts a juvenile while in the Forrest County Detention Center is not for public use or dissemination and shall not be disclosed without Court Order. Further, [Bolton], agents/representatives of WDAM television, and any other person or agent of other media outlets are hereby enjoined from disclosing the contents of said images or tapes to any other person or agency."

On January 5, 2011, WDAM filed a Motion to Dissolve Order Granting Injunctive Relief with the Youth Court. The motion argued that the State did not make the showing needed to justify a prior restraint and that the Order is an unconstitutional prior restraint. The Mississippi Supreme Court has stated that "[t]o overcome the presumption of invalidity placed on prior restraints, the United States Supreme Court has instructed trial courts to determine: (1) whether the publication would result in damage to a near sacred right [;] (2) whether the prior restraint would be effective [;] and (3) whether less extreme measures were available." *Jeffries v. State*, 724 So.2d 897, 899 (Miss. 1998) (citing *In re Providence Journal*, 820 F.2d 1342, 1351 (1st Cir. 1986), *cert. dismissed sub. nom.*, *United States v. Providence Journal*, 485 U.S. 693 (1988).

WDAM argued that the State had not made any showing as to the first two factors, and that broadcast of the video would not damage a "near sacred right." To the contrary, the Mississippi Constitution states that freedom of speech and the press "shall be held sacred." Miss. Const. Art. 3, §13. WDAM also had volunteered to employ a less extreme measure—blurring the juveniles' faces—than the prior restraint.

WDAM's motion also argued that the statute cited in the Order did not justify the prior restraint. The Youth Court relied on Section 43-21-261 of the Mississippi Code, which governs disclosures of "records involving children." But "records involving children" is defined in the Mississippi Code to include only certain records "from which the child can be identified." Miss. Code Ann. § 43-21-105(u).

WDAM argued that the video did not meet this standard both because it was not of good enough quality to identify the juveniles depicted in it, and because the station did not intend to identify the juveniles depicted in the video and had committed to blurring their faces. WDAM further argued that the Youth Court acted outside of its jurisdictional authority, which is the "protection and care of children in trouble and the rehabilitation of those gone astray" *(Helmert v. Biffany*, 842 So.2d 1287, 1291 (Miss. 2003). Instead, the Order only would protect the guards who allegedly engaged in the abuse, to the detriment of the juveniles. Finally, WDAM argued that the Order did not comply with the Mississippi rules governing preliminary injunctions and temporary restraining orders.

The Youth Court held a hearing on the Motion to Dissolve Order on January 6. At the hearing, WDAM presented the Youth Court with a DVD showing the blurred

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faces of the juveniles and represented to the Youth Court that this would be the manner in which the video would be broadcast. On January 11, the Youth Court issued its Final Order Granting Injunctive Relief. The Youth Court's findings included "[t]hat Bolton violated the confidentiality of the juvenile records statute of the Mississippi Youth Court Law and that the State's interest cannot justify publication or broadcasting of the videotapes" and that WDAM was "not involved with how the videotapes were obtained by Bolton."

The Court then stated that, "In this case WDAM has not presented evidence of a 'need' for disclosure of the videotapes. Certainly while the confidentiality requirements may frustrate WDAM in its reporting of the altercation incident … there is nothing in this Order that bans, prohibits or restricts WDAM from broadcasting any information concerning the altercation where WDAM has acquired that information in a legal fashion." The Youth Court stated that "Under the circumstances presented in this case, to allow the dissemination of and airing of the videotapes of juveniles under the jurisdiction of the Youth Court in the [detention center] would erode the confidentiality of Youth Court records and proceedings" and noted that WDAM had not made an application to the Youth Court to allow disclosure of the video. The Youth Court then concluded that "WDAM should and is precluded from disclosing the videotapes of the juveniles in the altercation at the Forrest County Detention Center" and ordered that,

> [T]he audio, video or photographic image that depicts juveniles in an altercation incident with detention staff while in the Forrest County Detention Center were unauthorized by the Forrest County Sheriff's office and are not for public use, dissemination or broadcast and shall not be disclosed. Further, Tawana Lavada Bolton, agents/representatives of WDAM television, and any other person or agent of other media outlets that may come into possession of said videotapes are hereby enjoined from disclosing, publishing or broadcasting the contents of said images or videotapes to any other person or agency.

Emergency Petition to the Mississippi Supreme Court

WDAM filed an Emergency Petition for Writ of Mandamus with the Supreme Court of Mississippi on January 13. The Petition argued that the Youth Court's orders are an unconstitutional prior restraint issued in violation of the First Amendment and Article 3, Section 13. The Petition also argued that the Youth Court's reliance on its finding that Bolton (but not WDAM) obtained the video "through unauthorized and possibly unlawful means" could not justify the Youth Court's orders because such a justification would be contrary to the United States Supreme Court's decision in *Bartnicki v. Vopper*, 531 U.S. 514 (2001).

WDAM cited *Bartnicki* in its motion but the Youth Court did not address it in either of its orders. In *Bartnicki*, the United States Supreme Court held that even where a third party obtains information unlawfully, the government may not prohibit the information's publication when the information is provided to a member of the media that did not participate in the alleged unlawful act. In so holding, the Supreme Court noted that in the Pentagon Papers case, it had "upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party." 531 U.S. at 528 (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). The Emergency Petition also reiterated the statutory and procedural arguments WDAM made to the Youth Court.

On January 20, a large group of media organizations and media companies moved to appear as *amici curiae*, and the Mississippi Supreme Court granted their motion the next day. The *amici* included the Mississippi Association of Broadcasters, the Mississippi Center for Freedom of Information, the Mississippi Press Association, and publishers, broadcasters and First Amendment organizations from around the country.

In their brief, the *amici* joined WDAM in arguing that the Youth Court's orders were an unconstitutional prior restraint, and argued that these Orders were no less a prior restraint because they permit reports of the alleged abuse if they do not include the video. They argued that a report without this video would not provide viewers with a full account of the behavior of the guards and the allegations against them.

The *amici* also addressed the Youth Court's claim that "WDAM has not presented evidence of a 'need' for

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disclosure of the videotapes." The *amici* argued that it is not for the Youth Court, or any other government actor, to determine what the public needs to know. Instead, a media organization's choice of material to air and its "treatment of public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press …." *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974).

Finally, the *amici* argued that the Youth Court's order was unlikely to effectively prevent the contents of the videotapes from being disclosed, because the nature of the guards' conduct had been disclosed, the Youth Court did not prohibit the disclosure of information about the allegations against the guards or interviews of former detainees who have alleged abuse, and media organizations including WDAM and WLBT (the NBC station in Jackson, Mississippi, also owned by Raycom Media) had reported on the allegations of abuse and the firing of at least one guard.

Youth Court Prosecutor Castle filed a response to the Emergency Petition on January 25 on behalf of the Forrest County Youth Court. It argued that the Youth Court's orders were not a prior restraint because WDAM still could broadcast a news report regarding the abuse allegations which included descriptions of the enjoined videos. Therefore, it contended, "[t]he right of the press to report the story was not restrained and no damage resulted" and "[a]ll the concerns citizens may have were adequately addressed by news coverage already aired by WDAM." It also argued that WDAM should have made a request for disclosure of the video pursuant to Section 43-21-261. The Forrest County Sheriff's Department also filed a response, making similar arguments.

On January 27, the Mississippi Supreme Court issued a one-page order granting the Emergency Petition and vacating the Youth Court's orders. That evening, WDAM broadcast a news report incorporating the previously-enjoined video and interviews of some of the former detainees depicted in it. The report is available on WDAM's website, http://www.wdam.com/global/Category.asp?C=195959&clipId=5510735.

Leonard Van Slyke, Christopher Shaw and Laura Hill of Watkins Ludlam Winter & Stennis, P.A. represented WDAM and Raycom Media, Inc. in these proceedings. Stephen Weiswasser, Kurt Wimmer, Jason Criss, Enrique Armijo and Kerry Monroe of Covington & Burling LLP and Luther Munford and Gregg Mayer of Phelps Dunbar LLP represented the amici curiae*. James K. Dukes, Jr. of Dukes, Dukes and Wood represented the Forrest County Sherriff's Department.*

Second Circuit Affirms Dismissal of Defamation Claim by Postdoctoral Researcher

Avoids Deciding Plaintiff's Status – Or Does It?

By Henry R. Kaufman and Michael K. Cantwell

In a recent decision the Second Circuit Court of Appeals affirmed the dismissal of a defamation claim brought by a post-doctoral research associate against the senior scientist heading the laboratory in which she worked. *Chandok v. Klessig*, 2011 WL 108729, --- F.3d --- (09-4120-cv(L), 2d Cir. Jan. 13, 2011). The Court also affirmed the dismissal of the defendant's counterclaim alleging that the plaintiff's suit violated New York's statute against Strategic Lawsuits Against Public Participation ("SLAPP"), see N.Y. Civ. Rights Law §§ 70-a, 76-a.

The undisputed facts, as recited by the court and set forth in part below, were so uniformly unfavorable to the plaintiff that it is surprising she chose to give them a wider airing by making them the subject of a defamation claim.

In 2000, plaintiff Meena Chandok was hired as a postdoctoral research associate at Boyce Thompson Institute for Plant Research ("BTI"), an affiliate of Cornell University. She was assigned to work in a laboratory headed by defendant Daniel Klessig on a project whose goal it was to find and purify a nitric oxide synthase ("NOS"), that is, an enzyme that catalyses the production of nitric oxide. In October 2002, she reported to Klessig that she had identified the protein (dubbed "variant P" or "varP") and had used it to create a recombitant protein that possessed NOS activity.

Her results were widely publicized in the plant-biology community and reported in articles co-authored with Klessig and others that were published in two prestigious scientific journals (*Cell* in May 2003 and *Proceedings of the National Academy of Sciences* in May 2004). Her success in isolating NOS was also instrumental in the laboratory obtaining a $1 million grant from the National Institutes of Health to fund further NOS research (after two prior applications submitted by Klessig had been rejected).

Chandok's personal relationship with Klessig had deteriorated due to what she claimed was his demeaning behavior toward her. In March 2004, she resigned from the laboratory and took a job in another state. After she left, scientists in Klessig's laboratory were unable to replicate her results.

Klessig called Chandok on several occasions over the following months and asked her to return to assist the lab in replicating her research results, with Chandok declining each invitation. Subsequently BTI's human resources director sent Chandok an email request acknowledging the tension with Klessig but noting the importance of being able to reproduce results. Chandok agreed but explained that she would be unable to return, at least in the near term: "my current commitments are keeping me extremely busy. However, if the situation changes at a future point in time, I shall contact you."

Eight days later, Klessig contacted Chandok by email and registered mail, explaining that while he continued to believe that she had isolated the NOS as claimed, it was essential that others be able to reproduce the results. He offered to pay for Chandok's return and give her "strong recommendations for future job applications" in exchange for her assistance. He added that if she refused he would have "little choice but to assume your results are unverifiable." In such event, he stated he would (1) retract both the *Cell* and *PNAS* papers, (2) contact the Immigration and Nationalization Service and retract his letter of support for her permanent residency application, and (3) notify the president of BTI as well as the government agencies that had funded her work.

Chandok's response came in the form of a letter from her attorney stating that she stood by her research and would welcome any "legitimate third party inquiry" but would not "work with or for Klessig." She claimed that he was harassing her and stated that she would sue for defamation if he made the disclosures threatened in his letter to her.

After several further months of attempting – and failing – to reproduce Chandok's results, Klessig raised the issue of possible scientific misconduct with BTI's president, who appointed an investigative committee. The committee considered (1) the inability of Klessig's team to reproduce

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Chandok's results, (2) subsequent successful efforts to do so by Abgent, a laboratory hired by Chandok that used reagents she had supplied, and (3) the inability of Klessig's team to reproduce Abgent's results. The committee reported that the evidence was inconclusive, finding "no conclusive evidence of data alteration or fabrication, but also no conclusive evidence that Dr. Chandok achieved the results reported." It noted that the verification by Abgent was not independent because Chandok had supplied the reagents and it found "several egregious breaches of commonly accepted scientific practice by Dr. Chandok," including "failures to maintain records and to archive research results." It concluded that, on balance, the evidence did constitute "ground for good faith suspicion of scientific misconduct."

While the investigation was underway, Klessig requested that *Cell* and *PNAS* withdraw the papers and announced the pending retractions at a scientific conference. He also sent emails to fellow scientists involved in NOS research who had made contributions to Klessig's research. An article in *Science* magazine reported the retractions and quoted Klessig as characterizing the data reported in the articles as "shaky" and adding that it was important "the rest of the scientific community not base their research on this unreliable data that we are no longer confident in."

Klessig also sent letters advising government officials at the NIH and NSF of the inability to reproduce Chandok's results. The letters stated that the evidence "strongly suggests she falsified" some of her data.

In her suit, Chandok ultimately identified 23 separate statements that she claimed were false, defamatory and made with "actual and common law malice." Klessig asserted a counterclaim seeking damages under the anti-SLAPP statute, N.Y. Civ. Rights Law § 70-a et seq. Following discovery, he moved for summary judgment on the ground that some statements constituted constitutionally protected opinion, others could not be shown to have been made with actual malice, others were not actionable because published only to coauthors, and the remainder were either absolutely or qualifiedly privileged.

Finding that Chandok was a limited purpose public figure and that she could not prove falsity or malice by the requisite clear and convincing evidence, the district court dismissed the complaint. It also dismissed Klessig's counterclaim on the ground that Chandok was not a "public applicant" within the meaning of the statute.

Dismissal of Plaintiff's Claims

The Second Circuit affirmed both dismissals, although it dismissed the defamation claim on different grounds, declaring that it was unnecessary "to reach the questions of whether Chandok was a limited-issue public figure or whether Klessig's statements concerned a matter of public interest" because all the communications were qualifiedly privileged under New York state common law. (In light of the holding in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), that the mere receipt of a federal research grant does not render a plaintiff a limited purpose public figure, defendant's brief wisely advised the appellate court that it was free to affirm on any ground appearing in the record and offered up numerous alternative grounds, including the ones ultimately selected by the Court.)

The Court found that all the allegedly defamatory statements fell within either of two common law privileges: (1) the qualified privilege for communications on a matter as to which Klessig had a duty to speak and/or (2) communications to persons with whom he had a common interest in the subject matter.

With respect to the first, the Court held that Klessig had a legal and/or moral obligation to inform the agencies that had funded the research of his suspicion of Chandok's scientific misconduct. Similarly he had a moral duty to share his concerns about Chandok's reported results with BTI's administration, the coauthors on the *Cell* and *PNAS* papers and the editors of both journals. In addition, the statements to his institution and coauthors fell within the privilege for statements on a matter of common interest, as did his emails to various fellow scientists who shared his interest in NOS research.

Under New York law, these common law privileges may be overcome upon a showing of either constitutional or common law malice and in the latter case only if such malice was "the one and only cause for the publication." *Id*. at 12 (*citing Liberman v. Gelstein*, 80 N.Y.2d 429, 438, 590 N.Y.S.2d 857, 863 (1992)). Reviewing the evidence, the court held that Chandok had not introduced sufficient evidence to overcome either of the qualified privileges.

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First there was no evidence that could lead a rational juror to conclude that Klessig knew the allegedly defamatory statements to be false or that he had acted in reckless disregard for the truth, in light of the failed efforts of a team of scientists to reproduce Chandok's results as well as the findings of the committee that investigated the charges of scientific misconduct. There was also no evidence that could lead a rational juror to conclude that Klessig was motivated solely by spite or ill will, in light of the importance of NOS research, the need for independently verifying Chandok's results and the reputational interests of the various institutions and scientists that had collaborated in the unverifiable results.

By relying on the common law privileges, the Second Circuit maintained that it had avoided the necessity of deciding "whether Chandok was a limited-issue public figure or whether Klessig's statements concerned a matter of public interest." Arguably, however, such a decision was implicit in the Second Circuit's determination that only a preponderance of the evidence was needed to overcome the qualified privileges:

> Unlike situations in which the actual malice' standard is constitutionally imposed and must therefore be proved by 'clear and convincing' evidence, ... to defeat qualified privilege in New York, the plaintiff need only establish 'actual malice' by a preponderance of the evidence." (*quoting Albert v. Loksen,* Albert v. Loksen, 239 F.3d 256, 273 (2d Cir.2001) .

The Second Circuit reached this conclusion despite the fact that *Liberman* is silent on the quantum of proof needed to overcome these qualified privileges, nor, to our knowledge, has the New York Court of Appeals addressed the issue. Certainly, the *Chandok* court did not rely on New York State case law to resolve the question, citing instead only its own prior decision, *Albert*, which in turn cited a 1993 decision, *Weldy v. Piedmont Airlines*, *Inc*., 985 F.2d 57 (2d Cir.1993), that attempted to predict how the New York Court of Appeals might ultimately rule.

The rub, however, is that both *Albert* and *Weldy* involved *private* figure plaintiffs and matters of *private* concern. Indeed, the plaintiff's status was critical to the decision in *Weldy*, which reasoned that the New York Court of Appeals would hardly choose to apply a more exacting standard of proof in a private-private case than the preponderance of the evidence standard applicable to a case involving a private figure plaintiff but a matter of public concern. *Weldy*, 985 F.2d at 65 ("we cannot imagine that New York would afford greater protection to private person/private matter statements, where first-amendment considerations are not implicated at all, than it did to the private person/public matter statements in *Chapadeau*, where there was, at least, some public interest involved").

Thus, in relying on *Albert* to apply a preponderance standard in this case, the Second Circuit must have either implicitly assumed that Chandok was a private figure or concluded, without any analysis, that the preponderance standard should apply to public figures as well when the actual malice is considered in the context of a qualified common law privilege. In any event, the questions that can be raised about the panel's adoption of the "preponderance" standard did not affect the outcome of the case since dismissal of the plaintiff's claims could be affirmed even under the lesser standard of proof.

Dismissal of the SLAPP Counterclaim

Having purported – in actuality somewhat questionably, as we have suggested – to have avoided a decision on the substantive constitutional issues presented, the Second Circuit panel then also dodged any hard thinking on the important issue of the reach of the New York anti-SLAPP statute – a statute enacted specifically to prevent and to sanction meritless claims against those who seek to question the activities of "public applicants and permittees." See N.Y. Civ. Rts. Law, §§70-a, 76-a. Relying centrally on a more than fifteen-year-old New York trial level decision (*Harfenes* v. *Sea Gate*), on scope issues that have never been considered by the New York Court of Appeals in the nearly twenty years since the SLAPP statute was enacted, the panel held that the statute was not applicable in the case.

The court reached this conclusion despite the facts that the plaintiff researcher, who had sought and received a $1 million federal grant to support her scientific research, the integrity of which was subject to significant federal and

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administrative regulation whose oversight the defendant was (in part) sued for invoking, was neither an applicant nor a permittee for purposes of the SLAPP statute, and that the defendant, who among other things had advised federal authorities of his concerns over fraud in the performance of the federally funded research, was not one who, under the statute, was "reporting on, commenting on, or challenging", such application or permission.

Already notoriously narrow and underused, in comparison to anti-SLAPP statutes in other jurisdictions (see especially Cal. Code Civ. Proc. §425), and despite the broad and supportive language of the New York Court of Appeals' only comment on the statute (in *Von Gutfeld*), decisions like the one reached by this Second Circuit panel will continue to minimize and marginalize the New York statute on the basis of no real controlling authority. At least in these authors' view, however, serious arguments could be made – in the absence of long-overdue action by the New York Legislature to accommodate the statute's judicially-narrowed reach with its far broader and more protective legislative intent – for a much more expansive judicial construction of the statute.

In particular, we see no reason that the dual application of the statute to governmental applicants as well as permittees, could not validly be construed to reach applicants for governmental funding and grants of all kinds, in which there is a substantial public interest in oversight and public comment, and not only to the narrow real-property type permits and public hearings to which the statute has typically been confined.

One final irony, in the panel's rejection of the SLAPP counterclaim, is that a central remedial section of the N.Y. anti-SLAPP statute, enacted in order to overcome any questions presented by the issue of the SLAPP plaintiff's public or private figure status, provides that in all suits governed by the SLAPP statute, the federal standard of actual malice is to be applied *and* the highest standard of "clear and convincing" proof is to be required. See N.Y. Civ. Rts. Law §76-a(2).

Henry R. Kaufman and Michael K. Cantwell, practice media, publishing and IP law with Henry R. Kaufman, P.C. in New York City. Plaintiff in the case was represented by Robert C. Weissflach, Buffalo, N.Y. (Harter Secrest & Emery, Buffalo, NY, on the brief). Defendant was represented by S. Paul Battaglia, Bond, Schoeneck & King, Syracuse, NY.

Illinois Trial Court Grants CBS's Anti-SLAPP Motion

News Broadcast Aimed at Procuring Favorable Government Action

By Steven Zansberg

In an early application of Illinois' anti-SLAPP statute to media defendants, on January 6, 2011, an Illinois trial judge dismissed a libel case against CBS owned WBBM-TV in Chicago and its investigative reporter Pam Zekman. *Tatgenhorst v. WBBM-TV,* (Ill. Cir. Ct. 2011).

The court found that the news report that gave rise to the plaintiff's claims was "genuinely aimed at procuring favorable government action" and was therefore entitled to immunity under Illinois' Citizen Participation Act. 735 Ill. Comp. Stat. 110/1, *et seq.* (the "anti-SLAPP Act").

Investigative Journalism Gives Rise to Lawsuit

In January 2009, investigative reporter Pam Zekman received a tip from a consumer that a local roofing and siding contractor, Xteriors, Inc., and its proprietor, Steven Tatgenhorst, had not completed repair work he had contracted to perform in the aftermath of two massive hail storms in the summer of 2008, and that numerous homeowners were complaining about the company's business practices. Zekman investigated the tip by reviewing numerous court files showing liens had been filed against homeowners by Tatgenhorst's roofing subcontractor, and several lawsuits had also been filed by homeowners against the roofing company.

Zekman also spoke with numerous disgruntled customers and former employees of the company, many of whom accused the company and Tatgenhorst of unethical business practices. Zekman tried, albeit unsuccessfully, to secure an interview with Tatgenhorst. She did interview Tatgenhorst's attorney, who generally denied all of the allegations lodged against his client by his customers and former employees.

On April 9, 2009, WBBM-TV broadcast Zekman's investigative report, "After the Storm," on its 10:00 p.m. newscast. The report featured three sets of disgruntled customers recounting, on camera, their negative experiences with the company, including allegations of forgery and insurance fraud by Tatgenhorst. At the end of the field-produced piece, Zekman appeared on camera and reported that, earlier that day, the Illinois Attorney General had filed a consumer fraud lawsuit against Tatgenhorst and his roofing companies. Zekman urged viewers who had bad experiences with the company to visit WBBM-TV's website, where there was a link to the Attorney General's Consumer Fraud office.

Tatgenhorst and Xteriors, Inc. filed a libel lawsuit in McHenry County Circuit Court, naming Zekman, WBBM-TV, and the three customers who appeared on camera in the broadcast news report. He also filed two additional lawsuits in the same court, against another customer who had filed a complaint with the Attorney General, two police officers who had investigated his company's practices, and his roofing subcontractor. Those other lawsuits were later voluntarily dismissed.

Defendants Invoke the Anti-SLAPP Act

In response to the Complaint, the defendants filed a motion to dismiss the case pursuant to the Illinois anti-SLAPP Act. Enacted in 2007, the anti-SLAPP Act provides absolute immunity from all civil claims arising from acts taken "in furtherance of" the defendants' rights of petitioning, free speech or assembly, that are "genuinely aimed at procuring [a] favorable government action, result, or outcome." 735 Ill. Comp. Stat. 110/15 & 110/20(c).

The defendants argued that their speech which served as the exclusive basis for the plaintiffs' claims – both that of the customers who spoke on camera in the news report, and of Zekman and her employer WBBM-TV – met that criterion, and was therefore absolutely immune from civil claims for defamation. In support of their motion, defendants filed affidavits from Zekman, the three customers who appeared in the broadcast, and several other customers who spoke with Zekman by phone (sharing similar stories).

Defendants also tendered an affidavit from the Illinois Attorney General's Office testifying that its Consumer Fraud Division had received additional complaints about the plaintiffs in the days and weeks following the broadcast. Pursuant to the anti-SLAPP statute, all discovery in the case was stayed pending resolution of the motion to dismiss.

In response to the motion, the plaintiffs argued that WBBM-TV's news report did not come within the ambit of the anti-SLAPP statute. Plaintiffs argued that the news report

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was not speech directed to any governmental body, and because the broadcast mentioned that the Attorney General's office had already filed a lawsuit against the company, the defendants' speech was not "genuinely aimed at procuring favorable government action."

Recent Appellate Rulings Strengthen Defendants' Position

The Court's trial schedule led to postponing the hearing on the defendants' anti-SLAPP motion twice, to January 6. This proved to be extremely helpful to the defendants because, in the interim, Illinois' appellate courts issued two rulings that broadly construed the reach of the anti-SLAPP Act in analogous circumstances.

In *Sandholm v. Kuecker*, 2010 WL 4102998 (Ill. App. 2d Dist. Oct. 18, 2010), a group of parents who had sought the removal of a public high school basketball coach and athletic director appeared as guests on a radio program and called for the plaintiff's ouster, *after* their petition to the school board had been denied.

The Second District Court of Appeals affirmed the trial court's holding that those citizens' statements made *to the media*, as well as the *statements made by the radio station and its talk show host*, were immune from liability under the anti-SLAPP statute; specifically the Court of Appeals affirmed that their speech was "part of the process of influencing the government." *See id.*, 2010 WL 4102998, at *19.

In so holding, the Second District made clear that the defendants' "statements did not need to be made within a petition or during a hearing, but needed only to be made within the defendants' participation in the government process, which *includes acts of gaining public support to influence favorable government action*." *Id.* at *20 (emphasis added). The appeals court also held that the subjective intent of the defendants need not be examined if the court found that the speech at issue was, objectively viewed, reasonably calculated to procure favorable governmental action.

In *Wright Dev. Group, LLC v. Walsh*, 2010 WL 4125655 (Ill. Oct. 21, 2010), the Illinois Supreme Court went even further, and interpreted the anti-SLAPP statute broadly. Specifically, the Supreme Court held immune from civil libel claims statements that the defendant made to a newspaper "reporter [which] addressed a public matter – the problems of condominium conversion and draft legislation – in furtherance of his right to petition the government." *Id.* at *8. The statements at issue were made *after* an alderman had publicly announced her intention to revise the municipal code concerning the sale of condominiums. *Id.* at *1, 8. The Supreme Court concluded that the defendant's statements made to a newspaper reporter were within the immunity granted by the anti-SLAPP statute because they addressed a matter that "potentially affected citizens" of the ward in which he lived and of the city at large. *Id.*

Noting that the statute's definition of "government" includes "the electorate," the Supreme Court held that the defendant's speech was immunized by the anti-SLAPP statute "because the Act expressly encompasses exercises of political expression directed at the *electorate* as well as government officials." *Id.* at *9 (emphasis in original).

Trial Court Judge Grants CBS's Motion

After hearing arguments from counsel, Circuit Judge Michael Caldwell granted the defendants' motion and dismissed the case. Judge Caldwell held that the defendants' speech fell within the protection afforded by the anti-SLAPP statute and he expressly rejected the plaintiffs' argument that the filing of the Attorney General's consumer fraud action before the broadcast negated such a finding: "The mere fact that the [Attorney General's] lawsuit was filed and it was pending and unresolved on the day the newscast aired . . . does not deprive the defendants of the protection of the Illinois Citizens Participation Act; and in that regard, the action by the A.G. is not the only governmental action that is available. . . . local law enforcement and local building enforcement officer action could also be initiated."

Accordingly, the court ruled, "the threshold questions have been met" and the plaintiffs did not meet their burden, under the statute, of demonstrating that the defendants' speech at issue was not "genuinely aimed at procuring favorable governmental action."

Thus, "the statements complained of are exempt [under the anti-SLAPP Act] and the lawsuit will be dismissed in its entirety."

The defendants were given thirty days from the judge's ruling in which to file their application for an award of their reasonable attorneys' fees. It is anticipated that the plaintiff will appeal Judge Caldwell's ruling.

Defendants WBBM, CBS Broadcasting and Pam Zekman were represented by Anthony Bongiorno and Naomi Waltman of the CBS Law Department, Lee Levine and Steve Zansberg of Levine Sullivan Koch & Schulz, and Tom Pontikis and Peter John of Williams, Montgomery and John. The plaintiffs were represented by Richard Van Den Bussche, of Crystal Lake, Illinois.

California Appeals Court Calls for Eliminating Appeals from Denials of Anti-SLAPP Motions

Court Bemoans "Misuse and Abuse" of Anti-SLAPP Law

In a published libel decision, a California appeals court urged the legislature to consider eliminating the right of appeal from denials of anti-SLAPP motions to strike. *Grewal v. Jammau et al.*, A126239, 2011 Cal. App. LEXIS 27 (Cal. App. 1st Dist. Jan. 11, 2011) (Richman, Kline, Haerle, JJ.).

Background

The instant libel case was brought by the founder and former president of a Sikh temple in California against the *Punjab Times*, a local ethnic newspaper, and several sources. At issue were articles that accused plaintiff of a variety of misconduct. Among other things, the articles accused plaintiff of being a tax fraud, and stated he was "wretched, unscrupulous, vice indulgent, and fun-loving,' and the Temple school he established was a "madrassa" training school for terrorists.

The accusations against plaintiff were first published in 2005 and plaintiff sued in 2006. There was a flurry of pretrial motions, and amendments, and not until April 2009 did the defendants move to strike the complaint under the anti-SLAPP statute. The motion was noteworthy in several respects, in that it was filed: (1) almost three years after plaintiff's original complaint; (2) the media and source defendants had filed verified answers to plaintiff's earlier complaints containing identical causes of action; and (3) an earlier anti-SLAPP motion by three other defendants was denied on the ground that plaintiff had a probability of prevailing.

In July 2009, the trial court denied the motion to strike. The allegations of personal misconduct did not involve matters of public interest and were therefore outside the scope of the anti-SLAPP statute. The allegation that the school was operating as a "madrassa" did involve a matter of public interest, but plaintiff demonstrated a probability of prevailing. The Court of Appeals panel affirmed without addressing the public interest prong of the anti-SLAPP statute, holding instead that plaintiff showed he could prevail on all the causes of action. Plaintiff showed that the allegations were false; and the allegations were based on a single unreliable source.

According to the court, the anti-SLAPP motion in this case "should never have been brought" and the appeal was "utterly lacking in merit."

Abuse of the Anti-SLAPP Statute

Discussing the abuse and misuse of the anti-SLAPP statute, Cal. Civ. Code. 425.16, the court began by noting what it called an "explosion" in filings under the statute. The court cited Judicial Council records showing the following filings of anti-SLAPP motions since 1999: 1999—55; 2000—327; 2001—302; 2002—543; 2003—587; 2004—542; 2005—515; 2006—598; 2007—508; 2008—555; and 2009—558.

In a lengthy discussion the court argued that the anti-SLAPP law is "being misused -- and abused," in several ways. First, numerous anti-SLAPP motions are made in cases that do not arise from protected activity within the scope of the law. The court cited as examples, motions made in personal injury, insurance coverage and malpractice cases. Second, in what the court termed a more "subtle" abuse, motions and appeals are made in cases where the non-movant meets the burden of going forward with the claim. The right of appeal from a denial of a motion to strike is the aspect of the statute most subject to abuse. Something, the court concluded, "is wrong with this picture."

The court urged the legislature to consider eliminating a losing defendant's right to appeal. This "should seriously be considered by the Legislature, especially as it would not necessarily leave the defendant without recourse. In those relatively rare circumstances where a trial court has *clearly* erred in denying a meritorious anti-SLAPP motion, relief might be obtained by a writ, as it has been in similar circumstances where an appeal does not lie."

Plaintiff was represented by N. Maxwell Njelita, Njelita Law Offices, Oakland, CA. Defendants were presented by Mark Cohen.

Texas Appeals Court Affirms Denial of Summary Judgment to Newspaper

Lawyer Plaintiff Not a Public Figure Despite Extensive Press Coverage

In an interesting decision, a Texas appellate court affirmed denial of summary judgment to a newspaper over an article accusing a lawyer of misconduct in representing a client. ZYZY Corp. v. Hernandez, No.04-10-00311-CV (Tex. App. Jan. 26, 2011) (Angelini, Marion, Hilberg, JJ.). The court held that plaintiff was not a public figure for purposes of her libel suit despite numerous mentions in the press about representing her client and numerous meetings with government officials on behalf of her client. The court reasoned that while plaintiff was mentioned in press articles, she was merely acting as a legal representative for her client and did not otherwise seek out publicity or seek to influence a public controversy.

At issue in the case was an April 2006 article published in the *Eagle Pass News-Guide* newspaper about an Indian tribal court hearing. The hearing involved a long running and contentious dispute over the leadership of the Kickapoo tribe, a federally recognized Indian tribe in south Texas. The tribe operates a casino in Eagle Pass, Texas. Plaintiff, Gloria Hernandez, is a lawyer for the ruling tribal faction.

At the hearing, Hernandez testified that she derived 10% of her income from representing the tribe. The newspaper article, however, reported that she was "raking off a 10% share of casino profits," and was violating federal gaming rules and defrauding the U.S. government. Plaintiff filed a libel suit in Comal County, Texas against the newspaper exactly one year after the article was published. She also filed a libel suit one year and three days after publication in Bexar County Court. The first suit was dismissed for want of prosecution. The second suit was allowed to proceed under a provision of the Texas Code of Civil Procedure which extends the statute of limitations to the next business day if the limitation falls on a day when the court is closed. Texas Civ. Code 16.072. The Bexar court was closed for the Battle of Flowers holiday, a local San Antonio holiday commemorating the Battle of the Alamo.

Defendants had moved to dismiss on statute of limitations as well as substantive grounds. The Court of Appeals first affirmed that the lawsuit was timely, notwithstanding plaintiff's ability to file a suit without benefit of the extension. The court declined to condition the application of Section 16.072 on the availability of a venue to bring suit without benefit of the extension.

As to plaintiff's status, the Court of Appeals first defined the controversy as the "legitimacy of the leadership" of the Kickapoo tribe. Plaintiff began representing the tribe in 2002, and had a role in the leadership fights as well as the tribe's casino operations. From 2002 to 2006, the defendant newspaper published 49 articles mentioning plaintiff; the *San Antonio Express-News* published 14 articles mentioning plaintiff; and the *Dallas Morning News* published one. Plaintiff also represented the tribe at meetings with federal officials.

The Court of Appeals held that none of the news reports or meetings made plaintiff a public figure for purposes of her libel suit. The court first found no evidence that plaintiff did more than accompany her clients to meetings with federal officials. "Merely accompanying a client to meet with elected officials to discuss matters of importance in his district or to meet with representatives that have some oversight authority over the lawyer's client does not make a lawyer a public figure," the court held.

Second, after reviewing the press coverage of plaintiff, the court found that nothing in the articles suggested that plaintiff sought out publicity. Instead, she was merely "responding to press inquiries regarding legal matters affecting the tribe."

The court concluded that plaintiff had no role in the tribal leadership conflict beyond her role as a legal advocate. That alone was not enough to make her a limited purpose public figure absent evidence that she engaged the media, had special access to the media or used the media to influence the outcome of the controversy.

Plaintiff was represented by Charles J. Kolb, San Antonio, TX. Defendant was represented by Mark J. Cannon, Clemens & Spencer P.C., San Antonio, TX.

Website Owner Brings Challenge Under SPEECH Act and Florida's Libel Tourism Statute

First Use of New Federal Libel Tourism Law

By Deanna K. Shullman and Paul R. McAdoo

On January 10, 2011, three plaintiffs, Investorshub.com ("iHub"), Matthew Brown, and Robert Zumbrunnen (collectively the "Plaintiffs") brought a declaratory judgment action, under the SPEECH Act and Florida's libel tourism provisions seeking to proactively address the question of whether the Canadian judgments against them stemming from defamation claims are enforceable in Florida. *Investorshub.com, Inc., Matthew Brown, and Robert Zumbrunnen v. Mina Mar Group Inc., Mina Mar Group Inc. (of the USA) n/k/a Emry Capital Group, Inc., and Miro Zecevic*, No. 4:11cv9-RH/WCS (N.D. Fla. filed Jan. 10, 2011). Plaintiffs base their claims on the SPEECH Act and Florida's state law counterpart.

On August 10, 2010, President Obama signed Public Law No. 111-223, the "Securing the Protection of our Enduring and Established Constitutional Heritage Act" (the "SPEECH Act"), into law. A similar statute, 2009 Fla. Laws Ch. 2009-232, was enacted into law in Florida in May 2009.

iHub is a Florida corporation that owns and operates a website which allows investors to review and post information related to a wide variety of investment-related topics. Co-Plaintiffs Brown and Zumbrunnen are former iHub employees. The Defendants, Mina Mar Group, Inc., Mina Mar Group, Inc. (of the USA) and Miro Zecevic (collectively "Mina Mar") filed a lawsuit in Canadian court against iHub, Brown, Zumbrunnen and others for defamation based upon statements by third parties on iHub's discussion boards.

Last year, Mina Mar obtained a final judgment by default against Plaintiffs in the amount of $105,000 (CAD) in damages and costs as well as numerous non-monetary awards. The non-monetary awards included orders for the Plaintiffs to apologize, publicly retract some of the statements at issue, and disclose the names of several posters to the iHub website. Plaintiffs also were enjoined from posting defamatory statements about Mina Mar. In addition, Mina Mar got a separate costs judgment against the Plaintiffs for $13,650 (CAD). The declaratory judgment action addresses both judgments.

Both the SPEECH Act and Florida's libel tourism allow parties with defamation judgments obtained outside the U.S. against them to seek declaratory judgment regarding the enforceability of those judgments.

Both the SPEECH Act and Florida's libel tourism allow parties with defamation judgments obtained outside the U.S. against them to seek declaratory judgment regarding the enforceability of those judgments. There are numerous available grounds for challenging the recognition of a defamation judgment obtained outside the U.S. For example, the SPEECH Act requires courts to refuse to recognize defamation judgments obtained outside the U.S. where the exercise of personal jurisdiction over the judgment debtor would not have comported with due process requirements in the United States.

The SPEECH Act also requires that courts not recognize defamation judgments obtained outside the U.S. unless the non-U.S. court provides as much protection for freedom of speech and press as the First Amendment, U.S. law, and the constitution and laws of the state in which the court sits. Florida's libel tourism law has a similar provision. Canadian law lacks many of the protections of United States courts, including the requirement that a defamation plaintiff prove any statements were made with a specific degree of fault. Canadian law also lacks a counterpart to the Communications Decency Act, a major obstacle for Defendants because the Canadian judgments rely solely on statements made by third parties on iHub's website.

The declaratory judgment action is believed to be the first lawsuit brought under the new federal and Florida libel tourism laws.

Deanna K. Shullman and Paul R. McAdoo of Thomas & LoCicero PL represent iHub, Matthew Brown, and Robert Zumbrunnen.

Kentucky Court Has Jurisdiction Over Arizona Gossip Website

Defamatory Statements "Targeted" Plaintiff's State

A Kentucky federal district court ruled that it had personal jurisdiction to hear a libel case brought by a Cincinnati Bengals cheerleader against an Arizona-based gossip website. *Jones v. Dirty World, LLC et al.* No. 2009-219, 2011 U.S. Dist. LEXIS 5948 (E.D. Ky. Jan. 21, 2011) (Bertelsman, J.). The court held that it had jurisdiction under either the *Zippo* sliding scale approach or the Calder effects test where the alleged defamatory statements were, in the court's opinion, "expressly targeted" at plaintiff.

Background

Plaintiff, Sarah Jones, is a school teacher in northern Kentucky and a member of the Cincinnati Bengals cheerleading squad. The website, TheDirty.com, notes that it publishes "rumors, speculation, assumptions, opinions, and factual information" adding that its user posts "may contain erroneous or inaccurate information." At issue are user postings stating that plaintiff "slept with every other Bengal Football player" and had sexually transmitted diseases from an ex-boyfriend; and the website operator's responsive comment: "Why are all high school teachers freaks in the sack?"

Plaintiff sued for libel, privacy and related claims in December 2009 and obtained an $11 million dollar default judgment. The default judgment, however, turned out to be against the wrong entity – a website called thedirt.com that had no relationship to the website where the statements appeared.

After filing an amended complaint, the thedirty.com moved to dismiss for lack of personal jurisdiction arguing that while it knew that plaintiff was a cheerleader for a Cincinnati team, it had no knowledge of any connection to Kentucky.

District Court Decision

The court began its analysis of the personal jurisdiction question by noting that "the problem with dealing with a personal jurisdiction issue is not that there are too few precedents, but rather that there are too many." The court then went on to consider the issue under the *Zippo* sliding scale approach, the Calder effects test, and more recent Internet jurisdiction cases.

Looking first at the website's interactivity, the court found that the website occupied the middle ground of the *Zippo* scale. "The defendants publish invidious and salacious posts by visitors to the web site (known on the site as "The Dirty Army"), they respond to those posts with their own comments, and they thereby encourage and generate further posts by readers. In effect, a dialogue is created."

Thus under *Zippo* there was purposeful availment in the forum. The court dismissed defendant's argument that it had no knowledge that plaintiff was connected to Kentucky.

> Here, there is no dispute that [defendants] were fully aware that [plaintiff] existed, and that they specifically targeted their conduct against [plaintiff]. That they were able to do so while remaining ignorant of [plaintiff's] precise location may render this case factually distinct from prior precedents finding jurisdiction for acts of express aiming, but not in a manner that warrants a different result.

Moreover, defendant conceded that Ohio would have personal jurisdiction over the case – and the court found no prejudice by allowing the case to proceed in Northern Kentucky which is geographically part of the greater Cincinnati area.

The court also held that there was personal jurisdiction under the Calder effects test, because defendants "knew that the invidious statements they posted would cause distress and harm to the plaintiff where she lived and/or worked."

Looking to more recent case law, the court found that a California decision "fits the bar exactly." Citing with approval to *Facebook, Inc. v. Connectu LLC*, No. C 07-

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01389, 2007 U.S. Dist. LEXIS 61962 (N.D. Cal. Aug. 13, 2007), the court stated that "in the age of the Internet, 'specific, targeted conduct may be expressly aimed at a particular individual or entity, despite the fact that the person engaging in the conduct may not know of the *geographic* location of the individual or entity.'"

Section 230 Issue

Finally, the court found denied defendant's motion to dismiss the claims under Section 230 of the Communications Decency Act, holding that the issue should be decided on a motion for summary judgment after discovery. The court also noted that Section 230 immunity could be lost where "the site owner invites the posting of illegal materials or makes actionable postings itself." Citing *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

Plaintiff was represented by Eric C. Deters, Eric C. Deters & Associates, P.S.C., Independence, KY; and Geoffrey P. Damon, Butkovich & Crosthwaite LPA, Cincinnati, OH. Defendant was represented by Alexander C. Ward, Huddleston, Bolen, LLP, Ashland, KY.

Ninth Circuit Vacates Prior Ruling on Anonymous Online Commercial Speech

Standard for Anonymous Commercial Speech Reserved for Another Day

By Thomas R. Burke and Ambika K. Doran

In July 2010, the Ninth Circuit issued an opinion discussing at length the proper standard to be applied to online anonymous commercial speech, concluding, in large part, that the more stringent standards for evaluating such speech were inapplicable. The court appears to have backed away from this position, however. In January 2011, the court vacated its earlier opinion and replaced it with another that explicitly declines to decide whether the speech at issue was commercial, and, like the prior opinion, finds the district court did not err in applying the most stringent standard to the disclosure of anonymous speakers, first set forth in *Doe v. Cahill*, 884 A.2d 451 (Del.2005).

The lawsuit centered around a business dispute between two competitors, one ("TEAM") an offshoot of the other ("Quixtar"). *See In re Anonymous Online Speakers*, 2011 WL 61635, at *1 (Jan. 7, 2011). Quixtar, the successor to Amway Corporation, claimed that TEAM "orchestrated an Internet smear campaign via anonymous postings and videos disparaging Quixtar and its business practices." *Id.* Quixtar is a marketing business that distributes consumer products like cosmetics and nutritional supplements through Independent Business Owners ("IBOs"). It sought the identity of the authors of five blogs targeting Quixtar with such allegedly defamatory comments as: "Quixtar has regularly, but secretly, acknowledged that its products are overpriced and not sellable"; "Quixtar refused to pay bonuses to IBOs in good standing"; Quixtar "terminated IBOs without due process"; "Quixtar currently suffers from systemic dishonesty"; and "Quixtar is aware of, approves, promotes, and facilitates the systematic noncompliance with the FTC's Amway rules." *Id.* The district court granted the motion as to three of the five speakers, applying the test set forth in *Cahill*, which requires a plaintiff to show it would prevail on a summary judgment motion as to the claim for which disclosure is sought.

The anonymous speakers filed a mandamus petition, which the court denied in its 2010 decision. *In re Anonymous Online Speakers,* 611 F.3d 653 (9th Cir. 2010). The court recognized that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 657-58 (quotation marks and citations omitted). It also noted that "online speech stands on the same footing as other speech—there is 'no basis for qualifying the level of First Amendment scrutiny that should be applied' to online speech." *Id.* at 658 (citation omitted). But it also emphasized that "commercial speech… enjoys a limited measure of protection, commensurate with its subordinate position on the scale of First Amendment values." *Id.* (quotation marks and citations omitted).

Notably, in its 2010 opinion, the Ninth Circuit found that the postings and videos at issue "are best described as types of expression related solely to the economic interests of the speaker and its audience and are thus properly categorized as commercial speech." *Id.* at 657. And, it found, that "[i]n the context of commercial speech balanced against a discretionary discovery order under Rule 26. . . *Cahill*'s bar extends too far." *Id.* at 661. The Ninth Circuit nonetheless denied the writ petition because the district court's decision was not "clearly erroneous." *Id.*

In its January 7, 2011, opinion, the Ninth Circuit signaled a change in position. It vacated its earlier opinion and replaced it with one that did not decide whether the speech at issue was commercial. Instead, it found that "even if the speech was commercial, the district court's choice of the *Cahill* test did not constitute clear error." 2011 WL 61635, at *6. The Court's 2011 opinion also omitted the earlier statement that *Cahill* "extends too far" in the context of "commercial speech," instead stating that it extended too far in the context of "the speech at issue here." *Id.*

The Ninth Circuit therefore appears to have reserved the proper standard for anonymous commercial speech for another day.

Petitioners were represented by John P. Desmond, Wyane O. Klomp, Jones Vargas, Reno, NV. Quixtar was represented by Cedric C. Chao, William L. Stern, Maria Chedid, and Somnath Raj Chatterjee, Morrison & Foerster LLP, San Francisco, CA.

Ohio Newspaper Wins Summary Judgment on Libel and Spoliation Claims

Articles Were Substantially True; "Viewpoint" Column Protected Opinion

An Ohio trial court granted summary judgment to the *Sandusky Register* newspaper, and individual employees, on libel and spoliation claims brought by an elected county prosecutor. *Baxter v. Sandusky Newspapers et al.,* No. 2009-cv-0281 (Ohio Comm. Pleas Jan. 19, 2011) (Coyne, J.). The court held that the news articles at issue were substantially true; a "viewpoint" article was protected opinion; and the spoliation claim failed because a reporter's alleged destruction of notes did not harm plaintiff's case.

Background

Plaintiff, Kevin Baxter, is the elected Eire County Prosecutor. Plaintiff was one of many local law enforcement officials interviewed for an official report about Sandusky's then Police Chief Kim Nuesse. Nuesse was fired for dishonesty and mismanagement. After the firing, the newspaper published a "viewpoint" column entitled "Baxter Needs Integrity Probe," accusing plaintiff of lying in the report about Police Chief Nuesse.

Nuesse later challenged her dismissal in a civil service commission hearing. At the hearing, her lawyer attacked plaintiff's credibility by introducing a law enforcement report discussing allegations of drug use. The newspaper articles, however, mistakenly attributed the allegations to a witness rather than Nuesse's lawyer who read portions of the report into the record.

One article at issue headlined "Baxter's Credibility Attacked" stated that "A high ranking undercover narcotics agent from the Ohio Bureau of Criminal Investigation and Identification testified about Erie County Prosecutor Kevin Baxter's alleged cocaine use. … According to a document from (Bureau of Criminal Investigation) … the government had a 'credible witness' who confirmed Baxter's cocaine use."

The witness only acknowledged that he was aware of the report; the allegations from it were read into the record by Nuesse's lawyer. The document, however, did discuss drug use by plaintiff, stating: "To date, only one witness of the myriad names provided to investigators has provided reliable information regarding the subject's drug use. The information, however, is about cocaine usage five years or more ago and is not sufficient for probable cause."

Plaintiff sued the newspaper, its publisher, editor and reporter for libel. He also later added a spoliation claim against the reporter after the reporter testified in deposition that he may have deleted his notes after the lawsuit was filed. Plaintiff moved for summary judgment declaring the allegations false; defendants moved for summary judgment to dismiss the claims.

Summary Judgment Granted

Granting the media defendants' motions for summary judgment, the trial court held that the news articles were substantially true notwithstanding the error in attribution. The mistake in attribution did not change the gist or sting of the underlying report which did discuss allegations of cocaine use. "Attributing reading of the report to the wrong individual is not sufficient to establish the falsity of the article," the court concluded.

The court also rejected plaintiff's argument that the newspaper's use of the phrase "credible witness" was false where the BCI report referenced a witness with "reliable information." There was no material difference between "credible" and "reliable," according to the court.

With respect to the column accusing plaintiff of telling "straight out lies," the court concluded that when viewed as a whole the column was clearly opinion. The column appeared as a "Viewpoints article," and included phrases such as "if you ask me" and "in my opinion."

Finally with respect to the spoliation claim, the court noted that to recover the plaintiff must establish 1) pending or probably litigation; 2) knowledge on the part of defendant that litigation is pending or probable; 3) willful destruction of evidence designed to disrupt plaintiff's case; 4) disruption of plaintiff's case; and 5) damages proximately caused by defendant's acts.

Here plaintiff could not meet the fourth and fifth elements of the claim because the articles were substantially true.

Seventh Circuit, Florida State Court Reach Opposite Conclusions on Whether Non-Party Websites May Ignore Takedown Orders

Website Ordered to Remove Third-Party Postings

By Charles D. Tobin and Christine N. Walz

The U.S. Seventh Circuit Court of Appeals and a state trial court in Florida -- within one day of each other, and in cases involving the same website -- reached contradictory conclusions about the authority of judges to enforce third-party takedown orders against web operators. The stark divergence of judicial opinions highlights the difficulties courts continue to face in developing consistent principles governing jurisdiction over websites.

In the Seventh Circuit case, the panel agreed with the trial judge and held that-- where a non-party website's operator has done "nothing more than . . . [ignore] the injunction" -- courts lack the authority under the Federal Rules to order www.ripoffreport.com, to take down allegedly defamatory postings. *Blockowicz v. Williams*, 2010 WL 5262726, *5 (7th Cir. December 27, 2010) (Cudahy, Flaum, Wood, JJ.)

On the day following this decision, a Florida Circuit Court judge in Miami, in an unrelated case, issued an order enjoining the same website's operator, on pain of contempt, from maintaining the statements about the plaintiffs posted on the website. *Giordano v. Romeo*, No. 09-68539-CA-25, "Final Order on Plaintiffs' Motion for Temporary Injunctive Relief" at 4 (Fla. 11th Cir. Ct. Dec. 28 2010).

Background

Xcentric Ventures, LLC, an Arizona-based company, operates the "Ripoff Report" site, which describes itself as "a worldwide consumer reporting Web site and publication, by consumers, for consumers, to file and document complaints about companies or individuals." As of this writing, the site boasts that it contains more than 570,000 indexed, searchable reports about businesses and individuals.

The site has a business model of its own. It states that if the subject of a report believes it is the subject of a false complaint, it may enter the "Ripoff Report's VIP Arbitration Program" by paying $2,000. The fee will pay for the services of one of the "private arbitrators" under contract with the site's owner, "who have extensive experience, including experience as judges in court." The site promises that, after the arbitrator reviews submissions from the business, "any statements of fact that the arbitrator determines to be false will be removed from the original report."

However, the site's Terms of Service makes clear that, absent participation in this arbitration program, the postings are "a permanent record of disputes, including disputes which have been fully resolved" and further, that "in order to maintain a complete record, information posted on [the site] will not be removed."

Seventh Circuit Decision

In the Seventh Circuit *Blockowicz* case, the Northern District of Illinois court had enjoined the individual posters, ordering that they remove the crude, critical comment about the plaintiffs. When the defendants failed to comply, the plaintiffs asked the judge to enforce the injunction and compel the www.ripoffreport.com to remove the statements. They argued that under Federal Rule of Civil Procedure 65, which allows a federal court to issue an injunction against those who are "in active concert or participation" with an enjoined party and who have actual notice of the injunction, the website's operator was bound by the injunction. The Northern District of Illinois court disagreed, however, and determined that it lacked the power to require the host and manager of the website to remove the statement.

On appeal, the Seventh Circuit affirmed. The appeals court said that the website operators could not be bound by the injunction under Rule 65, and therefore could not be compelled to remove the allegedly defamatory statement. The appeals court held that, because all of the website's actions predated the injunction, its operator did not have actual notice of the injunction at the time it acted, and that the

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operator therefore did not aid and abet the posters' violation of the injunction or act in concert with them.

The Seventh Circuit also rejected the argument that the website's failure to take down the posts, even though they had the technical ability to do so, constituted action in concert with the posters. Mere inactivity, the court concluded, is not aiding and abetting the posters' violation of the injunction: "Since the injunction was issued, [the website operator] has simply done nothing, and it has certainly not actively assisted the defendants in violating the injunction."

Florida Circuit Court Decision

In Florida, the *Giordano* court took a radically opposite view of the legal consequences of Ripoff Report's decision to ignore that court's injunction. There, the owner of the business G&G Holistics Addiction Treatment Center originally sued both the poster and Ripoff Report's operator for postings alleging unsanitary conditions and poor staff treatment at the facility, and for calling the business's owner a convicted felon.

The trial judge had dismissed the website from the lawsuit, finding that the Communications Decency Act, 48 U.S.C. §230(c)(1), immunized the operator. The poster then entered into a stipulated injunction with the plaintiffs that required her to ask the website operator to take down her postings. After the website refused, the judge held an immediate hearing and ordered the operator to take down the postings.

In a curious ruling that contradicts a thread of CDA decisions around the country, the Florida judge held that the statute only immunizes a website from liability for damages, not from contempt sanctions. "The Court specifically finds that the CDA does not categorically bar this Court from issuing an injunction against" the website's operator, the order stated. Relying on a provision in the CDA (§230(e)(3)) that preserves the authority of state judges to enforce state laws that are "consistent" with the CDA, the Florida judge further held: "The Court does not believe that Congress intended to provide immunity from an equitable injunction in such a situation."

> The Court finds that in this situation, Xecentric [sic] refusal to comply with the Court's order and the demand of the publisher to remove the statements, makes Xcentric the publisher of the statements. This is different from determining that they are the publisher solely because of the posting. However, even if Xcentric were not treated as the publisher (and indeed, Plaintiffs do not seek to impose civil liability upon Xcentric), the CDA does not bar this Court from entering injunctive relief.

In a post commenting on this case, Ripoff Report said, "We intend to appeal the court's decision because we believe that it violates both the First Amendment right to free speech and, in addition, we believe the court's injunction is barred by federal law, specifically the Communications Decency Act, 47 U.S.C. § 230."

Charles D. Tobin and Christine N. Walz are with the Washington D.C. office of Holland & Knight LLP

Consumers Union Wins Typosquatting Litigation

Typosquatters Ordered to Turn Over Domain Names

By Eric Rayman

Typosquatting – registering a domain that is an intentional misspelling of someone else's domain name – is aggravating to domain owners. As anyone who's ever typed more than a 3 -letter name domain into a search box knows, dropping a letter, omitting a double "t," or adding an unauthorized "s" happens to all of us. When I kept landing on a webpage of keyword ads every time I tried to visit the advertising-free *Consumer Reports* site, I finally asked their counsel about it.

Consumer Reports and *ConsumerReports.org* are published by Consumers Union of United States, Inc. (Speaking of names, that is its name. There's no "the" in there.) CU is a non-profit whose mission is to test and evaluate products and services sold to consumers. CU accepts no advertising or commercial sponsorship so that the independence of its ratings cannot be questioned. Not surprisingly, CU counsel knew about this squatter and didn't like it either.

The owner of some of the most common misspellings of the CR domain, including the one on which I kept landing, was Netex Galaxy, a Latvian company who registered its domains with a Russian registrar.

The international domain registries all must agree to abide by the Uniform Dispute Resolution policies administered by ICANN, the Internet Corporation for Assigned Names and Numbers. In theory these policies allow an aggrieved domain owner to bring a case against a squatter relatively easily and inexpensively. The matter is entirely handled on paper. There's no discovery and no hearing. There are essentially only three things a plaintiff has to prove:

1. that the defendant's domain name is confusingly similar to the plaintiff's trademark;
2. that the defendant has no legitimate rights in the domain that's the subject of the dispute; and
3. that the domain was registered in bad faith.

CU appeared to have an excellent basis for bringing this action against Netex Galaxy on all three elements, but had just one concern. Under the Uniform Dispute Resolution rules, if the defendant seeks to appeal an adverse ruling of an arbitrator, the plaintiff must consent to the dispute being heard in the country where the defendant resides or the jurisdiction where the Registrar is located. In this case, that meant Latvia or Russia.

Consequently, CU chose to file an action in the Eastern District of Virginia under the provisions of the 1999 Anticybersquatting Consumer Protection Act instead of consenting to jurisdiction in Russia or Latvia under the Uniform Domain Name Dispute Resolution policies of ICANN. Since CU could not obtain jurisdiction over Netex Galaxy in Virginia, it brought an "*in rem"* action against the five misspellings of its domain name.

On December 6, 2010, United States District Judge Leonie M. Brinkema held that the five domain names violated the anticybersquatting provisions of the Lanham Act and ordered them turned over to Consumers Union. *Consumers Union of United States v. Consumerreport.com et al.,* No. 1:10-268.

Judge Brinkema found that Consumers Union owns the trademarks CONSUMER REPORTS and CONSUMERREPORTS.ORG. She ruled that the five contested domain names differed from Consumers Union's mark by only one or two letters each and that the registrant for the contested domain names was only using them to generate "click-through" advertising fees. Accordingly, she held that there was no genuine dispute of material facts other than that the five contested domains were confusingly similar to Consumers Union's marks and that Netex Galaxy must have had a bad faith intent to profit from that confusion.

Judge Brinkema ordered Verisign and Public Interest Registry to transfer the ownership of the contested domain names to Consumers Union. Previously the Magistrate Judge overseeing discovery had ordered Netex Galaxy to pay Consumers Union's attorney's fees in connection with a Motion to Compel Discovery. Netex failed to provide any discovery in response to the Motion, or the underlying requests.

Eric Rayman is Of Counsel at Miller Korzenik & Sommers in New York. Thomas W. Brooke and Birte Hoehne of Holland & Knight represented Consumers Union. Netex Galaxy was represented by Anatoly Ostrovsky in Latvia and Brian Fletcher in Virginia.

New York Trial Court Dismisses Article 78 Petition Attempt to Block Release of Teacher Data

Teachers Have No Privacy Interest In Performance Ratings

By Amanda M. Leith

A New York trial court recently dismissed an effort by the New York City teachers union to block the release of reports assessing the job performance of city school teachers that had been sought by a number of news organizations under New York's Freedom of Information Law. *Mulgrew v. Board of Education,* No. 113813/10 (N.Y. Sup. Ct. Jan. 10, 2011) (Kern, J.). The court denied the union's petition, finding that the Department of Education properly determined that the teachers had no significant privacy interest in the performance of their public functions, and that release of the reports was crucial to local control of public schools.

Background

The New York City Department of Education ("DOE") has in the last few years implemented a program designed to evaluate teacher's "added value" by comparing students' predicted improvement on state-wide tests with their actual improvement, known as teacher data reports ("TDRs"). In August through October 2010, several media organizations made requests under New York Freedom of Information Law ("FOIL") for the TDRs, including disclosure of the individual teacher's names. Although in the past it had redacted teacher names before disclosing the reports, the DOE indicated that it would comply with the most recent requests and disclose the names.

Upon learning of the DOE's determination to disclose teacher names, the United Federation of Teachers ("UFT") filed an Article 78 petition, seeking an order directing the DOE to redact and keep confidential the names of any teachers found in the TDRs. The UFT argued that the TDRs, and specifically the teachers' names, should be withheld under two exemptions to the presumed disclosure under FOIL – the exemptions for "inter-agency or intra-agency materials which are not statistical or factual tabulations of data" and materials which, "if disclosed, would constitute an unwarranted invasion of personal privacy."

The news organizations moved to intervene in order to oppose the petition.

Decision

The court first addressed UFT's standing to bring the petition. It found that, although the union was not the entity that made the FOIL request, it had standing to challenge the DOE's determination to release the records. The court noted both that FOIL did not specifically address the question of whether the subject of requested records may challenge disclosure and the lack of case law directly on point, but further observed that several courts had permitted such cases to go forward. In addition to promoting disclosure by the government, FOIL is intended "to protect the interests of parties who would be harmed by such disclosure if the subject records fall into one of the exceptions enumerated under FOIL." The court held that the UFT had demonstrated that the DOE's action would have "a harmful affect" on the union and that "it is within the zone of interest encompassed by the statute."

With respect to the issue of the disclosure, the court concluded that the only issue before it was "whether the DOE was 'arbitrary and capricious' in determining that the unredacted TDRs would be released because the names of the individual teachers did not fall into any exception under FOIL," and that it would not conduct a *de novo* review of the DOE's decision. The court held that "the DOE's determination that teachers' names were not subject to any of the [FOIL exemptions submitted by the UFT] was not arbitrary and capricious."

According to the court, while the TDRs may have been intra-agency records, as a compilation of data regarding students' performance "the DOE could have rationally determined that . . . the unredacted TDRs . . . are statistical tabulations of data which must be released." It found the UFT's argument that the records should be released because they were flawed and unreliable to be without merit, noting that the "Court of Appeals has clearly held that there is no requirement that data be reliable for it to be disclosed," citing *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 277

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(1996).

The court similarly held that the DOE rationally found that the release of the teachers' names would not cause an "unwarranted invasion of personal privacy." It found that under Court of Appeals' precedent, the appropriate test required it to balance the "privacy interests at stake" against the "public interest in disclosure of the information," citing *The New York Times Co. v. City of New York Fire Dept.*, 4 N.Y.3d 477, 485 (2005).

The court noted that the release of even negative job-performance related information repeatedly has been held not to constitute an unwarranted invasion of privacy, while the release of personal information such as birth dates or personal contact information had been held to constitute such an invasion. Since the data at issue related to the teachers' work performance in connection with a public agency, as opposed to their personal lives, the Court found that the DOE could have reasonably determined that releasing the unredacted TDRs would not be an unwarranted invasion of the teachers' privacy and, in addition, that the privacy interests of the teachers was outweighed by the public interest in disclosure.

Finally, the court dismissed the UFT's contention that the DOE could not release the TDRs under FOIL based on the department's promise to the teachers that the reports would be confidential, holding that regardless of whether such assurance "constituted a binding agreement, 'as a matter of public policy, the Board of Education cannot bargain away the public's right to access to . . . pubic records,'" quoting *LaRocca v. Board of Educ. Of Jericho Union Free School Dist.*, 220 A.D.2d 424, 427 (2d Dep't 1995).

UFT has noticed its appeal of the decision, and the trial court's decision has been stayed pending an expedited briefing of the appeal.

The Media Organizations, which included Dow Jones & Company, Inc., NYP Holdings, Inc., Daily News, L.P., the New York Times Company and NY1 News, were represented by David A. Schulz, Cameron Stracher and Amanda M. Leith of the New York office of Levine Sullivan Koch & Schulz, L.L.P. The United Federation of Teachers was represented by Charles G. Moerdler, Alan M. Klinger and Ernst H. Rosenberger of Stroock & Stroock & Lavan LLP and the Department of Education was represented by Jesse Levine, Assistant Corporation Counsel.

Colorado Judge Seals Arrest Warrant Affidavits

First Amendment and Common Law Rights Outweighed by Countervailing Interests

By Steven D. Zansberg

A Colorado County Court judge has kept under seal arrest warrant affidavits in the sexual assault case filed against a Denver Broncos football player, Perrish Cox. In doing so, Judge Susanna Meissner-Cutler denied the motions to unseal that had been filed by the Associated Press, *The Denver Post*, and *The New York Times*.

Cox, a defensive back for the Broncos, has been charged with two counts of felony sexual assault (involving a victim who was "physically helpless" and "incapable of determining the nature of the conduct"), charges that reportedly carry a maximum sentence of life in prison. At his first court appearance, on December 10, 2010, reporters for the Associated Press, *Denver Post*, and *New York Times* each asked the court, in handwritten motions, to unseal the court file, including the affidavit of probable cause in support of arrest.

After a hearing on those motions on December 13, 2010, Judge Meissner-Cutler ordered that the felony complaint be unsealed, with the victim's name redacted (as is required under Colorado's Criminal Justice Records Act), but reserved until the next court date, a status conference on January 7, 2011, whether to unseal any portions of the affidavit of probable cause, which sets forth the factual basis for the arrest and charges.

At the hearing on January 7th, both the prosecutor and defense counsel represented to the court that they were engaged in "ongoing investigations," which they claimed would be interfered with if the arrest warrant affidavit were unsealed. Additionally, the victim had retained her own

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attorney, who appeared and notified the court that the victim, too, wished to maintain the affidavit under seal. Counsel for the three news entities urged the court to exercise its discretion and release a redacted affidavit, that would adequately protect the privacy rights of the victim and the ongoing investigation, while allowing the public to know what is the basis for the defendant's arrest and the felony charges against him.

In a detailed bench ruling (borrowed, literally verbatim, in parts from the similar ruling, back in 2003 in the Kobe Bryant rape case in Colorado that was dismissed by the prosecutor on the first day of jury selection), Judge Meissner-Cutler denied the news media's request to unseal the affidavit of probable cause in its entirety.

The Court said it was required to balance competing interests: the rights of the press and public, under First Amendment, to attend proceedings and inspect court files, and the privacy rights the defendant and the victim, the ongoing investigations of counsel, and the defendant's fair trial rights.

Applying a "strict scrutiny" analysis, the court found that the First Amendment rights to attend judicial proceedings and inspect court records were outweighed by countervailing interests "of the highest order." The judge found that release of the affidavit of probable cause "would recite facts that could severely prejudice the defendant's rights to a fair trial, [because] this information is not presently a matter of public record." Moreover, the judge stated, much of the information in the affidavit would not be entered into the public record in the preliminary hearing. The affidavit, as she described it, includes a factual recitation of:

- graphic details of the alleged sexual encounter;
- statements of police officers, including hearsay from third parties that would not be admissible;
- medical tests that have not been subject to cross-examination by the defense;
- witness statements from individuals who may not know that they are identified in the affidavit;
- numerous factual details that are irrelevant and inadmissible;
- statements of the defendant that may not be admitted at trial or introduced at the preliminary hearing; and
- descriptions of items of evidence that were obtained which also may not be admitted.

In short, the court said, the affidavit contains "multiple statements that bear little relevance to the determination of probable cause and the release of such information would be highly prejudicial and inflammatory."

On this basis, the Court found, there is "a substantial probability of prejudice to the defendant's fair trial rights." Acknowledging that some of the information concerning the alleged crime will be disclosed at the preliminary hearing, the Court found that delaying release of documents is one way to protect the fair trial rights of the defendant.

The Court also found that both the victim and the accused enjoy rights of privacy and that the release of the arrest affidavit (even with the victim's name redacted) would subject her to harassment and abuse.

Based on the evidence the Court had received (some of it under seal), and the representations of the attorneys before the court concerning their investigations, the Court also found that releasing the affidavit would interfere with ongoing investigations.

Lastly, the Court rejected the press' request to release a redacted version of the affidavit, finding that "redaction would render the affidavit meaningless" and would result in "inappropriate presumptions and presumptions" by those reading the affidavit in a highly redacted form. In sum, "redaction of prejudicial information only is not a viable alternative." Thus, the affidavit of probable cause shall remain under seal, in its entirety, until further order of the court.

The preliminary hearing is set for March 10, 2011. It is anticipated that one or more of the parties will ask the court to close portions, if not all, of that preliminary hearing, on the same grounds that the court has ordered that the arrest warrant affidavit be sealed.

Steven D. Zansberg, a partner in the Denver office of Levine Sullivan Koch & Schulz, represented the media intervenors.

European Court of Human Rules That UK Success Fees Violate Article 10

The End of Recoverable Success Fees in UK Media Cases?

By Jaron Lewis

In a ground breaking decision, the European Court of Human Rights has ruled that UK laws allowing the recoverability of success fees in privacy cases violated a newspaper's rights of freedom of expression. *MGN Limited v. United Kingdom*, Application no. 39401/04 (Jan. 18, 2011). The landmark decision almost certainly means that later this year the Government will scrap recoverable success fees and ATE insurance premiums in defamation and privacy cases.

What Are Conditional Fee Agreements?

CFAs are "no win, no fee" agreements. They were introduced in the 1990s to help provide access to justice following the withdrawal of legal aid, particularly in areas like personal injury. A lawyer acting for a claimant under a CFA is entitled to charge an uplift – called a success fee – if the claimant wins. This success fee can be up to 100% of the lawyer's original charges. Initially, success fees were paid by the claimant, typically from damages. In 2000 the law was changed to allow success fees to be recoverable from an opponent.

Reform

In 2010, one of the UK's most senior judges, Lord Justice Jackson, concluded a comprehensive review of litigation costs, which included an analysis of claims data from media cases. His report recommended that success fees should no longer be recoverable from the losing party and should be paid instead by the claimant. In other words, returning to the pre-2000 situation. In November 2010 the Government announced its intention to implement these recommendations, subject to consultation.

The Decision in Campbell v MGN

The facts of *Campbell* are well known. In 2001 the Daily Mirror published a front page article headed "Naomi: I am a drug addict". In 2004 the UK's then highest court – the House of Lords – found on appeal, by a majority of 3 to 2, that the publication of details of her treatment for drug addiction together with covertly taken photographs was a disproportionate interference with her right to privacy. She was awarded £3,500 damages, which included £1,000 for aggravated damages. The decision has gone on to be the cornerstone of the UK's developing law of privacy.

Campbell's total costs for the substantive claim were an eye-watering £1,086,295. Of these, £594,470 were for a two day hearing before the House of Lords, comprising base costs of £288,468 and success fees of £279,981. By contrast, The Mirror's solicitor's costs were just £43,084. The Mirror challenged the success fees. Campbell's costs of dealing with this challenge added a further £255,535 on to the costs, which included a 95% uplift for her solicitors.

The Article 10 Argument

The Human Rights Act 1998 incorporated into UK law a right to freedom of expression in Article 10 of the European Convention on Human Rights. It reads as follows:

Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Any requirement on defendants to pay costs or damages in media cases will, in theory,

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> interfere with Article 10 rights. To be lawful, any such interference must be (a) prescribed by law; (b) pursue a legitimate aim; and (c) be necessary in a democratic society. The requirement of necessity includes a need for the interference to be proportionate, and to go no further than is necessary to accomplish the objective.

ECHR Decision in MGN v UK

On 18 January 2011 – in an unanimous decision – the ECHR ruled that "the requirement that the applicant [newspaper] pay success fees to the claimant [Campbell] was disproportionate having regard to the legitimate aims sought to be achieved and exceeded even the broad margin of appreciation accorded to the Government in such matters".

The ECHR's decision can be summarised as follows:

1. The requirement on the Mirror to pay success fees in breach of confidence proceedings constituted an interference with the newspaper's right to freedom of expression.

2. Recoverable success fees were "prescribed by law" and helped to further a legitimate aim, namely to provide the widest possible access to legal services for civil litigation. The right of effective access to the Court is a right inherent in Article 6 of the Convention.

3. The requirement that the Mirror pay success fees to Campbell was disproportionate having regard to the legitimate aims sought to be achieved and exceeded even the broad margin of appreciation accorded to governments in such matters.

In reaching this decision, the Court focused primarily on the flaws in the CFA system, as well as on the facts of the particular case.

It considered the proportionality of requiring a defendant to pay not only the reasonable and proportionate base costs of a successful claimant, but also to have to contribute to the funding of other litigation and general access to justice through a success fee.

It considered whether the system struck a fair balance between Article 6 and Article 10.

It noted that states have a wide margin of appreciation, not only in striking a balance between Articles 6 and 10, but also in implementing social and economic policies, such as the one relating to CFAs. It said it would respect a state's judgement "unless that judgment is manifestly without reasonable foundation".

It noted that the UK Government itself had accepted that the current system was in need of reform, and considered in detail the consultations and reviews undertaken in the past few years. The Court concluded that the "depth and nature of the flaws in the system… are such that the Court can conclude that the impugned scheme exceeded even the broad margin of appreciation to be accorded to the State".

As well as ruling that the whole system of recoverable success fees was legally flawed, the Court also criticised the operation of the regime on the facts of this particular case. It found that Campbell was wealthy and not in the category of persons needing assistance with access to justice, and also observed that the success fee would be unlikely to assist Campbell's lawyers in providing access to justice to impecunious claimants because the firm rarely did this type of work.

The decision focused on cases involving rights of freedom of expression, such as defamation and privacy. It is unlikely to affect success fees in other types of case.

What Next?

The Government will now almost certainly implement its proposed reforms, and scrap recoverable success fees and ATE insurance premiums in media cases. Success fees and ATE will survive, but will be paid for by the claimant.

In the meantime, the ECHR decision is not directly binding on the UK Courts. However, the Human Rights Act 1998 makes it unlawful for a Court to act in a way which is incompatible with a Convention right, so the UK Courts will have to take the ECHR decision into account when assessing costs.

Jaron Lewis is a partner at Reynolds Porter Chamberlain LLP and a former in-house counsel at the BBC. MGN was represented before the ECHR by Kevin Bays, Davenport Lyons, London, and barristers David Pannick QC, Keir Starmer QC and Anthony Hudson.

Fee-Splitting or Splitting hairs?

How Rigid Application of Rule 5.4(a) Impacts In-House Media Lawyers

By: David A. Strassburger

Have you ever had a client complain about your bill? Nothing is more deflating for a lawyer than to hear a client say: "You are an expense item." Despite the quality of our services, we still have a tough time convincing clients that we are necessary to generate revenue, or at the very least protect it.

In-house lawyers are not immune from this prejudice, which can emanate from the business folks on the floor above them carefully watching the bottom line. In-house lawyers, moreover, often work not only for their parent company employer, but also for the parent's subsidiaries and affiliates. The question of how to account for the cost of an in-house legal staff implicates the Rules of Professional Conduct and has generated a number of opinions addressing the rule against fee-splitting.

A lawyer or law firm shall not share legal fees with a nonlawyer. Model Rules of Prof'l Conduct ("Model Rule") 5.4(a). This prohibition against fee-sharing with nonlawyers is one of the clearest, and most familiar black-letter rules governing ethical practice.

In 1995, the American Bar Association announced an equally clear opinion: "If a corporate in-house lawyer provides services to third persons for a fee, the lawyer violates Model Rule 5.4(a) if the lawyer turns over to the corporation any portion of the fee beyond the cost to the corporation of the services provided." *Sharing Legal Fees with a For-Profit Corporate Employer*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-392 (April 24, 1995). The Formal Opinion explained the traditional purpose of Model Rule 5.4 is to safeguard a lawyer's independence and "prevent problems that might occur when non-lawyers assume positions of authority in business arrangements with lawyers." According to the Formal Opinion, the involvement of nonlawyers, "such as corporate employers," in the legal process is of concern because the lawyer's independent professional judgment can be impaired by the influence and control of nonlawyers who, by definition, are not subject to the same ethical mandates regarding independence, conflicts of interest, confidentiality, fees, and the other important provisions of the profession's code of conduct." The Formal Opinion concludes: "If anything is clear under Model Rule 5.4, it is that a corporation cannot hire one or more lawyers, pay them salaries, make their services available *generally to others*, and directly receive the fees for the lawyers' work" (emphasis added).

The Formal Opinion addressed an easy fact pattern. An in-house lawyer with extra time to devote to legal matters cannot be rented out for profit to parties unrelated to the corporation, earn fees with a profit component, and then share them with the corporate employer.

In-house lawyers, however, often are employed by corporations that provide a central legal staff for subsidiaries, affiliates, and related legal entities. Sometimes the related entities are wholly owned by the entity employing the attorney; sometimes minority shareholders own stakes in the related entities. In the media context, a parent company with a central legal staff could own all or part of other, single-purpose business entities, each of which could own or operate a separate newspaper, magazine, television or radio station. In this scenario, the business folks may have tax and other business reasons to charge the subsidiary for the work of the parent's lawyer. Is Rule 5.4(a) implicated when related entities share an in-house lawyer?

Perhaps surprisingly, all of the commentary on the subject says "yes," Rule 5.4(a) applies, and affiliated entities may only be charged the actual cost of the services provided by central legal staff. The Professional Ethics Committee of the Supreme Court of Texas was asked, in 1999: "May a corporation charge wholly-owned or partially-owned subsidiaries 'market-based' fees for legal services rendered by the corporate legal staff?" TX Eth. Op. 531, 1999 WL 1007267 (Tex.Prof.Eth.Comm.). The Inquirer in that matter was a Texas-based, multi-national corporation with a large legal staff that wished to provide legal services to subsidiaries. Instead of charging the subsidiaries for the costs of the services, which encompassed overhead such as the salaries of lawyers and support staff, and rent, the Inquirer wanted to charge fees comparable to fees charged by lawyers in private practice for rendering the same services in the particular region. The Texas Committee determined that the market-based fee approach would run afoul of Rule 5.4(a). Only actual costs of the legal staff, it said, could be passed on to subsidiaries for the legal services. The Committee also determined that when a non-lawyer corporation profits from the services of its legal staff, the corporation engages in the

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unauthorized practice of law, and the assisting lawyer violates Model Rule 5.5(b).

The Virginia State Bar's Standing Committee on Legal Ethics reached the same interpretation of Rule 5.4(a) in its Legal Ethics Opinion 1838. The question there was: "Can an in-house counsel for a corporation provide legal services to a sister corporation and can that corporation collect reimbursement for those services from the sister corporation?" VSB Comm. on Legal Ethics, Legal Ethics Opinion 1838 (May 10, 2007), available online at. In the Virginia scenario, Corporation A was one of several privately held corporations in a Group, all of which were directly or indirectly owned exclusively by a single corporate entity. Corporation B was another member of the Group. A and B were commonly owned by the same parent company, but did not own any part of each other. A employed a patent lawyer, and B needed patent advice. On these facts, the Committee concluded that A's lawyer could provide services to B, but bills to B could only include A's actual costs for the lawyer' services; no profit component could be included in the charges without violating Rule 5.4(a). Bar Opinions in New York and Pennsylvania have reached the same conclusion. NY Eth. Op. 618, 1991 WL 164541 (N.Y.St.Bar.Assn.Comm.Prof.Eth.) (Feb. 15, 1991) (in-house counsel for multi-employer association could only charge actual costs to pension plan partially controlled by association); PA Eth. Op. 93-116, 1993 WL 851224 (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp.) (July 30, 1993) (parent may only charge subsidiary actual cost of services of parent's lawyer, citing PBA Informal Opinion 87-119).

A good argument can be made that, at least in the case of parents and their wholly-owned subsidiaries, the prevailing wisdom relegates form over substance. The Model Rules are supposed to be "rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Model Rules of Prof'l Conduct (Preamble, ¶ 14). According to ABA Formal Opinion 95-392, Rule 5.4's twin aims are to avoid "the possibility of a nonlawyer's interference with the exercise of a lawyer's independent professional judgment" and to ensure that "the client is treated fairly by not being overcharged."

These considerations could be implicated if a subsidiary has minority shareholders who lack control and would be disadvantaged if the parent wants to charge market rates for its lawyer's services. Where the subsidiary is wholly-owned, however, respecting the corporate form does nothing to advance the goals of ethical practice that Rule 5.4 hopes to achieve.

Courts in a number of contexts have concluded that regulations designed to prevent illicit commercial dealings do not apply to relationships between parents and wholly owned subsidiaries. For example, in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Supreme Court determined that, for purposes of construing section 1 of the Sherman Act, a parent and its wholly owned subsidiary could not conspire with each other. The Court explained that although a parent corporation and its wholly owned subsidiary are separate for the purposes of incorporation or formal title, for purposes of Sherman Act liability they must be considered a "single economic unit." They are controlled by a single center of decisionmaking and control a single aggregation of economic power. In other words, the Court preferred to focus on substance, rather than form. *Id.* at 769, 772 n. 18, 773 n. 21, and 777.

Delaware corporate law leans in the same direction. That state has recognized that "in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders," and the parent does not owe a fiduciary duty to its wholly-owned subsidiary." *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171, 1174 (Del. 1988).

These decisions take a more practical approach than the Bar Committees, and cast doubt on whether the twin aims of Rule 5.4(a) have any application in the parent wholly-owned subsidiary setting. The in-house lawyer who must exercise independent professional judgment, and must avoid undue influence from the lawyer's client to generate profit at the expense of a third party, is not likely to succumb to that influence because the parent generally is not interested in taking unfair advantage of its wholly owned subsidiary. Likewise, there is little economic incentive for an in-house lawyer for the parent to pursue a course of action so that the parent can generate fees, or charge excessive fees, when the client is a wholly-owned subsidiary.

In sum, Rule 5.4(a) should not be interpreted to inject itself into the internal tax, accounting, and bookkeeping of parent corporations and their wholly-owned subsidiaries. At least in this context, clients and the profession do not need the protection of Rule 5.4(a). Nevertheless, until the Bar Committees reverse field on this issue, in-house media lawyers providing services to wholly owned subsidiaries should charge the subsidiary only the actual cost of their services.

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