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MEDIA LAW LETTER

Reporting Developments Through March 25, 2011

SUPREME COURT

It's All Over But The Shouting.....	.03
<i>Despite Early Mixed Signals, Eight Justices Vote to Protect Funeral Protests</i>	
Snyder v. Phelps	
Court Limits Two Federal Freedom of Information Act Exemptions.....	.05
<i>In Separate Opinions, Grammar and Ordinary Meaning Rule as High Court Rejects Corporate "Personal Privacy" and "High 2"</i>	
Federal Communications Commission v. AT&T Inc.; Milner v. Department of the Navy	
Court to Consider Whether Restoration of Certain Foreign Copyrights Violates Copyright Clause or First Amendment.....	.09
<i>Court Took Case despite Solicitor General's Objection</i>	
Golan v. Holder	

LIBEL & PRIVACY

N.D. Ill. Snyder Applied To Dismiss Right of Publicity Claim In Reality TV Case.....	.11
<i>Plaintiff's Arrest a Matter of Public Concern</i>	
Best v. Malec	
Mass. App. Newspaper Articles about Prisoner's Online Personal Ads Not Libelous.....	.12
<i>Articles Not Actionably False; Plaintiff a Limited Purpose Public Figure</i>	
LaChance v. Boston Herald, Inc.	
N.Y. Sup. Court Dismisses Defamation and Privacy Claims Based on Publication of Youth's Photograph with Article on Gangs.....	.14
<i>Newspaper was not Grossly Irresponsible as Photo had Journalistic Connection</i>	
Knutt v. Metro International, S.A.	
Tex. App. CBS Wins Appeal in Defamation Case.....	.16
<i>Broadcast about Doctor Was Substantially True</i>	
Neely v. Wilson	
Mich. Michigan Supreme Court Sings Dr. Dre's Song after Decade of Litigation.....	.19
<i>Rapper Did Not Violate Eavesdropping Statutes by Filming Police</i>	
Bowens v. Young	
N.Y. Sup. Snyder v. Washington City Paper.....	.21
<i>Legitimate Defamation or Empty Intimidation Tactic?</i>	

N.Y. Sup.	Court Dismisses Idea Theft and Slander Claims in Kids Cookbook Dispute.....	24
	<i>Idea for Book Not Novel; Criticism of Plaintiff Protected Opinion</i>	
	Lapine v. Seinfeld, HarperCollins	

2d Cir.	Court Affirms Dismissal of First Amendment Retaliation Claim.....	25
	<i>Per Se Defamation Does Not Satisfy “Actual Chilling” Requirement</i>	
	Zherka v. Amicone	

REPORTERS’ PRIVILEGE

2d Cir.	Second Circuit Preserves Gonzales Journalist’s Privilege In Face of Sixth Amendment Rights	26
	<i>Court Considered Novel Issue of Scope of Journalist’s Cross Examination</i>	
	U.S. v. Treacy	
Colo. Dist.	Court Quashes Subpoena to TV Station for IP Address in Murder Case.....	30
	<i>First Amendment Shielded News Source’s IP Address</i>	
	People of Colorado v. Adan Viveros	

NEWS & UPDATES

E.D. Va.	Twitter Must Disclose Subscriber Records in Wikileaks Criminal Investigation.....	32
	<i>Request for Records Does Not Raise First or Fourth Amendment Issues</i>	
	In re Application of the U.S. For an Order Pursuant to 18 USC 2703(d)	

ACCESS

D. Ariz.	Court Unseals Search Warrant Materials in Giffords Shooting Case.....	33
	<i>Qualified First Amendment Right of Access</i>	
	United States v. Loughner	

INTERNATIONAL

France	French Court Dismisses Criminal Libel Case between Academics.....	36
	<i>Using Criminal Proceedings in a Defamation Case Is Not Without Risk</i>	
	France v. Weiler	

ETHICS

Newspaper v. Judge = Recusal?.....	39
<i>It Takes More than Some Bad Press to Force His Honor to Step Aside</i>	

It's All Over But The Shouting: Despite Early Mixed Signals, Eight Justices Vote to Protect Funeral Protests

By Robert Corn-Revere, Bruce E.H. Johnson,
Thomas R. Burke, and Rory Eastburg

By the time *Snyder v. Phelps* reached the Supreme Court last October, it was making free speech enthusiasts nervous. Its facts were profoundly unsympathetic, pitting the grieving father of a fallen Marine against the right of the tiny cult-like Westboro Baptist Church ("Westboro") to protest military funerals with signs reading "Semper fi fags" and "Thank God for dead soldiers." The Fourth Circuit ruling that the protests were protected speech hewed closely to Supreme Court precedent, but the justices nonetheless decided to hear the case. Few recent cases have arrived at the Court with such potential to turn repellant facts into bad First Amendment law.

But the waiting turned out to be the hardest part. On March 2, the Court ruled 8-1 that the protest was protected by the First Amendment. Only Justice Samuel Alito dissented from the Court's opinion, written by Chief Justice John Roberts, which declared that "[a]s a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 131 S. Ct. 1207, 2011 U.S. LEXIS 1903 *30-31 (2011).

A \$10.9 Million Verdict

In 2006, Marine Lance Corporal Matthew A. Snyder of Maryland was killed in Iraq. Westboro members, who preach that God is punishing America for tolerating homosexuality, protested on a public street near Snyder's funeral, just as their fellow congregants have done at various events for twenty years. Westboro was careful to obey all time, place and manner restrictions on its protest, and Snyder saw its messages only later through the

mass media. *Id.* *9-10.

Snyder sued Westboro and related individuals for torts including intrusion upon seclusion and intentional infliction of emotional distress. These two claims resulted in a \$10.9 million jury verdict, later reduced to \$5 million. But the Fourth Circuit reversed in 2009, finding that Westboro's hyperbole and opinion on matters of public concern were clearly protected, regardless of the specific tort being employed or whether the Snyders were public figures.

Snyder v. Phelps, 580 F.3d 206, 221 (4th Cir. 2009). It relied on *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), which held that public figures cannot recover for emotional distress caused by a publication unless it contains a false statement of fact made with actual malice.

To the surprise of many, the Supreme Court accepted the case for review. Snyder's opening brief argued that the Court "has never granted absolute, categorical protection to speech that cannot reasonably be interpreted as stating actual facts" and that the Fourth Circuit's reliance on *Hustler* was misplaced because the plaintiff in that case, Jerry Falwell, was a public figure. Snyder added that his son's death and funeral did not present legitimate matters of public concern, and that he was a "captive audience" at the funeral. Brief for Petitioner at 18-19. (The briefs of the parties and

amici are available at www.abanet.org/publiced/preview/briefs/oct2010.shtml#snyder)

In response, Westboro claimed that Snyder's emotional distress claim must fail under *Hustler* simply because its speech was on a matter of public concern and had not been proven false. Brief for Respondents at 18. A coalition of

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Snyder's arrival at the Court was greeted with alarm, but the case proved to be one of the most resounding victories for speech in recent years.

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news media amici added that a ruling for Snyder on these facts “would have far-reaching effects on the media and other speakers, because the [Westboro] protests are not unique in any constitutionally meaningful sense.” Brief *Amici Curiae* of The Reporters Committee For Freedom of the Press and Twenty-One News Media Organizations in Support of Respondents at 6.

A Lopsided Decision

Despite the concerns when certiorari was granted, the Court in March issued a stirring vindication of the First Amendment. Though it did not explicitly address the Fourth Circuit’s broad holding extending *Hustler*’s protections to private-figure plaintiffs, the Court concluded that speech on a matter of public concern is entitled to “special protection” under the First Amendment and “cannot be restricted simply because it is upsetting or arouses contempt.” Westboro’s protest was protected because even if some signs related to the Snyders personally, the “dominant theme of Westboro’s demonstration spoke to broader public issues.” *Snyder*, 131 S. Ct. 1207, 2011 U.S. LEXIS 1903 *20, 26.

The Court also rejected the claim that the proximity to the funeral changed the analysis. While the picketing could be limited by reasonable time, place, or manner restrictions, the seven Westboro protestors followed all laws and police instructions. “Simply put,” the Court said, “the church members had the right to be where they were.” The majority also rejected the claim that Snyder was a captive audience at the funeral, noting that the captive audience doctrine has been applied “only sparingly” in the past and Westboro kept its distance from the funeral. *Id.* *25, 29.

Finally, the Court refused to rule on an “epic poem” that a Westboro member posted on its website, claiming that Lance Corporal Snyder’s parents “raised him for the devil.” The Court disposed of the “epic” in a footnote, finding that it had not been properly raised by Snyder and “may raise distinct issues in this context.” *Id.* *10 n.1.

Justice Alito was the lone dissenter, just as he was when the Court recently struck down a law criminalizing videos depicting animal cruelty in *U.S. v. Stevens*, 130 S.Ct. 1577 (2010). Alito wrote that “funerals are unique events at which special protection against emotional assaults is in order.” He rejected the conclusion that the protests were immune because they dealt mostly with matters of public concern, writing that “actionable speech should [not] be immunized simply because it is interspersed with speech that is protected.” Alito also rejected the conclusion that *Hustler*

should apply to private-figure plaintiffs, writing that the *Hustler* Court “did not suggest that its holding would also apply in a case involving a private figure.” *Snyder*, 131 S. Ct. 1207, 2011 U.S. LEXIS 1903 *48, 51, 53 (Alito, J., dissenting).

What About Online Speech?

Despite the ruling’s strong reaffirmation of First Amendment protection for offensive speech on public issues, the Court stressed that its holding was limited. It said that it was addressing only the protest on the day of the Snyder funeral, and that claims arising from the Westboro website were not properly before it. This limiting language might have been a concession to Justice Stephen Breyer, who wrote a concurring opinion to emphasize that the decision did not examine the potential effects of television broadcasting or Internet postings. Justice Breyer had observed at oral argument that he was “very bothered about” whether statements in the mass media could be so offensive as to give rise to liability.

Potential liability for hurtful and offensive speech transmitted by mass media or via the Internet also concerned Justice Alito. He chastised the majority for declining to consider whether Westboro’s online “epic” should give rise to liability, and his dissent also suggested a willingness to apply the emotional distress tort to speech encountered in the media. *Id.* *31. Given his and Justice Breyer’s feelings and the majority opinion’s limiting language, the extent to which such speech may give rise to liability in other circumstances awaits resolution another day.

Conclusion

Snyder’s arrival at the Court was greeted with alarm, but the case proved to be one of the most resounding victories for speech in recent years. It showed that nearly all current members of the Court remain profoundly committed to the robust exchange of even deeply offensive ideas, and signaled a broad consensus for the fundamental principle that, while speech can “inflict great pain ... we cannot react to that pain by punishing the speaker.” *Id.* *30.

Robert Corn-Revere, Bruce E.H. Johnson, Thomas R. Burke, and Rory Eastburg are lawyers with Davis Wright Tremaine LLP. The authors submitted a friend-of-the-Court brief for the Reporters Committee for Freedom of the Press and Twenty-One News Media Organizations in Support of Respondents.

U.S. Supreme Court Limits Two Federal Freedom of Information Act Exemptions

In Separate Opinions, Grammar and Ordinary Meaning Rule as High Court Rejects Corporate “Personal Privacy” and “High 2”

By Mark R. Caramanica

The U.S. Supreme Court this month issued two opinions narrowing the scope of federal Freedom of Information Act (“FOIA”) exemptions 7(C) and 2 in [*Federal Communications Commission v. AT&T Inc.*](#), 131 S. Ct. 1177, (“AT&T”) and [*Milner v. Department of the Navy*](#), 2011 U.S. Lexis 2101, (“Milner”), respectively.

In what turned out to be a relatively closely watched case—inaptly labeled by some as “Citizens United II” as it follows last term’s decision in *Citizens United v. FEC* that struck down certain corporate speech restrictions on federal constitutional grounds—the Supreme Court reversed a 2009 decision of the United States Court of Appeals for the Third Circuit and held in *AT&T* that corporations cannot assert a statutory right to “personal privacy” under FOIA exemption 7 (C) to prevent the disclosure of federal agency records.

While not garnering similar popular attention as *AT&T*, the *Milner* case is arguably the more important of the two decisions in that it negates a 30-year history of FOIA jurisprudence, upsets long standing agency reliance on Exemption 2, and potentially leaves certain classes of sensitive records that previously found shelter from disclosure under the exemption with no fallback exemption on which to rely.

In *Milner*, the Court resolved a split among the federal circuits by wholly rejecting the “High 2” reading of Exemption 2 in favor of the “Low 2” interpretation. Exemption 2 exempts from mandatory disclosure under FOIA records “related solely to the internal personnel rules and practices of an agency.” This exemption was for many years understood to relieve agencies of the burden of producing trivial, internal agency records for which the public presumably had no interest. Records detailing, e.g., employee parking rules, sick leave policies or workday break/lunch policies fit into this class of records.

However, beginning with the Court of Appeals for the District of Columbia’s decision in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F. 2d 1051 (D.C. Cir.

1981), certain circuits gradually expanded the scope of what was covered under Exemption 2 to also provide protection for records that were deemed “predominantly internal” whose disclosure would aid individuals in circumventing agency regulation or statute. Records such as ATF training manuals, records regarding U.S. port vulnerabilities and government building blueprints have been withheld under this more expansive reading. Over time, the trivial materials conceived by the plain language of the amendment were referred to as “Low 2” records while records covered under the broad, judicially-glossed *Crooker* interpretation became known as “High 2” records.

The years following 9/11 saw a proliferation of “High 2” exemptions cited to cover records that could in some way aid terrorist activity. The Bush administration approved of using “High 2” in such a manner with then Chief of Staff Andrew Card issuing a 2002 memo to all federal agencies affirmatively encouraging its use. It was against this legal and policy backdrop that the Supreme Court had to consider whether the U.S. Navy could withhold records from Glen Scott Milner describing explosives storage practices and blast zone maps under an exemption that protects against the disclosure of records “related solely to the internal personnel rules and practices of an agency.”

AT&T Background

In *AT&T*, the telecommunications firm sought to prevent the disclosure of certain documents it provided to the FCC relating to an Enforcement Bureau investigation into potential overbilling resulting from AT&T’s participation in an FCC-administered program known as “E-Rate.” E-Rate, or Education-Rate, was a program designed to provide enhanced telecommunications and information services to schools and libraries. AT&T had in 2004 self-reported the potential overbilling and in December of that year signed a consent decree with the FCC whereby it admitted no liability

(Continued on page 6)

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but agreed to pay the government \$500,000 and institute a monitoring plan to ensure better program compliance going forward.

Months later, CompTel, a trade association that represented a number of AT&T's competitors, filed a FOIA request seeking all "pleadings and correspondence" relating to the FCC's investigation. AT&T opposed the disclosure and the Enforcement Bureau issued a letter-ruling finding that much of the information provided by AT&T was protected from disclosure under Exemptions 4 and 7(C). Particularly, information regarding, e.g., cost/pricing data and billing-related data was properly withheld under Exemption 4 which protects against the disclosure of information relating to "trade secrets and commercial or financial information." Further, the FCC concluded that information identifying individuals was properly withheld under Exemption 7(C) which protects from disclosure any law enforcement record whose release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The Bureau did not, however, apply 7(C)'s personal privacy protections to documents relating to the corporation generally finding that the exemption simply was not intended to cover such entities. This determination was upheld by the FCC on appeal and eventually appealed further to the Third Circuit. The Third Circuit reversed the FCC's decision.

AT&T in the Third Circuit

Writing for a unanimous three-judge panel, Judge Michael A. Chagares agreed with AT&T that the plain language of FOIA Exemption 7(C) permits a corporate entity to assert the same privacy rights as individuals. The court found that because Congress defined "person" in the Administrative Procedure Act at 5 U.S.C. § 551(2) to include "an individual, partnership, corporation, association, or public or private organization other than an agency" and that "personal" as found in Exemption 7(C) is the adjectival form of the defined word "person," it follows that under the FOIA a corporation may assert "personal" privacy rights. As the issue was not before the court for review, it did not go further to determine whether the disclosure of the records at issue could constitute an "unwarranted" invasion of such rights as the statute demands. Hence, the court did not review nor engage in any balancing of the public's right to know against AT&T's corporate personal privacy rights.

AT&T at the Supreme Court

In an 8-0 opinion written by the Chief Justice (Justice Kagan took no part in the decision), the Supreme Court reversed the decision of the court below. The Court began by noting that while typically an adjective will have some relation to a corresponding noun, that is not always the case. Echoing examples the Chief Justice Roberts raised during oral arguments, the Court highlighted that words such as "crabbed," "corny" and "cranky" generally have distinct meaning from their roots, "crab," "corn" and "crank," noting that "in ordinary usage, a noun and its adjective form may have meanings as disparate as any two unrelated words."

Hence, the Court concluded words such as "personal" have developed a distinct, common understanding relating to individuals only. "We do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities." The Court also cited dictionary definitions of the word "personal" that reinforced its view that the term relates only to individuals.

The Court went on to note that the construction of statutory language will often depend on context and despite AT&T's arguments to the contrary, it cannot treat the phrase "personal privacy" simply as the "sum of its two words: the privacy of a person." Two words taken together often have a distinct meaning beyond a literal interpretation, held the Court, noting that a "golden boy" is a lucky or talented individual rather than a person literally composed of gold. The Court concluded that AT&T offered the Court no reason to ignore common usage and meaning to find that "personal privacy" under Exemption 7(C) was intended to apply only to individuals.

The Court also found that the exemption's statutory history also suggested it was meant to be limited to individuals. It noted that at the time FOIA was amended in 1974 to include 7(C), Exemption 6's personal privacy protections were already in place for 8 years. 7(C)'s language closely mirrored its use in Exemption 6 which clearly can apply only to individuals as it protects "personnel and medical and similar files" from disclosure. Further, Department of Justice Memoranda at the time 7(C) was adopted indicated it was not intended to apply to corporations.

For all these reasons, the Court refused to extend 7(C)

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protection to corporations quipping in conclusion, “[w]e trust that AT&T will not take it personally.”

AT&T Analysis

The *AT&T* case can probably better be viewed as correcting an errant and anomalous lower court ruling rather than establishing any greater rights under FOIA than what was generally previously thought to exist. Indeed, no court until the Third Circuit had ever ruled that corporations had personal privacy rights under FOIA and the conventional thinking among the media and government alike was that such rights never existed. While the decision should be lauded for making clear that corporations cannot seek shelter under 7(C) to simply shield embarrassing information from the public by raising 7(C), it does nothing to alter the fact that, just as in this case, corporations can still rely on Exemption 4 to keep confidential business records private and still rely on Exemption 7(C) to protect *individuals* within a corporate entity.

Nor does the decision negate the requirement under 7(C) that should a recognizable personal privacy interest in a record be asserted, a requester must still present a counterbalancing argument as to why disclosure would not constitute an unwarranted invasion as set forth in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 136 (1989). However, armed with the *AT&T* decision, media lawyers should remain vigilant in ferreting out denials for records related to corporate or other non-corporeal entities in which the government is claiming a wide swath of information to be protected under 7(C). It is only information that could be linked to identifiable individuals that may qualify for protection even if it reveals embarrassing or intimate details of corporate behavior.

Milner Background

In 2003 and 2004, local resident Glen Scott Milner requested copies of U.S. Navy Explosive Safety Quantity Distance (“ESQD”) information for ammunition and other explosives stored at Naval Magazine Indian Island (“NMII”) in Puget Sound, Washington. ESQD data aid Navy personnel in determining the proper and safe storage of explosives in an effort to minimize explosive damage due to chain reactions and also detail potential blast ranges should an accident

occur. This information is often portrayed in map form. Milner sought copies of NMII ESQD data in order to determine what risks storing explosives at NMII posed to the local community as the base sits near publicly accessible areas. The Navy refused to release the records citing security concerns, invoking Exemption 2 to the FOIA.

Milner in the Ninth Circuit

Writing for the 2-1 majority of a three-judge panel of the Ninth Circuit, Judge Richard C. Tallman affirmed the Court’s previous approval of the *Crooker* “High 2” rationale and held that the disclosure of such records would constitute a threat to NMII security and could aid someone intent on causing destruction. Judge William A. Fletcher in dissent wrote that while he agreed that “High 2” was a valid interpretation of Exemption 2, its application should be limited to only those classes of people that are specifically subject to agency regulation. “The Navy is not acting as a regulatory or law enforcement agency, and the arc maps do not regulate anyone or anything outside of the Navy itself,” wrote Judge Fletcher.

Judge Fletcher went on to address the potential application of additional FOIA exemptions, namely 7(F) which covers records compiled for law enforcement purposes the disclosure of which “could reasonably be expected to endanger the life or physical safety of any individual” and Exemption 1 which exempts from disclosure information classified pursuant to Executive order. Fletcher rejected application of 7(F) finding that the Navy did not compile the ESQD records for law enforcement purposes. As to Exemption 1, Judge Fletcher thought it proper, given the potential security risk the release of such records potentially posed, for the government on remand to argue that the ESQD records should be retroactively classified.

Milner at the Supreme Court

The Supreme Court reversed and remanded the Ninth Circuit’s decision holding that the plain language of Exemption 2 did not support a “High 2” construction and that “Low 2 is all of 2.” Justice Kagan, writing for the 8-1 majority (with Justice Alito concurring and Justice Breyer dissenting) began by noting that the Court’s analysis began with the text of the exemption and that the determinative

(Continued on page 8)

(Continued from page 7)

word within Exemption 2 was the word “personnel.” That term, in common parlance and usage, refers to matters related to employee relations and management. Further, the phrase “personnel file” would normally refer to information related to an individual employee and their performance. Exemption 2, according to the Court, uses the phrase in this contemplated manner and is consistent with the notion that FOIA exemptions be construed narrowly. Hence exemption 2 cannot reach the ESQD records as they do not relate to personnel rules or matters but govern the safe placement of explosives at NMII.

The Court additionally dismissed the government’s argument that a 1966 House Report on FOIA (H.R. Rep. No. 89-1497) lending support for a “High 2” reading controlled as a companion Senate Report (S. Rep. 89-813) essentially stated the exact opposite. “When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language,” Kagan wrote. The Court also found that subsequent *post-Crooker* amendments to Exemption 7, namely 7(E) which prevents the disclosure of law enforcement records that aid in the circumvention of law, demonstrated that Congress did not believe such records to be covered under Exemption 2. Finally, the Court also rejected the government’s argument that Exemption 2 could be interpreted to cover any records that are created for use by personnel labeling such a construction as advocacy for a “Super 2.”

For these reasons, the Court held that “High 2” simply does not exist. However, the Court was not unsympathetic to its upending of developed precedent and agency reliance on “High 2.” It further stated it had no reason to doubt the Navy’s claims that the disclosure of ESQD data presented a security risk. Hence, in dicta it offered a variety of alternative avenues of relief those being: (1) post-FOIA request classification processes; (2) seeking a specific statutory exemption for such records under Exemption 3; (3) application of Exemption 7(F); and (4) Congressional codification of the “High 2” standard. The case was ultimately remanded to the Ninth Circuit to consider the application of 7(F) to the records.

Justice Alito’s concurrence focused on why he believed 7 (F) applicable, mainly arguing the case why the ESQD records are records of a law enforcement agency, compiled for law enforcement purposes as Exemption 7 requires. He wrote that crime prevention and security is just as legitimate a

law enforcement function as is investigation and prosecution. Moreover, records like ESQD maps could serve a dual purpose and the primary purpose for their compilation need not be for law enforcement so long as that it a purpose of their compilation.

In dissent, Justice Breyer noted his reluctance to upset a statutory interpretation that in his words was well-established in law and carried out the purpose of FOIA and questioned how sensitive records previously shielded by “High 2” and not compiled for law enforcement purposes such as building plans, computer passwords, credit card numbers, or safe deposit combinations could now ever be protected from disclosure.

Milner Analysis

Milner should be praised by media lawyers as a victory in that it rejected a “High 2” reading that was often broadly and indiscriminately applied to any records that in the mind of the government could be used to commit a crime. However, it appears that the *Milner* decision may have the effect of government simply shifting its reliance to 7(F) for law enforcement records, seeking more Exemption 3 statutory exemptions from Congress, relying more on classification and possibly pushing for a statutory codification of “High 2” as an entirely new exemption.

Indeed as Justice Breyer notes in his dissent, there appears now to be some records (e.g., computer passwords) that government would have a strong interest in keeping secret but now no longer have any refuge in a FOIA exemption. Overreaction to this reality combined with a rush to enact a remedy could leave requesters with a codified “High 2” or witnessing a flurry of b(3) statutory exemptions. However, it thus far seems too soon to tell how agencies will respond and the Reporters Committee continues to monitor on this front. But as the remand proceedings in this case will highlight, the issue of what constitutes a federal “law enforcement” record and what federal records are in fact “compiled for law enforcement purposes” will surely be an issue media attorneys should be better prepared to litigate into the foreseeable future.

Mark R. Caramanica is the Freedom of Information Director at The Reporters Committee for Freedom of the Press in Arlington, Virginia. The Reporters Committee filed briefs amicus curiae in both AT&T and Milner on behalf of media interests.

Supreme Court to Consider Constitutionality of Restoration of Certain Foreign Copyrights

By Al J. Daniel, Jr.

It is no surprise that the plaintiffs sought certiorari after the United States Court of Appeals for the Tenth Circuit rejected their claim that Congress's restoration of copyrights in foreign works that had fallen into the public domain in the United States for failure to comply with U.S. "formalities" did not violate either the Copyright Clause or the First Amendment. U.S. Const. Art. I, § 8, cl. 8, and Amend I. The surprise is that the Supreme Court of the United States took the case over the opposition of the Solicitor General. [*Golan v. Holder*](#), S. Ct. No. 10-545, *cert. granted*, March 3, 2011.

The Tenth Circuit held that Section 514 of the Uruguay Round Agreements Act, 17 U.S.C. § 104A, does not violate any of petitioners' First Amendment rights or exceed the government's power under the Copyright Clause. [*Golan v. Holder*](#), 609 F.3d 1076 (10th Cir. 2010) (*Golan II*). This decision was somewhat surprising because, in the first appeal, the Tenth Circuit had reversed the district court's ruling in the government's favor, seemingly intimating that the lower court should rule in petitioners' favor on remand. *Golan v. Gonzalez*, 501 F.3d 1179 (10th Cir. 2007) (*Golan I*), which the district court dutifully did.

Contrary to expectation, *Golan II* held that Congress properly enacted Section 514 to implement U.S. obligations under the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs"). Section 514 restores copyright protection in the United States only for limited classes of foreign works which are still protected by copyright in their countries of origin, but which fell into the public domain in the U.S. for limited, specific reasons, such as failure to comply with U.S. copyright formalities. It also affords some protection for so-called "reliance" parties, such as petitioners, all of whom claim the right to exploit these foreign works without compensation because they had become part of the U.S. "public domain."

The Tenth Circuit also rejected petitioners' First Amendment claims, holding that Section 514 was a "content-neutral regulation" of speech reasonably enacted to satisfy U.S. obligations under the Berne Convention and under TRIPs, and to protect U.S. copyright interests abroad. The court applied an "intermediate scrutiny" test, *Turner Broad. Sys., Inc. v. FCC*, 522 U.S. 180, 189 (1997), which the parties and the courts agreed was the appropriate standard, though they disagreed as to its proper application. See *MLRC MediaLawLetter* 33 (August 2010) for a detailed analysis of *Golan II*.

The petition for certiorari presented two questions: (1) whether the "Progress Clause" (petitioners' newly-minted phrase) in Art. I, § 8, cl. 8 of the Constitution "prohibits Congress from taking works out of the Public Domain ..." and (2) whether Section 514 violates the First Amendment. *Golan Pet. i*.

To a significant extent, this case is a rerun of the challenges to Congress's copyright term extension which the Supreme Court upheld in *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

Petitioners urged the Supreme Court to take the case because of the importance of the issues presented, as there is no conflict in the circuits. The petition urges a grand argument on the importance of the "Public Domain," a capitalized realm in which works only go in, and never come out. Petitioners wax eloquent on the harm they will suffer by having to pay for the exploitation of foreign works by Stravinsky, Virginia Wolff, Alfred Hitchcock, Renoir, and Picasso, all of which are still protected by copyright in their countries of origin. Pet. 3-4. By definition, plaintiffs are not and never were the authors or owners of any of the works they previously exploited without compensation to their rights owners.

The government opposed certiorari on the ground that the Tenth Circuit's decision is correct as a matter of law and does

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To a significant extent, this case is a rerun of the challenges to Congress's copyright term extension which the Supreme Court upheld in *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

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not conflict with decisions of the Supreme Court or any other court, pointing out that the D.C. Circuit agreed with the Tenth Circuit on the Section 514 issue. Resp. Opp. 12.

The term “public domain” does not appear in the Copyright Clause of the Constitution, Art. I, § 8, cl. 8. The government’s brief in opposition points out that petitioners are wrong as a matter of fact about their “only in, never out” theory of the public domain. In fact, it points out that the very first U.S. Copyright Act, Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, provided protection for works which had already been printed in the U.S., before there was any federal protection for copyright. Resp. Opp. 14 n. 7. A number of other statutes similarly restored copyright in foreign works. *Id.*

The government points out the obligations undertaken by the United States as a member of the Berne Convention and TRIPs, and explains that Section 514 was enacted to implement the government’s international obligations. It also explained that these agreements are important to the protection and exploitation of U.S. copyrighted works abroad, which are a significant part of the U.S. economy. Resp. Opp. 10-12.

On the First Amendment issue, even with these foreign works restored to copyright protection, petitioners continue to have rights to discuss the restored works, to exploit them to the extent allowed by “fair use” and other statutory exemptions in the Copyright Act, and to continue to exploit them to the extent allowed by Section 514. Resp. Opp. 18.

In further support of their petition, petitioners reiterated their position on the importance of the issues, the limits of Congress’s powers under the Copyright Clause. On the First Amendment issue, petitioners invoke a phrase used in *Eldred*, by contending in Point IV that “Section 514 Alters Traditional Contours of Copyright Protection” Reply Br. 13. In *Eldred*, the Court stated that those, such as petitioners, who wish to use the works of others have lesser First Amendment interests than those exercising their own speech rights; the Court found it unnecessary to further explore the First Amendment issues there because Congress’s term extension “has not altered the traditional contours of copyright protection” *Eldred*, 537 U.S. at 221.

Expect to hear much about “the traditional contours of copyright protection” in the upcoming briefs to be filed in the Supreme Court in the coming months.

Next Prediction

This case will be a grand copyright *cause célèbre*, on the scale of *Eldred*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913 (2005), and *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). There will be scores of amicus briefs from all the usual suspects and interest groups. Predicting the outcome is another matter, though the Court’s recent decision in *Eldred*, which upheld Congress’s copyright term extension, gives some indication that it would be safer to put odds on the Court affirming the 10th Circuit’s decision in *Golan II*.

Al J. Daniel, Jr. is a partner at Cowan, DeBaets, Abrahams & Sheppard LLP, New York, New York. Petitioners Golan et al. are represented by Anthony T. Falzone, Julie A. Ahrens, and Sarah H. Pearson at the Stanford Law School Center for Internet and Society, Stanford, California, and Hugh Q. Gottschalk and Carolyn J. Fairless, Wheeler Trig O'Donnell LLP, Denver, Colorado. Respondents Eric H. Holder, Jr., Attorney General et al., are represented by Neal Kumar Katyal, Acting Solicitor General, Tony West, Assistant Attorney General, and William Kanter and John S. Koppel, Attorneys, United States Department of Justice, Washington, D.C.

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Snyder Applied To Dismiss Right of Publicity Claim In Reality TV Case

By Steve Mandell, Steve Baron, and Shari Albrecht

Media defendants are finally catching a break in a series of federal lawsuits filed in Chicago based on the television series *Female Forces*. In *Best v. Malec*, No. 09-cv-7749 (N.D. Ill. March 3, 2011), Judge Matthew Kennelly issued an order on March 3 granting the defendants' motion to dismiss the plaintiff's right of publicity claim and strongly suggested that the plaintiff's claims for invasion of privacy by publication of private facts and intentional infliction of emotional distress will be dismissed on the same grounds.

(The August 2010 issue of the MediaLawLetter covers Judge Kennelly's previous denial of motion that made the same arguments; that article provides additional procedural background about this case. Additionally, the February 2010 issue of the MediaLawLetter addresses a similarly unfavorable ruling in the case of *Frederick v. City of Naperville*, No. 09-cv-6837 (N.D. Ill.).

Background

Eran Best was arrested in Naperville, Illinois, in February 2008, for driving with a suspended license, and police found marijuana and drug paraphernalia in a subsequent search of her car. Her arrest, which occurred on a public road, was filmed and appeared in an episode of *Female Forces*, a show that followed female police officers in Naperville, Illinois, while they carried out their duties. Best did not sign any release, and she alleges that she was told by a police officer that the footage would not be used if she did not sign a release.

Best's lawsuit includes claims for violation of the Illinois Right of Publicity Act (IRPA), invasion of privacy by publication of private facts, and intentional infliction of emotional distress. The defendants are the production company (A Day With, Inc. a/k/a The Greif Company) and A&E Television Networks, LLC, the municipality and two police officers.

The defendants initially filed a joint motion to dismiss the state-law claims on February 12, 2010, which the court denied in large part. The defendants had argued that plaintiff's claims ran afoul of the First Amendment and devoted four pages of briefing to the issue, but the court held that the argument had not been "squarely presented." The court's ruling was also troubling because (1) the court ruled that the show was for "a commercial purpose" under IRPA because it is broadcast by a for-profit enterprise, along with

commercial advertisements, on a cable channel for which viewers indirectly pay subscription fees, and (2) suggested without explanation that there might be some question whether the principles expressed by the Supreme Court in cases concerning "books and newspapers" would apply to a television show.

After that ruling, the plaintiff filed an amended complaint to substitute a party. The defendants moved to dismiss the amended complaint, taking the opportunity to once again present their First Amendment arguments to the court. This time, it worked. The court ruled on March 3, one day after the Supreme Court's ruling in *Snyder v. Phelps*.

District Court Decision

The court held that Best's arrest was a matter of public concern, quoting *Snyder* for the proposition that "[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."

The court noted that the episode did not "involve court proceedings or charges that were, at the time of the events they depicted, even pending before a court," that the episode was entertainment "as opposed to a pure news broadcast," and Best's conduct "was arguably toward the lower end of the spectrum of criminality." Nevertheless, the court stated that it found no support for any conclusion other than to deem the broadcast to be truthful coverage of a matter of public concern.

In light of this analysis, the court held that IRPA's exemption for "non-commercial" uses could be interpreted to include the episode and granted the motion to dismiss as to the right of publicity claim.

In its order, the court also required that the plaintiff show cause as to why her claims for invasion of privacy by publication of private facts and intentional infliction of emotional distress should not be dismissed under the same reasoning. The plaintiff has filed a motion to reconsider, arguing that her case is distinguishable from *Snyder*.

Steve Mandell, Steve Baron, and Shari Albrecht of Mandell Menkes LLC represent the defendants. Plaintiff is represented by Thomas A. Zimmerman, Jr. and Adam M. Tamburelli of Zimmerman Law Offices, P.C.

Newspaper Articles about Prisoner's Online Personal Ads Not Libelous

Articles Not Actionably False; Plaintiff a Limited Purpose Public Figure

By Elizabeth A. Ritvo and Nathan C. Forster

On February 22, 2011, the Massachusetts Court of Appeals in [*LaChance v. Boston Herald, Inc.*](#), 78 Mass. App. Ct. 910 (2011) affirmed a summary judgment decision in favor of the Boston Herald and reporter Michele McPhee on a defamation claim arising out of the publication of three articles reporting on personal advertisements placed on the Internet by Massachusetts prisoners serving sentences for violent crimes.

The plaintiff, Edmund D. LaChance, Jr., has spent most of his adult life in prison following convictions for rape, armed robbery, and aggravated rape. While serving his sentence for his second rape, LaChance placed a personal advertisement on the website "Inmate Connections," that sought romance, friendship, and legal and financial assistance. LaChance's personal advertisement represented that he was "not a bad man" and that he "treated others how he liked to be treated." The advertisement did not disclose his rape convictions and contained inaccurate information concerning his age and release date.

On April 25, 2005, April 26, 2005, and April 27, 2005, the Herald published three articles entitled, "Jailed thugs looking for love in cyberspace," "Inmate personals: Match made in hell?," and "Victim outraged by predators' web dating." The articles reported on the dangers of responding to personal advertisements placed on the Internet by felons incarcerated for violent crimes and the inefficacy of the Massachusetts Department of Correction's policy banning prisoners from accessing the Internet.

In his suit, LaChance alleged that the first of the three articles erroneously reported that he was incarcerated for manslaughter and that the second two articles erroneously reported that he lied about his convictions. LaChance also

alleged that he was defamed by a number of statements in the articles concerning other details of his crimes and the Herald's reporting of an entry on his docket sheet, later corrected, that indicated that LaChance had committed one of his rapes against an elderly person.

Summary Judgment

The Massachusetts Superior Court granted the Herald and McPhee summary judgment on all counts of LaChance's complaint on the grounds that the statements in the articles were either not actionably false, protected opinion, and/or privileged as fair reports of judicial action. The Court of

Appeals affirmed the Superior Court's decision in its entirety and specifically held that the statement that LaChance was convicted of manslaughter, rather than rape, was not actionably false. Relying on the Supreme Court's decision in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), the Court of Appeals reasoned that "[p]ublication of the plaintiff's actual criminal record in the first article would have been, at the very least,

equally as damaging to plaintiff's reputation in the mind of a reader." The Court of Appeals further held that the statements that LaChance lied about being convicted for manslaughter were not actionably false, because although the statements were literally untrue, the "gist" of the articles was that "inmate advertisements should not be trusted and plaintiff's particular advertisement was dangerously deceptive by withholding his crimes while portraying himself in a light that would seem more innocuous to potential respondents on a match-making Web Site."

The Court of Appeals further held that summary judgment should enter on the independent ground, not relied on by the

(Continued on page 13)

The Court of Appeals affirmed the Superior Court's decision in its entirety and specifically held that the statement that LaChance was convicted of manslaughter, rather than rape, was not actionably false.

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Superior Court, that LaChance was a limited purpose public figure and could not make the required showing of actual malice. The Court of Appeals applied the two-pronged analysis in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which requires that the Court find a “public controversy exists” and determine “the nature and extent of the individual’s participation in the particular controversy.” The Court of Appeals found the public controversy element was satisfied because the articles addressed a matter of public concern. Furthermore, LaChance was not an “unwitting participant” in the defendants’ coverage” because he posted his personal advertisement on the Internet, despite the Department of Correction’s prohibition on inmate Internet access, and he actively sought the attention of those visiting the website. In this context, the Appeals Court characterized LaChance’s ad as “misleading and controversial” and “especially deceptive.”

The Appeals Court also found that the Herald’s article was privileged as a fair report of a docket entry that was in existence at the time of publication.

LaChance has filed an application for further appellate review of the decision of the Court of Appeals, which the Herald and McPhee have opposed. LaChance’s application for further appellate review is currently pending before the Massachusetts Supreme Judicial Court.

Elizabeth A. Ritvo is a partner and Nathan C. Forster is an associate at the Boston office of Brown Rudnick LLP. They represent the Boston Herald and Michele McPhee.

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Court Dismisses Defamation and Privacy Claims Based on Youth's Photograph With Article on Gangs

Newspaper Was Not Grossly Irresponsible as Photo had Journalistic Connection With Topic of Public Interest

By John J. Lynch

A state trial court in Brooklyn, N.Y. has dismissed claims for defamation, invasion of privacy and intentional infliction of emotional distress against the newspaper *Metro NY* that arose out of *Metro*'s publication of a young boy's photograph accompanying an article about increased gang activity in New York City and the dangers posed to inner-city youth. *Knutt v. Metro International, S.A.*, N.Y. Supreme Court, Kings County, Index No. 19237/2010 (March 1, 2011).

Focusing on the fact that a photograph of a youth who potentially could be impacted by gang violence bears a real relationship to the article, which addressed a matter of public interest, the Court held that the complaint failed to state a cause of action for invasion of privacy or defamation. The court also held that the allegations of the complaint did not establish the "extreme and outrageous conduct" necessary to state a claim for intentional infliction of emotional distress under New York law.

Background

The plaintiff, Jayden Knutt, is an African-American who was photographed in April 2009 while he was looking over a yellow police line observing a crime scene. He was nine-years old at the time. In December 2009, *Metro NY* published an article titled "*Call to get tougher on gang activities.*" The article's subtitle read "*Officials disagree if gang violence is rising or falling. Worry over youth, communities leads city to pursue stiffer penalties for recruiting, initiations*"

The article was accompanied by the April 2009 photograph of plaintiff, which *Metro* had licensed from Getty Images. Neither plaintiff nor his parents had consented to *Metro*'s use of the photo. The article discussed two recent incidents in which a 15-year-old girl and a 92-year-old woman, respectively, had been struck by stray gunfire in the Bronx. The article also discussed city officials' reaction to the perceived increase in gang activity and proposed steps to combat gang recruiting and initiation activities. The article did not refer to the perpetrators of any particular crime and it did not refer to plaintiff or to his photograph. The

photograph's caption referred to the recent stray bullet incidents.

Defendant's Motion to Dismiss

In lieu of answering, defendant *Metro NY* moved to dismiss the complaint for failure to state a cause of action pursuant to N.Y. Civil Practice Law and Rules 3211(a)(7). With respect to the defamation claim, defendant argued that the article and photograph, taken as a whole, did not contain any statements "of or concerning" the plaintiff that were susceptible of a defamatory meaning. Each of these elements of a defamation claim ("defamatory meaning" and "of and concerning") present threshold questions of law that a court can determine on a motion to dismiss. Defendant urged the court to find that, as a matter of law, no reasonable reader could conclude that the innocent-looking boy in the photograph was involved in an of the criminal activity referred to in the article. Rather, defendant argued, given the article's discussion of innocent victims of violence and the community's "fear for youth" occasioned by the uptick in gang activity, the only reasonable conclusion that could be drawn by the newspapers' readers was that the young boy represents the youths in New York City who might fall prey to stray bullets, gang recruitment or gang intimidation. In support of this argument, defendant pointed out that the boy in the photograph displayed no outward sign of gang membership or other criminality. He was depicted calmly looking at a crime scene. He was not wearing gang "colors," he did not appear to be armed or otherwise threatening, and he was not speaking with or in the custody of the police.

In support of its motion to dismiss the invasion of privacy claim, defendant noted that New York does not recognize a common law right of privacy, and that a privacy claim can only derive from N.Y. Civil Rights Law §§ 50 & 51 which prohibit the use of a person's name, portrait or picture for advertising or trade purposes without first obtaining the person's consent. Defendant cited a long line of case law in New York holding that where a publication's use of a person's image bears a real relationship to reports of

(Continued on page 15)

(Continued from page 14)

newsworthy matters, such use will not be considered to be for advertising or trade purposes.

With respect to plaintiff's claim for intentional infliction of emotional distress, defendant argued that the complaint did not allege any extreme or outrageous conduct on plaintiff's part. In addition, defendant cited case law to the effect that an infliction of emotional distress claim cannot be based on privileged conduct, such as a newspaper's publication of a newsworthy photograph, and that such a claim cannot be based solely on a single instance of alleged defamation.

The Court's Decision

In granting *Metro NY*'s motion to dismiss the complaint, the court first addressed the sufficiency of the plaintiff's invasion of privacy claim. The court observed that whether a publication is "newsworthy" is a question of law for the court to determine, and that a publisher's motive to increase circulation and enhance profits has no bearing on whether an article has been published for "trade purposes." The court concluded that the article addressing gang activity was indeed newsworthy. Regarding the photograph's relationship with the newsworthy topic, the court characterized the plaintiff as "a youth who bears a real relationship to the theme of the publication (a youth affected by gang violence)." The court focused on the relationship of the image to the article, rejecting the plaintiff's objection that there was no relationship between him personally and gang activity. The court concluded that this relationship between the image and the article's theme precluded a claim under N.Y. Civil Rights Law §§ 50 & 51 regardless of whether plaintiff's depiction falsely implied that he was involved in gang violence.

The court next rejected plaintiff's claim for intentional infliction of emotional distress, finding that the complaint's allegations did not establish the necessary elements of extreme and outrageous behavior and intent to cause severe emotional distress. In reaching this conclusion, the court cautioned that "the tort of intentional infliction of emotional distress must not be construed so as to avoid the harsh limitations of Civil Rights Law §50 and §51," particularly the "newsworthy" exception.

In dismissing the plaintiff's defamation action, the court did not analyze or rely on the main prongs of defendant's argument, *i.e.*, that as a matter of law there was nothing in the publication that was "of a defamatory nature" regarding the plaintiff, and/or that its discussion of criminality and gang activity could not be construed as a publication "of and

concerning" the plaintiff. Instead, the court focused solely on whether or not *Metro NY* had "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (quoting *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975)) (establishing an intermediate standard for fault, unique to New York, applicable in defamation cases where the plaintiff is a private individual who is referred to in an article addressing matters of public concern). The court held that the plaintiff could not meet his burden of establishing that *Metro NY* was grossly irresponsible. The court rejected the plaintiff's position that gross irresponsibility could be found based on the allegation that *Metro NY* had chosen to run a photograph that it allegedly knew to be unrelated to the article, holding that "[s]ince the infant [plaintiff] was not named in the publication as being involved in criminal activity and his image has a journalistic connection to the theme of the publication, *i.e.*, a youth affected by gang violence, editorial judgment will not be second guessed." In reaching this conclusion, the court relied on a New York appellate decision, *McCormack v. County of Westchester*, 286 A.D.2d 24 (2d Dep't 2001), which held that a newspaper had not been grossly irresponsible in publishing a photograph of a young baby in an incubator in connection with an article addressing, *inter alia*, the dangers of HIV transmission from pregnant mothers to their children.

Notably, at the oral argument for the motion to dismiss, Justice Martin Solomon, reacting to a discussion of New York privacy cases such as *Messenger v. Gruner + Jahr Printing and Publishing*, 94 N.Y.2d 436, 441 (2000) (dismissing privacy claims by a teenage girl whose picture was published in a magazine accompanying a fictionalized story about a girl who had engaged in promiscuous sex because the image bore a real relationship to an article addressing a matter of public interest), expressed a strong personal view that a newspaper should not be able to publish a child's photograph without permission. Justice Solomon's decision concludes with this theme: "while existing law compels the dismissal of plaintiff's complaint, it is not a satisfying result. The use of an infant's photograph, without consent, does not afford children the protection that we, as a society, have come to expect. This is, however, an issue that requires legislative action."

John Lynch is a partner at Pryor Cashman LLP, which represented Metro NY. Plaintiff was represented by Barbara S. Mehlsack and Michael R. Nerenburg of Gorlick, Kravitz & Listhaus, P.C.

CBS Wins Appeal in Defamation Case

Broadcast About Doctor Was Substantially True

By Lauren Leahy and Daniel J. Kelly

A Texas Court of Appeals has affirmed summary judgment for the media defendants in a lawsuit brought by a neurosurgeon who claimed he and his professional association were defamed by an investigative news report broadcast on an Austin, Texas television station, which was owned and operated by CBS at the time of the broadcast. *Neely v. Wilson, et. al.* 2011 WL 477041 (Tex. App. –Austin, Feb. 9, 2011). The Third Court of Appeals affirmed summary judgment in favor of CBS Stations Group of Texas, L.P. d/b/a KEYE-TV, CBS Corporation (formerly known as Viacom Inc.), and investigative reporter Nanci Wilson (collectively, “CBS”).

The broadcast at issue aired in January 2004. The defamation action was filed in June 2004 by Dr. Byron Neely and his professional association (collectively, “Dr. Neely”). In support of the district court’s summary judgment ruling, CBS argued that the broadcast was true and that news organizations were free to publish allegations from third parties involved in a public controversy. CBS also argued the broadcast was a substantially true account of judicial or official proceedings, that Neely was a limited purpose public figure, and that reporter Wilson did not act with actual malice. The Court of Appeals, in a lengthy opinion, affirmed summary judgment, holding that the broadcast was substantially true. The Court did not address whether Neely was a limited purpose public figure or whether the broadcast was privileged under the fair-comment and the official proceeding privileges.

Background

The broadcast at issue detailed allegations and controversies surrounding Dr. Neely’s care of two former patients, an autopsy report on one of those patients by the Travis County Medical Examiner’s Office (“Medical Examiner”), a public disciplinary action taken against Dr. Neely by the Texas State Board of Medical Examiners (“Medical Board”), and responses to these allegations by one of Dr. Neely’s attorneys.

Specifically, the broadcast reported on Dr. Neely’s public discipline by the Medical Board in December 2003, including

the Medical Board proceedings against Dr. Neely, which resulted in findings that Dr. Neely had self-prescribed numerous controlled substances from 1999 to 2002 and that he had a history of hand tremors. The broadcast also described allegations from a malpractice lawsuit against Dr. Neely by Paul Jetton, a former NFL football player. Jetton alleged, among other things, that Dr. Neely negligently performed an unnecessary procedure.

The other malpractice lawsuit reported in the broadcast involved Dr. Neely’s treatment in 1999 of Wei Wu, a software engineer who committed suicide after he was operated on by Dr. Neely and diagnosed with brain cancer. The Medical Examiner’s autopsy report of Wu revealed no residual cancer in Wu’s brain.

Dr. Neely alleged that the broadcast falsely portrayed that he was addicted to drugs, that he was drug impaired while performing surgeries, that he performed unnecessary surgeries, and that he had hand tremors during surgeries. Dr. Neely further claimed the broadcast omitted a host of material facts.

On July 3, 2008, the district court granted summary judgment in favor of CBS. *See Byron D. Neely, Individually and Byron D. Neely, M.D., P.A. vs. Nanci Wilson, CBS Stations Group of Texas, L.P., d/b/a KEYE-TV, and Viacom Inc.*, No. GN401858 (200th Jud. Dist., Travis Co., Texas). Neely appealed the ruling, and the Court of Appeals affirmed summary judgment on February 9, 2011.

Substantial Truth and the Applicability of the Third-Party Allegation Rule

On appeal, CBS argued that the broadcast satisfied the substantial truth test in Texas. In particular, CBS argued that the truth of the underlying allegations by the Medical Board, Jetton, and Wu’s family and the Medical Examiner is not relevant to summary judgment and that CBS need only show that the allegations were made and accurately reported, not that the underlying allegations are true. In response, Neely argued that, under applicable precedent, the allegations themselves must be substantially true.

In considering the substantial truth of the broadcast, the

(Continued on page 17)

(Continued from page 16)

court engaged in an extensive analysis of the “third-party allegation rule” under Texas law. The parties presented the court with “diametrically opposed” positions on the issue. *Neely*, 2011 WL 477041 at *12 (Tex. App. –Austin, Feb. 9, 2011, no pet. h.). CBS maintained that, under the third-party allegation rule, it need only show that the allegations were made and accurately stated, not that the underlying allegations were substantially true. Dr. Neely, on the other hand, asserted that content of the allegations must have been substantially true for CBS to escape liability.

The parties’ arguments depended in large part on their interpretation of *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990), in which the Texas Supreme Court considered whether a television broadcast concerning an internal investigation regarding allegations that some municipal employees of the City of Houston were misusing public resources was substantially true.

The Court of Appeals considered *McIlvain* and a number of Texas appellate decisions following *McIlvain*. Ultimately, the Court of Appeals agreed with CBS that *McIlvain* “stands for the proposition that a media defendant’s reporting that a third party has made allegations is ‘substantially true’ if, in fact, those allegations have been made and their content is accurately reported.” *Id.* at *18. In reaching this conclusion, the Court of Appeals considered a number of cases relying on and interpreting *McIlvain*, including *KTRK Television v. Felder*, 950 S.W.2d 100 (Tex. App.—Houston [14th Dist.] 1997, no writ), and the Court of Appeals’ own opinion in *Cox Newspapers, L.P. v. Penick*, 219 S.W.3d 425, 431, 443 (Tex. App.—Austin 2007, pet. denied). Informed by its analysis of *McIlvain* and its progeny, the Court of Appeals turned to Dr. Neely’s specific allegations.

Neely’s Complaints

Dr. Neely claimed that the CBS broadcast was not substantially true because it omitted material facts and misrepresented the allegations made by his former patients and the Medical Board. The court considered, and rejected, Dr. Neely’s claims concerning the broadcast one-by-one.

Use of and impairment from dangerous drugs

The Court of Appeals first addressed Dr. Neely’s allegations about the broadcast’s discussion of his history of self-prescription and use of prescription drugs. Dr. Neely claimed that CBS wrongly implied that the Medical Board disciplined him for using, rather than self-prescribing,

dangerous drugs. *Id.* at *19. The broadcast started with a hypothetical question posed by the news anchor: “If you were told you needed surgery would you want to know if your surgeon had been disciplined for prescribing himself and taking dangerous drugs . . . ?” *Id.* at *19. The report then identified Dr. Neely as the subject of the broadcast.

With this language in mind, the Court of Appeals initially agreed with Dr. Neely that an ordinary viewer could view the broadcast as asserting that he was disciplined for taking dangerous drugs. However, it held that any factual discrepancies between the broadcast and the allegations did not rise to the level of not substantially true, as Dr. Neely’s use of self-prescribed medications was plainly a focus of the disciplinary action: “In short, even if it was not literally true that Neely had been ‘disciplined for . . . taking dangerous drugs’ in terms of the precise legal bases of the Board’s order, that assertion would at least be substantially true because it would be no more damaging to Neely’s reputation in the eyes of the ordinary viewer than a literally true recitation of the Board’s order would have been.” *Id.* at *20.

In addition, Dr. Neely claimed that an ordinary viewer could reasonably have understood the broadcast as asserting that the Board disciplined him for operating on patients while under the influence of dangerous drugs. Dr. Neely’s argument centered on statements made by Paul Jetton, one of Dr. Neely’s former patients in the broadcast: “[n]arcotics, opiates, I mean it’s just things that, I mean things that they don’t even let people operate machinery or drive cars when they’re, when they’re taking them and this guy’s doing brain surgery on people.” *Id.* at *19. In rejecting Dr. Neely’s claim, the Court of Appeals noted that the broadcast explicitly presented these statements as Jetton’s allegations, holding, under *McIlvain*, that the allegations were accurately reported. *Id.* at *21.

Further, Dr. Neely claimed that CBS juxtaposed statements and omitted material facts regarding his self-prescription of drugs and, as a result, the “gist” of the story defamed him. *Id.* at *21. The Court of Appeals noted that Dr. Neely failed to identify any specific juxtapositions or omissions that created a misleading impression.

Surgeries

Dr. Neely also complained that the broadcast created the false and defamatory impression that he performed unnecessary surgeries. With respect to Jetton’s surgery, he focused on Jetton’s wife’s claim that every other

(Continued on page 18)

(Continued from page 17)

neurosurgeon to analyze Jetton's condition concluded that he would not have performed surgery and would have instead monitored him with MRIs. The Court of Appeals found the broadcast's reporting of her allegation was not actionable under *McIlvain*. The Court also noted that the broadcast included Dr. Neely's contrary position to that allegation that, "two highly qualified neurosurgeons who reviewed the case agree with the medical decisions made by Dr. Neely." *Id.* at *22. With respect to Wu's surgery, Dr. Neely complained that the broadcast left viewers with the false impression that Dr. Neely performed brain surgery to treat brain cancer that never actually existed. In rejecting Neely's argument, the Court looked to the broadcast's report that Wu did not have *residual* brain cancer after the surgery. *Id.* at *23.

Hand Tremors

Finally, Dr. Neely alleged that the broadcast falsely implied that he suffered from hand tremors that impacted his surgical competence. The court held that the broadcast's statement that Dr. Neely had a history of hand tremors was substantially true and in accordance with the findings of the Medical Board as stated in its order. As a result, the Court of Appeals concluded that the broadcast was substantially true with respect to its account of Dr. Neely's "history of hand tremors." *Id.* at *24.

After considering *McIlvain* and its progeny and evaluating all of Dr. Neely's claims, the Court held that, as a matter of law, CBS did not make actionable false assertions in the broadcast, and affirmed the district court's summary judgment ruling.

Lauren Leahy and Dan Kelly are attorneys with Vinson & Elkins L.L.P. in Dallas, Texas. Anthony Bongiorno, Senior Vice President and Associate General Counsel, Litigation and Hazel-Ann Mayers, Vice President, Assistant General Counsel, Litigation, represent CBS. CBS is represented in the Texas lawsuit by Tom Leatherbury, Dan Kelly and Lisa Bowlin Hobbs, attorneys with Vinson & Elkins L.L.P. Tom Leatherbury argued the appeal for CBS and Dan Kelly and former Vinson & Elkins partner Mike Raiff handled the summary judgment hearing. Dr. Neely is represented by Gary Richardson of Richardson, Richardson & Boudreaux, P.C., of Tulsa, Oklahoma; Cindy Olson Bourland of the The Bourland Law Firm in Austin, Texas; and Jamie Baskin of the Baskin Law Firm in Austin, Texas. On appeal, Dr. Neely was also represented by J. Bruce Bennett of Cardwell, Hart & Bennett of Austin, Texas. Mr. Baskin argued the appeal for Dr. Neely.



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Michigan Supreme Court Sings Dr. Dre's Song After Decade of Litigation

By Herschel P. Fink

After more than a decade of litigation over a concert DVD “bonus track” showing Detroit Police censoring a concert performance by famed rap music icon Dr. Dre (Andre Young), Snoop Dog and Eminem, the Michigan Supreme Court on March 18, 2011 ruled that Dre had not violated Michigan eavesdropping statutes, because the public officials had no “reasonable expectation of privacy” when Dre’s backstage camera crew captured them threatening to “shut the power off” during the performance, and to arrest tour promoters, including Dre, unless changes were made in the performance. [*Bowens v. Young et al.*](#) A Detroit federal judge later called that action a “blatant prior restraint.”

The controversy, which involved two federal court lawsuits, as well as the Michigan litigation, was described by the Supreme Court in its 6-1 opinion reversing a Court of Appeals decision, which in turn reversed a trial court ruling which had dismissed the privacy and eavesdropping lawsuit against Dre, saying:

After ten years of litigation – during which time this case has been summarily dismissed, reversed and remanded to the trial court for additional discovery, summarily dismissed for a second time, and reversed and remanded yet again – our review of this matter is limited to plaintiffs’ one remaining claim. Specifically, plaintiffs argue that defendants violated Michigan’s eavesdropping statute, MCL 750.539a *et seq.*, which prohibits “[a]ny person who is present or who is not present during a *private conversation* [from] willfully us[ing] any device to eavesdrop upon the conversation without the consent of all parties thereto” MCL 750.539c (emphasis added). “[P]rivate conversation’ means a conversation that a person reasonably expects to be free from casual or hostile intrusion or surveillance.” *People v Stone*, 463 Mich 558, 563 (2001).

After considering all the evidence of record in the light most favorable to plaintiffs, the non-moving party . . . we conclude that no genuine issue of material fact exists to warrant a trial concerning whether the conversation at issue constituted a “private conversation.”

As the Court of Appeals dissenting opinion correctly asserted, under the circumstances presented, “no reasonable juror could conclude that plaintiffs had a reasonable expectation of privacy in the recorded conversation” at issue.

In ruling narrowly, based on the facts of the case, the Michigan Supreme Court sidestepped a broader ruling on the issue it had agreed to decide when it granted Dre’s application for leave to appeal:

Whether, and under what circumstances, a public-official or police-plaintiff possesses a reasonable expectation of privacy under [Michigan’s eavesdropping statute] in conversations with private citizens in pursuit of official business in enforcing state or local laws and ordinances.

That issue was of great concern to traditional news media and others in covering police misconduct with now ubiquitous cell phone cams. The Court, however, instead focused on the locale of the meeting being backstage in a municipal arena “during the hectic hours preceding a high-profile concert, where over 400 people, including national and local media, had backstage passes,” where Dre’s own security people controlled access to the room, where the door to the room remained open, and where there were “at least nine identified people in the room, plus unidentified others who were free to come and go from the room, and listen to the conversation, as they pleased.” At the Supreme Court

(Continued on page 20)

(Continued from page 19)

argument, Dre's counsel utilized a huge blowup of a screen capture from the DVD showing the plaintiffs arguing with tour promoters while unidentified bystanders leaned in through an open doorway to listen.

The case is also a testament to a party, Dre, who refused to settle with public officials who he believed had abused his civil rights, and saw it through, despite numerous reversals, and at great cost.

The litigation saga began immediately after the confrontation with police in Detroit's Joe Louis Arena on July 6, 2000. In advance of the second night's performance, Dre's lawyers went to U.S. District Court in Detroit and obtained an emergency injunction against further interference with the show. U.S. District Judge Nancy Edmunds then described the interference by Detroit Police: "It's nothing but the most blatant violation of the First Amendment."

Dre then filed a civil rights lawsuit against the City of Detroit and its officials, who had censored his show, for violating his First Amendment rights. That suit was settled in 2001 with the payment of Dre's attorney fees and a letter of apology from then Detroit Mayor Dennis Archer, himself a former Supreme Court justice, who admitted that "the U.S. Constitution prohibits this," and noting that the federal judge had interpreted their interference "as an impermissible prior restraint."

But that was hardly the last chapter. Dre included the footage of the police confrontation in his concert video as a "bonus track" called "Detroit Controversy," prompting in 2002 the same Detroit officials to sue Dre and three dozen others in federal court, alleging 19 causes of action, including defamation, privacy, conspiracy and federal and state eavesdropping law violations. Ultimately, the case was split into separate federal and state cases, and the defendants were

narrowed to Dre and handful of others associated with the concert DVD, and the claims to only violation of the Michigan Eavesdropping statute. (The plaintiffs' claimed throughout that the cameras were hidden; the producers testified the cameras were large, shoulder mounted, and that the recording was conspicuous, including use of camera mounted lights and boom mikes.)

Following the first dismissal in state court in 2003, the federal court dismissed the similar federal claims as *res judicata*. *Bowens v. Aftermath Entertainment*, 364 F. Supp. 2d 641 (E.D. Mich. 2005). That was the end of the federal action.

Not so the state, however, with the first trial court dismissal in 2003 being reversed and remanded by the state Court of Appeals in 2005; then, following discovery, the state trial court again on remand dismissed the case in 2007, followed by yet another Court of Appeals reversal in 2009 by a split three judge panel; leave to appeal was granted in 2010 by the Supreme Court, and, finally, the March 18, 2011 Supreme Court 6-1 decision agreeing with the 2009 dissenting Court of Appeals opinion, and reinstating the second trial court dismissal order.

Whether this brings the marathon litigation to a close remains to be seen, as the Detroit Free Press wrote on March 20, 2011 that Dre's lawyers are

exploring possible further action to recover his attorney fees for the decade long case against the City officials -- one of whom, as a deputy chief of police, recently recovered a multimillion dollar settlement as a result of his own lawsuit against the City of Detroit, and is now a member of the Detroit City Council.

The final chapter may yet be written.

Herschel P. Fink of Honigman Miller Schwartz and Cohn LLP, Detroit, represented Andre Young (Dr. Dre) during the entire course of the litigation since 2000, assisted over the years by now retired partner Cynthia G. Thomas, and current partner Brian D. Wassom.

The Court ruled that Dre had not violated Michigan eavesdropping statutes, because the public officials had no "reasonable expectation of privacy" when Dre's backstage camera crew captured them threatening to "shut the power off" during the performance, and to arrest tour promoters, including Dre, unless changes were made in the performance.

Snyder v. Washington City Paper: Legitimate Defamation or Empty Intimidation Tactic?

By Michael E. Fox

Is a newspaper “entitled to employ lies, half-truths, innuendo and anti-Semitic imagery to ... defame ... a prominent member of the community in order to generate reader interest”? According to the Washington Redskins’ principal owner, Daniel M. Snyder, the answer is a resounding “no,” so he is seeking defamation damages from the *Washington City Paper*. On the other hand, Snyder’s claim may only be an unsupportable intimidation tactic designed to silence fair, but unfavorable, criticism.

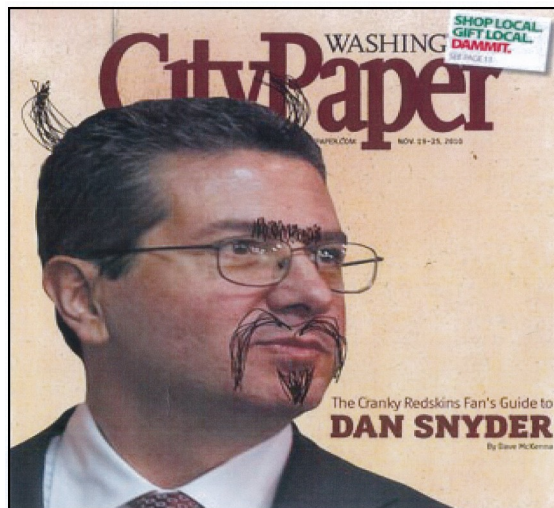
On February 2, 2011, Snyder filed a [complaint](#) in the Supreme Court of the State of New York against Atalaya Capital Management, LP and Creative Loafing, Inc. According to Snyder, Atalaya owns Creative Loafing, which is doing business as the *Washington City Paper* – a free weekly tabloid circulated in the Washington D.C. area. He seeks compensatory damages, totaling more than \$1,000,000.00, as well as punitive damages.

Snyder’s complaint alleges that “[s]ince late 2009, Defendants have engaged in an ongoing campaign ... [to] smear his business and personal reputation”. It further alleges that “[s]ince Spring 2010, in connection with this campaign, the *Washington City Paper* has published (on line or in print) more than fifty columns in which Mr. Snyder ... was the subject of derision, ridicule, and/or vilification.” “This ongoing effort,” according to Snyder, “was capped by the ... cover story on November 18, 2010, wherein it featured an anti-Semitic depiction of Mr. Snyder with horns on his head, bushy eyebrows, and surrounded by dollar signs.”

Snyder contends that the imagery is “precisely the type ... used historically, including in Nazi Germany, to dehumanize and vilify the Jewish people and associate them with a litany

of libels over the last 2,000 years.” Snyder even has the support of the Simon Wiesenthal Center, which has demanded the defendants’ apology for using an image that it claims has been “associated with virulent anti-Semitism going back to the Middle Ages.”

Snyder further alleges that the imagery “accompanied an article that contained numerous outrageous, false, and defamatory statements of and concerning Mr. Snyder” Specifically, his complaint lists the following four “most egregious falsehoods” that “are libelous on their face and constitute libel *per se*”:



Snyder contends that the imagery is “precisely the type...used historically, including in Nazi Germany, to dehumanize and vilify the Jewish people and associate them with a litany of libels over the last 2,000 years.”

1. ““Snyder ... got caught forging names as a telemarketer with Snyder Communications;”
2. “Snyder caused Agent Orange to be used to destroy trees ‘protected by the National Park Service;”
3. “Snyder bragged that his wealth came from diabetes and cancer victims;” and
4. “Snyder was ‘tossed off’ the Six Flags’ board of directors.”

In the past, libel cases have been difficult to win. Publishers have relied on laws protecting First Amendment freedoms, good libel insurance policies and sharp media lawyers to back them. However, with newspaper companies in recent decline, libel plaintiffs have been asserting more muscle under the assumption, perhaps misguided, that publishers are not likely spend a lot to defend their publications.

In this case, the *Washington City Paper* appears to have plans to defend the case. Publisher Amy Austin made available a letter to readers, defending columnist Dave McKenna, in which she stated, “We expect the claims to be

(Continued on page 22)

(Continued from page 21)

defended vigorously.” The defendants have also reportedly retained counsel.

At first blush, the lawsuit appears to be more a claim against opinion, metaphor and exaggeration than a claim for legitimate defamation. It also appears that McKenna’s statements might be grounded in fact.

With regard to the claim that “Snyder ... got caught forging names as a telemarketer,” McKenna also wrote: “Florida authorities fined ... Snyder Communications, \$3.1 million in 2001 after investigators uncovered more slamming in its office than you’d find stagefront at a Limp Bizkit show.” According to the Federal Communications Commission, “slamming” is the illegal practice of switching a consumer’s traditional wireline telephone company without permission.

On April 26, 2001, the *Associated Press* reported that “Verizon and its former marketing agency, ... [Snyder Communications], were fined \$3.1 million for illegally switching Florida customers’ long distance telephone service without authorization.” Moreover, the article noted that “[t]he state Attorney General’s Office said representatives of ... Snyder Communications forged thousands of customer signatures”

With regard to the claim that “Mr. Snyder caused Agent Orange to be used to destroy trees,” it does not resemble McKenna’s actual words. He actually stated, in what appears to be a metaphoric wisecrack, that “Snyder ... made a great view of the Potomac River for himself by going all Agent Orange on federally protected lands.” Comparing someone’s conduct to an illegal herbicide falls short of accusing them of actually using an illegal herbicide.

In his article, McKenna linked to a *Washington Post* article that reported that a “high-ranking National Park Service official improperly helped ... Snyder broker a deal to cut down more than 130 trees.” The *Washington Post* cited a report by the Interior Department Inspector General’s Office, which noted that Snyder did “nothing improper” but that the official “unduly influenced the decision” by “inserting himself into the process through personal communications with Mr. Snyder.”

With regard to the claim that “Snyder bragged that his wealth came from diabetes and cancer victims,” it refers to one of McKenna’s blog posts. The post refers to a PBS program titled “CEO Exchange,” in which host Jeff Greenfield urged Snyder to divulge marketing secrets to

Northwestern University students. Snyder replied that Snyder Communications had weekly meetings to identify target groups, or “niches,” to whom they could market. He stated, “[w]e’d make jokes, we’d say each niche should be a \$5 million niche, and we’d go after each one.” When pressed for examples, Snyder responded, “aging baby boomer demographics were coming on strong, so that meant there’s going to be a lot more diabetic patients, a lot more cancer patients, etc. ...”

With regard to the claim that Snyder was ‘tossed off’ the Six Flags’ board of directors, the *Associated Press* reported on May 2, 2010, that “Dan Snyder is losing his seat as chairman of the board.” Under a bankruptcy reorganization plan, Snyder reportedly could not be appointed to the new board without the consent of junior bondholders who took control of the company from him.

Finally, with regard to Snyder’s claims that his depiction with horns and facial hair is anti-Semitic, the defendants pointed out that “the staffers who edited the story and designed the cover” are Jewish. Managing editor Mike Madden also alleged in a post that “the image is meant to resemble the type of scribbling that teenagers everywhere have been using to deface photos for years. ... [I]t doesn’t look like an ‘anti-Semitic caricature’ – it looks like a devil.” Jeffrey Goldberg, in writing for *the Atlantic.com*, agreed. He called the anti-Semitic reference “almost unbearably stupid.” Public figures such as Snyder find it more difficult to prove defamation due to the “actual malice” requirement. And, in Snyder’s case, his complaint concedes that he is a public figure. Moreover, he alleges that, as a public figure, “he accepts the right of the public and the press to criticize him or to express personal dislike.”

To prove actual malice, Snyder must prove either that the defendants knew the information was false or that they acted with reckless disregard for the truth. On the other hand, the defendants allege that they “have the facts right,” and they might prove the absence of “reckless disregard” by showing that they provided the article to Snyder, along with an opportunity to respond, prior to publication. In this case, however, Snyder claims that the defendants never contacted him before publishing the article.

Snyder also needs to show that the article has injured his reputation, and this hurdle might be difficult to overcome. Judging by the reader comments following McKenna’s article, Snyder’s reputation in the D.C. area is far from good.

(Continued on page 23)

(Continued from page 22)

However, Snyder may argue that such comments were encouraged by the defamatory article.

In light of the potential problems in proving his case, the inquiry turns to why Snyder filed his lawsuit. Since he can't otherwise control McKenna, he may have filed suit to intimidate the defendants into submission (i.e., fire McKenna or bankrupt the company through costly litigation). In fact, in a letter purportedly penned by Washington Redskins' General Counsel David P. Donovan, Mr. Donovan warns that "Mr. Snyder has more than sufficient means to protect his reputation We presume that defending such litigation would not be a rational strategy Indeed, the cost of litigation would presumably quickly outstrip the asset value of the Washington City Paper."

In conclusion, Snyder faces an uphill battle in proving defamation. And, the court is not likely to favorably view his threat to litigate the defendants out of business for the exercise of First Amendment rights. To the contrary, the court is likely to view Snyder's motivations for filing this lawsuit with much skepticism.

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New York Trial Court Dismisses Idea Theft and Slander Claims in Kids Cookbook Dispute

Idea for Book Not Novel; Criticism of Plaintiff Protected Opinion

A New York state trial court dismissed idea theft and slander claims against HarperCollins and comedian Jerry Seinfeld in a dispute over rival cookbooks. [*Lapine v Seinfeld*](#), 2011 NY Slip Op 21064, 1 (N.Y. Sup. Ct. Feb. 23, 2011). Plaintiff claimed that she developed the idea for a book about hiding healthy food in the foods that kids love to eat. Her complaint, though, failed to plead an implied contractual relationship with HarperCollins and her cookbook idea was not sufficiently novel to be protected. Jerry Seinfeld's statements criticizing plaintiff were non-actionable expressions of opinion as a matter of law.

Background

Plaintiff Missy Chase Lapine is the author of *The Sneaky Chef: Simple Strategies for Hiding Healthy Foods in Kids' Favorite Meals* published in April 2007. In 2006, Lapine allegedly submitted proposals to HarperCollins for a book about "camouflaging healthy foods so that children will eat them without realizing or objecting," which HarperCollins ultimately rejected. In October 2007, HarperCollins released *Deceptively Delicious: Simple Secrets To Get Your Kids Eating Good Food*, by Jessica Seinfeld, the wife of comedian Jerry Seinfeld.

Lapine first sued HarperCollins and Jessica Seinfeld for copyright and trademark infringement. In 2009, the Second Circuit affirmed summary judgment for defendants, holding that the two books were not "substantially similar." *Lapine v. Seinfeld*, 375 Fed. Appx. 81, 83-84 (2d Cir. N.Y. 2010).

Lapine then brought a variety of state law claims against HarperCollins, including breach of an implied-in-fact contract and misappropriation of ideas. She added a slander claim against Jerry Seinfeld after he criticized her on *The David Letterman Show* and *E! News*. Among other things, Lapine alleged that Seinfeld referred to her as "a wacko," "a nut," "a mentally unhinged stalker" and remarked that "many of the three-name people do become assassins."

The Court's Decision

The court first dismissed the implied contract claim against HarperCollins as entirely conclusory. The complaint contained no factual allegations to show that HarperCollins assented to a contract, agreed to compensate Lapine or that any industry custom provided for an amount of compensation. Lapine's misappropriation of idea claim failed because of a lack of sufficient novelty in her idea. For a misappropriation of an idea claim to succeed under New York law, the idea must be novel to the world at large. The court found that the idea of "sneaking healthy foods into children's meals" was not novel and that numerous publications dating back to the 1970s had expressed that idea.

The court also considered whether these claims were preempted by the Copyright Act. The court discussed at length conflicting California case law on preemption of implied contract claims, but concluded it did not need to decide the issue where the claim was not properly pleaded. Plaintiff's misappropriation of idea claim, however, even if properly pleaded, would have been clearly preempted. "It is well settled," the court noted, "that misappropriation claims grounded solely in the use of a plaintiff's protected expression are preempted by the Copyright Act."

Finally the court dismissed Lapine's slander claim against Jerry Seinfeld. Plaintiff argued that viewers understood Seinfeld's comments to mean that she "had fabricated opportunistic allegations of plagiarism against his wife." The court noted the comedic context of the television show and interview, but concluded that "Seinfeld's statements are protected not because they were made in a comedic context" but because he was expressing an opinion about the lack of merit of plaintiff's claims. "If the law were to the contrary," the court concluded, "the protection of the First Amendment would be unacceptably denied to persons who publicly defend themselves against what they believe to be baseless public charges or lawsuits."

Plaintiff was represented by David R. Buchanan, of Seeger Weiss LLP, New York, NY. Defendants were represented by Orin Snyder and Laura O'Boyle of Gibson, Dunn & Crutcher LLP, New York, New York.

Second Circuit Affirms Dismissal of First Amendment Retaliation Claim

Per Se Defamation Does Not Satisfy “Actual Chilling” Requirement

The Second Circuit affirmed dismissal of a local newspaper publisher’s §1983 First Amendment retaliation claim based on alleged defamatory statements by an elected official. [*Zherka v. Amicone*](#), 2011 U.S. App. LEXIS 3944 (2d Cir. N.Y. Mar. 2, 2011) (Pooler, Wesley, Chin, JJ.). Describing the case as one of “speech against speech,” the court held that per se defamatory statements do not constitute concrete harm as required in a First Amendment retaliation claim where plaintiff does not credibly allege any “actual chilling” of First Amendment rights.

Background

Plaintiff Selim Zherka owns and publishes the Westchester Guardian, a weekly periodical covering Westchester County. The defendant is the Mayor of Yonkers, NY. The present case is one of several legal feuds between the parties. See “Jury Rejects Mayor’s Libel Claim Against Thorn-in-the-Side Newspaper: Newspaper Wins Big Damages for Seizure of Newspapers,” *Media Law Letter* Oct 2010 at 12.

In 2007, the Guardian criticized Mayor Amicone and his administration for corruption, fiscal mismanagement, and police brutality. Zherka alleged that in retaliation for these articles, Amicone defamed Zherka at a campaign event, calling him a “convicted drug dealer,” “Albanian mobster” and “thug,” and that if Amicone would lose his re-election bid, Zherka would open “drug dens” and “strip clubs” throughout Yonkers and “loot” the “pension funds” of Yonkers residents and the city’s own funds.

Zherka sued Amicone for violation of his First Amendment rights and for defamation. Zherka did not allege any actual chilling of his free speech rights, but instead sought to meet the injury requirement of §1983 by asserting that the statements were defamatory per se and thus injury was presumed. Amicone denied making the alleged statements and moved for judgment on the pleadings. The Southern District Court of New York dismissed Zherka’s

First Amendment claim on the ground that per se defamation does not constitute concrete harm as required to maintain a cause of action for deprivation of constitutional rights against a public official. The court dismissed without prejudice the state law defamation claim.

Second Circuit Decision

The Second Circuit affirmed, agreeing that per se defamation, unaccompanied by any credible allegations of particular injury, does not constitute “actual chilling” of First Amendment rights. Section § 1983, the Court noted, has a quite different purpose than defamation law. “It provides a remedy when federal rights have been violated through the use or misuse of a power derived from a State. To that end, a requirement that plaintiffs allege ‘actual chilling’ ensures an identified injury to one’s right to free speech is established. Hurt feelings or a bruised ego are not by themselves the stuff of constitutional tort.”

Therefore, the “actual chilling” requirement is necessary to ensure that a plaintiff establishes an identifiable injury to his right to free speech. The court noted that in some limited contexts, alternative demonstrations of concrete harm could substitute for the “actual chilling” requirement. Here, however, the court found that per se defamation was an insufficient concrete harm to substitute for the harm of “actual chilling” and stated, “Retaliatory insults or accusations may wound one’s soul, but by themselves they fail to cross the threshold of measurable harm required to move government response to public complaint from the forum of free speech into federal court.” Without the limitation of requiring real injury to the level of “actual chilling,” the court concluded that “the Constitution would change from the guarantor of free speech to the silencer of public debate.”

Plaintiff was represented by Rory J. Bellantoni, Lovett & Bellantoni, LLP, Hawthorne, NY. Defendant was represented by Brian T. Belowich, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, NY.

Section § 1983, the Court noted, has a quite different purpose than defamation law.

Second Circuit Preserves *Gonzales* Journalist's Privilege In Face of Sixth Amendment Rights

By Slade R. Metcalf and Rachel F. Strom

In [*United States of America v. Treacy*](#), Docket No. 09-3939-cr, 2011 WL 799781 (2d Cir. Mar. 9, 2011), the United States Court of Appeals for the Second Circuit addressed the novel issue of the scope of cross-examination of a journalist in a criminal case. While, notably, extending the journalist's privilege to protect even non-confidential and *published* information, the Court avoided confronting the issue of the clash between a defendant's Sixth Amendment right to cross-examine government witnesses and a journalist's right to protect his or her newsgathering materials.

Instead, the Second Circuit simply held that "in instances where a reporter is not protecting a confidential source or confidential materials, the showing required to overcome the journalist's privilege is the same in a criminal case as it is in a civil case—namely, the showing required by *Gonzales* [*v. Nat'l Broad. Co.*, 194 F.3d 29, 32 (2d Cir. 1999)]—and that this is true whether the party seeking to overcome the privilege is the prosecution or the defense."

Background

Charles Forelle ("Forelle"), a reporter for *The Wall Street Journal* (the "*Journal*"), which is published by Dow Jones & Company, Inc. ("Dow Jones"), was part of a Pulitzer Prize-winning team of *Journal* reporters investigating the improper backdating of executive stock options at various corporations, including Monster Worldwide, Inc. ("Monster"). The *Journal's* series of articles triggered federal authorities to investigate nearly 140 companies and has contributed to at least 70 top executives losing their jobs and numerous former executives, including three executives at Monster, facing federal or state criminal charges.

As part of the *Journal's* investigation, Forelle spoke to James J. Treacy ("Treacy"), the defendant in this case, about the options-granting process at Monster and some of the stock options that Treacy himself received and exercised. Following that interview, Forelle authored an article (along

with another *Journal* reporter) that was published in the issue of the *Journal* dated June 12, 2006, and was entitled "Monster Worldwide Gave Officials Options Ahead of Share Run Ups" (the "Article"). In the Article, Treacy is quoted and paraphrased as saying that he was not involved in Monster's option-granting process and that he did not notice the favorable prices of the stock option grants he received.

On April 24, 2008, Treacy was indicted on two charges related to his alleged role in a scheme to commit securities fraud while he was an executive and board member of Monster (the "Indictment"). Both charges were based on the theory that Treacy was involved in backdating Monster's stock option grants so that the grants were "in-the-money" grants, *i.e.*, stock options with an exercise price lower than

the fair market value of the stock grants on the date they were in fact awarded. The Indictment further alleged that Treacy personally exercised \$13.5 million from "in-the-money" stock options that he received while he was an executive at Monster.

The Government served Forelle with a subpoena *ad testificandum* on November 27, 2008 ("Subpoena"), which did not define the scope of the requested testimony.

On December 17, 2008, Forelle moved to quash the Subpoena, relying on the reporter's privilege. In opposition to Forelle's motion, the Government argued that it merely sought Forelle's testimony so that Forelle could "confirm[]" the accuracy of three published statements (including quotations and paraphrasing of statements) that were attributed to Treacy in the Article in which Treacy denied "involvement in the options-granting process." The Government claimed that Treacy's statements were relevant because they were made in furtherance of a conspiracy, were false exculpatory statements that showed Treacy's consciousness of guilt, and demonstrated Treacy's knowledge of the stock options process at Monster.

The district court thereafter ordered the Government, Treacy and Forelle to submit letters regarding the proper

(Continued on page 27)

The Second Circuit addressed the novel issue of the scope of cross-examination of a journalist in a criminal case.

(Continued from page 26)

scope of cross-examination by Treacy. In its letter to the court, Treacy took the position that the Government's inquiries opened the door to "three general areas of cross-examination" that were geared towards establishing that Treacy's statements to Forelle were about his own stock options and not about options-granting at Monster in general.

The Trial Court's Decision

On March 23, 2009, the Honorable Jed Rakoff, of the Southern District of New York, denied Forelle's motion to quash the Subpoena, but, recognizing that a broad direct or cross-examination would violate Forelle's reporter's privilege, limited both the Government's and Treacy's lines of questioning of Forelle. *United States v. Treacy*, 603 F. Supp. 2d 670 (S.D.N.Y. 2009). The court concluded that, although no party was claiming that Treacy was misquoted, the Government should be permitted to ask Forelle about the Statements and the questions Forelle posed to Treacy that elicited these Statements. The court reasoned that this testimony was "relevant . . . as statements made in furtherance of the alleged conspiracy and false exculpatory statements evidencing consciousness of guilt."

As to Treacy, the district court permitted him to "ask[] about questions posed by Forelle to defendant . . . immediately preced[ing] the questions referred to above." Although this inquiry into the "context" of the reported materials called for testimony regarding the unreported aspects of Forelle's interview with Treacy, the court stated that Forelle was being called "solely to confirm statements that were made in a published newspaper article." Thereafter, Forelle gave limited testimony at trial, with his counsel present to object to any further intrusion into the journalist privilege.

On May 13, 2009, Treacy was convicted of one count of conspiracy to commit securities fraud and one count of substantive securities fraud (over objection to the limited scope of cross-examination), and he was sentenced on September 2, 2009.

The Appeal

Treacy appealed on the grounds, *inter alia*, that the District Court committed reversible error by "tight[ly]" limiting the scope of Treacy's cross-examination of Forelle,

thus violating Treacy's right of confrontation safeguarded by the Sixth Amendment. In response, the government claimed that the district court did not abuse its broad discretion to balance Treacy's confrontation rights with the reporter's privilege and, even if the court did abuse its discretion, the error was harmless because the government provided "overwhelming" evidence that supported Treacy's conviction.

Thereafter, Dow Jones submitted an *amicus* brief that did not support the Government or Treacy. Rather, Dow Jones' brief focused on the significance of the reporter's privilege and stressed that the trial court, while attempting to balance Treacy's Sixth Amendment rights against Forelle's reporter's privilege rights, erred by requiring Forelle to testify in the first place.

Dow Jones also submitted the brief to address the novel issue that faced the Court: what standard a district court should apply in circumstances where the *government* is seeking to compel a reporter to testify at a criminal trial and where a criminal defendant's right to cross-examine a government's witness will necessarily elicit information that is protected by the reporter's privilege. That situation presents unique pressures on the rights of both the reporter and the accused because no matter how narrowly tailored the prosecutor's subpoena may be, if the government is seeking to put a journalist on the stand, the criminal defendant will have a right to cross-examine the journalist. In this circumstance, unlike the cases the Second Circuit had addressed before, it is the government – not the defendant – that is creating a direct conflict between two fundamental rights, the reporter's First Amendment and common law right to protect newsgathering materials and the criminal defendant's Sixth Amendment rights.

Dow Jones argued that the Second Circuit should take the opportunity to set a new standard to address this situation and hold that, in these limited circumstances, the government should be compelled to make "a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim and not obtainable from other available sources." *U.S. v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983). This standard would ensure that the requested information is sufficiently relevant and probative to force the journalist to testify at all and, therefore, subject the journalist to a potentially broad cross-examination in contravention of his or

(Continued on page 28)

(Continued from page 27)

her reporter's privilege.

Dow Jones noted that this heightened standard was consistent with the standard that the United States Department of Justice ("DOJ") imposes on itself before it is able to obtain newsgathering information from a reporter in a criminal case. See [28 C.F.R. § 50.10](#) (the "Guidelines"). Specifically, recognizing the concern of compelling a journalist to testify on the Government's case-in-chief, the DOJ has set forth Guidelines that are intended to protect the media in the course of DOJ investigations and prosecutions. The Guidelines state that "[b]ecause freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." [28 C.F.R. § 50.10](#). The government, therefore, is required to "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." [28 C.F.R. § 50.10\(a\)](#). Under both the test proposed by Dow Jones and the Guidelines, the government must prove that the requested information is "critical" or "essential" to its case and that the information is not available from other sources. Thus, if the government is complying with the its own Guidelines, the proposed new rule should impose no further burden on the government.

In its brief, Dow Jones also pointed out that either under the proposed heightened test or the test set forth in [Gonzales v. Nat'l Broad. Co.](#), 194 F.3d 29, 32 (2d Cir. 1999) (where the information to be disclosed must (1) be of likely relevance, (2) address a significant issue in the case, and (3) not be reasonably obtainable from other sources), the subpoena should have been quashed because the government had no real need for Forelle's testimony. In so arguing, Dow Jones cited the Government's Brief, in which the Government conceded that it "presented abundant evidence at trial — separate and apart from the testimony of Forelle — that demonstrated Treacy's guilt beyond a reasonable doubt on both counts of the Indictment." Because, by the

Government's own claims, Forelle's testimony was merely cumulative of the "abundant" evidence the Government proffered, Forelle's testimony was of such minimal relevance (let alone *critical* to the case, as the *Burke* test requires), that Forelle should not have been forced to testify in the first place.

The Second Circuit's Decision

On March 9, 2011, the Second Circuit found that the district court erred in limiting Treacy's cross-examination of Forelle, but that the error was harmless because "even if Treacy had been able to persuade the jury that Forelle's memory of their conversation was hazy, and that Treacy had only been discussing his own options, not a general backdating scheme, the other evidence at trial demonstrated that Treacy was, in fact, involved broadly in the backdating of options at Monster."

In finding that the district court erred in limiting Treacy's cross examination, the Second Circuit first reaffirmed that "a journalist possesses a qualified privilege protecting him or her from the compelled disclosure of even nonconfidential materials." The Court cited its recent *Chevron Corp. v. Berlinger*, 629 F.3d 297, 306-07 (2d Cir. 2011) opinion, which stressed the "burden" on the press when it is forced to comply with subpoenas seeking non-confidential materials.

The Court then went on to find that because "not only was Forelle not protecting any confidential material or source, he sought to withhold evidence that his source himself (Treacy) desired be disclosed," the Government was entitled to the requested information if it was able to meet the test set forth in *Gonzales*. Notably, because the Government only sought to have Forelle confirm the accuracy of certain *published* statements, the Second Circuit, at least implicitly, extended the reporter's privilege to cover not only non-confidential information but non-confidential information that has been published.

The Court rejected Dow Jones' argument that the district court should have applied a higher standard in situations such as the one presented here. In rejecting Dow Jones' argument, however, the Court incorrectly claimed that Dow Jones was

(Continued on page 29)

The Second Circuit "again decline[d] to wade into these constitutional waters," and determine whether the "reporter's privilege is derived from the First Amendment rather than a federal common law of privileges."

(Continued from page 28)

arguing that a higher standard should apply in “all criminal cases,” rather than in those limited cases in which the government – not the defendant – seeks to compel a journalist to disclose newsgathering materials. As Dow Jones argued, it is only in those circumstances where the government is itself creating a direct conflict between two fundamental rights that the Court should apply a higher standard that would ensure that the requested information is sufficiently important to subject the reporter to a potentially broad cross-examination, and thus an extensive invasion of the journalist’s privilege.

In refusing to apply a higher standard in these circumstances, the Second Circuit “again decline[d] to wade into these constitutional waters,” and determine whether the “reporter’s privilege is derived from the First Amendment rather than a federal common law of privileges.”

The Court then found that the district court properly applied the *Gonzales* test in compelling Forelle to testify but that it was error to limit Treacy’s right to cross examine Forelle. In this regard, the Second Circuit’s opinion is inconsistent. The Second Circuit first implies that, once the government overcomes the *Gonzales* test and compels a reporter to testify, there should be no limitation on the criminal defendant’s right to cross-examine “subject to ordinary rules regarding the scope of direct and relevance, see Fed.R.Evid. 611(b)-as he would any other witness.” The Court then states, however, that the district court should have

applied “the test we set forth in *Gonzales* to evaluate Treacy’s need for Forelle’s answers.” The Court then went on to evaluate what areas of cross-examination would satisfy the *Gonzales* test. Importantly, stressing that a defendant’s cross-examination is subject to the *Gonzales* test (and applying Dow Jones’ original argument), the Second Circuit noted that “if the district court had believed that Treacy could not fully exercise his Confrontation Clause rights because of Forelle’s assertion of the privilege, it ought to have granted Forelle’s motion to quash or subsequently stricken his testimony.” Thus, despite some statements that a criminal defendant’s right to cross examine a journalist is limited only by Fed. R. Evid. 611(b), it appears the Second Circuit recognized that the examination must be further limited by the test set forth in *Gonzales*.

Either way, in this case, the Second Circuit determined that the District Court’s limitation on Treacy’s right to cross-examine Forelle was error – just harmless.

Slade R. Metcalf, Katherine M. Bolger and Rachel F. Strom of Hogan Lovells US LLP, New York City represented amicus curiae Dow Jones & Company, Inc. The U.S. Government was represented by Deirdre Ann McEvoy, Assistant United States Attorney for Preet Bharara, United States Attorney for the Southern District of New York. Defendant James J. Treacy was represented by Reid H. Weingarten, Bruce C. Bishop and Evan T. Barr, Steptoe & Johnson, LLP, Washington DC and New York City.

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Colorado District Court Quashes Subpoena to TV Station for IP Address in Murder Case

By Charles D. Tobin & Drew E. Shenkman

A Colorado Springs trial court this month quashed a murder defendant's subpoena to a TV station for the computer address of an anonymous source who sent a news tip via the internet.

In an eloquent ruling from the bench, Judge David Gilbert upheld the "extremely important principle" underlying Colorado's newsperson's privilege statute, as well as the First Amendment, which permit "a news organization's reliance on information provided by people who wish to remain anonymous." *People of Colorado v. Adan Viveros*, Case No. 10CR1482 (oral ruling, El Paso County District Court, March 8, 2011). The court quashed the subpoena to station KKTV, which is owned by Gray Television, and its reporter Lauri Martin.

The subpoena arose out of the second-degree murder prosecution of Adan Viveros, who is pending sentencing for the April 2010 gang-related street shootings in Colorado Springs that resulted in death of an 18-year-old man and the injury of a minor. No suspects were immediately arrested after the shooting.

In the days that followed, KKTV received a series of anonymous news tips through a page on its website inviting visitors to send information about newsworthy issues, and also through a direct email to the newsroom. The news tips were sent electronically directly to the station and were not posted on the public discussion pages of the station's websites.

The news tips did not identify the source as an eyewitness to the shootings or indicate first-hand knowledge. Rather, the tips stated that the police should be looking for two Hispanic males, identified by their street names, and also reported that a "girl who was standing in the neighbor's yard by the white fence" witnessed the shooting. The source did not provide his or her name, email address, or contact information.

Lauri Martin, KKTV's lead crime investigative reporter, quickly followed up on the news tips with the Colorado Springs Police Department. Days later, police arrested Viveros, whose street name, "Nono," was one of those referenced in the tips to KKTV. A few months later, Viveros pleaded guilty to second degree murder.

Sentencing was set for January 2011, but just prior to that hearing, Viveros issued a subpoena to KKTV and Martin

seeking the internet protocol, or "IP" address -- which is a series of numbers that can identify the computer from which someone sends information over the internet -- of the anonymous communicator. When station counsel advised defense counsel they would resist the subpoena, the defense filed a citation of contempt against KKTV and Martin.

Opposing the contempt citation and moving to quash the subpoena, KKTV asserted its rights under Colorado's Newspaper's Privilege, C.R.S. § 13-90-119, and the First Amendment to the U.S. Constitution, as well as Article II, Section 10 of the Colorado Constitution.

The Colorado Newspaper's Privilege provides members of the mass media with a broad privilege shielding them from providing testimony and information learned while acting in a newsperson's capacity. The statute protects any: "knowledge, observation, notes, documents, photographs, films, recordings, videotapes, audiotapes, and reports, and the contents and sources thereof, obtained by [them] while engaged as [newspersons], regardless of whether such items have been provided to or obtained by [them] in confidence." C.R.S. § 13-90-119(1)(b) & (2). In a handful of decisions, the courts have expansively applied this protective shield in both the civil and criminal contexts, including unsolicited news tips.

In order for the subpoenaing party to overcome Colorado's privilege, they must show, by a preponderance of the evidence, that (1) the information sought is directly relevant to a substantial issue in the case, (2) the information cannot be obtained by any reasonable means, and (3) there is a strong interest by the subpoenaing party which outweighs the interest under the First Amendment. C.R.S. §13-90-119 (3)(a)-(c).

At the hearing this month, defense counsel asserted that they needed the IP address to identify the person the tipster described as the "girl who was standing in the neighbor's yard by the white fence." The defense argued, without providing any other evidence for the record, that the girl could possibly provide exculpatory evidence to support a withdrawal of the defendant's guilty plea. The defense further argued that, in light of the substantial penalty for a murder conviction, it was entitled to all potential evidence in the case, and counsel

(Continued on page 31)

(Continued from page 30)

represented that a number of eyewitnesses in the case had refused to cooperate.

KKTV countered that, on their face, nothing in the tipster's communications indicated that the unnamed girl saw anything relevant to exculpating the defendant, and in fact, the email identified "Nono," Viveros' street name, as responsible. Additionally, KKTV pointed to the record from the preliminary probable cause hearings, which included over 20 named individuals who may have the same knowledge, and noted that the defendant had put no evidence before the court of any measures they had taken to obtain the same information from these people. Finally, station counsel argued that the First Amendment right to receive newsworthy information outweighed the defense's right to engage in a fishing expedition.

Applying the test under the Colorado statute, Judge Gilbert found that the information sought was "potentially relevant to the case." He noted, however, that on this record "it's difficult to say," and "purely speculative," whether the anonymous tipster was an eyewitness to the shooting and whether he knows of someone not previously identified in the investigation.

The court remained solidly unconvinced that such information could not be obtained by alternative means. The court noted that it could compel any recalcitrant witnesses to speak with the defense, and that "the privilege does [not] become moot when certain witnesses wish not to cooperate." Judge Gilbert added that an obvious potential source of the information was the neighbor who owned the property where the girl had been standing, but that he had not "heard any detail . . . any written or oral response in terms of what has been done by the defense, if anything, to canvass the neighborhood with respect to neighbors."

He continued that if the unknown girl was "someone standing in the neighbor's yard, presumably there very well may be witnesses who are aware, individuals who could have been present and could have seen [who was] there as visitors or residents in neighboring yards." He further found that the severity of the crime charged is irrelevant to the analysis under the privilege: "It is not simply a function of how high the potential sentence is . . . these principles do not bend and waiver solely with respect to the issue of how serious a case is."

As to the First Amendment balance under the third prong of the test, Judge Gilbert held that the underlying principle of

the Colorado newsperson's privilege statute was "a news organization's reliance on information provided by people who wish to remain anonymous."

The court held that people providing that information often do so anonymously:

"in hopes that their information will spark further investigation by police or further discovery of other information or journalists' further investigation into stories. And they do so under the assumption that they will be able to provide this information freely without being subject to potential retaliation. Sometimes people are afraid of gang affiliations, as individuals may very well have been concerned in this particular case. The information produced alleges the likelihood of some gang involvement, gang retaliation. The discussion here has revolved around some previous potential gang retaliation against Mr. Viveros. And then allegations in this case that they were potential gang members, that he was in fear of that allegedly caused him to shoot, in this particular case, a victim."

Judge Gilbert emphasized the "very strong interest here in terms of why an individual should be able to give information and retain their anonymity . . . that a news organization should not be forced to violate that assumed trust, lest news organizations not be included by individuals wishing to give information in the future."

The court, succinctly, alternatively ruled that the First Amendment also shielded the IP address: "Pursuant to the First Amendment, the news organization is free to guard certain information in support of their news gathering, in support of an individual's right to give certain information and withhold certain information in approaching a news organization."

Charles D. Tobin and Drew E. Shenkman, of Holland & Knight LLP in Washington, D.C., along with James E. Dallner of Lathrop & Gage, LLP, represented KKTV and its reporter Lauri Martin in this matter. David Foley and Cynthia McKedy, of Anaya, Foley, & McKedy, P.C., Colorado Springs, CO, represented Defendant Adan Viveros. District Attorney Daniel May and Deputy District Attorney Bryan Gogarty represented the People of Colorado.

Twitter Must Disclose Subscriber Records in Wikileaks Criminal Investigation

Request for Records Does Not Raise First or Fourth Amendment Issues

A federal magistrate judge this month refused to vacate an order directing Twitter to turn over certain subscriber information to the U.S. government as part of its Wikileaks investigation. [*In re Application of the U.S. For an Order Pursuant to 18 USC 2703\(d\)*](#), Civ. 1:11-dm-00003 (E.D. Va. March 11, 2011) (Buchanan, J.). The judge rejected statutory as well as First and Fourth Amendment challenges to the government's request for records.

Background

As part of its investigation into the disclosure of classified information by Wikileaks, the U.S. government filed a sealed application for an ex parte order under the "Required disclosure of customer communications or records" section of the [Stored Communications Act](#), (18 U.S.C. 2703(d)). The government sought to obtain subscriber information relating to several Twitter accounts, including those of Julian Assange, Wikileaks, Bradley Manning, Birgitta Jonsdottir, a member of the Icelandic Parliament, Jacob Applebaum, a U.S. computer security research, and Rop Gonggrijp, a Dutch computer security specialist. The latter three moved to vacate the order on statutory and constitutional grounds.

The government asked Twitter for several pieces of information relating to the accounts at issue: account holders' identities; their contact information; session records; length and type of service; an identifying subscriber number; and means and source of payment. Additionally, prosecutors requested records of connections to or from the accounts, including data transfer volume and source and destination IP addresses; non-content information associated with the contents of communication, including email and IP addresses; and correspondence and notes of records connected to the accounts.

Decision

The court found that the petitioners did not have standing to challenge the order under the Stored Communications Act because the government's request and court order only

involved "non-content" records information. The court noted that customers who voluntarily provide ISPs with non-content records have no general constitutional protection against disclosure.

The court, however, went on to consider the petitioners' motion on the merits. The court found that the order was properly issued because the information sought was "relevant and material" to the government investigation.

Addressing their First Amendment claim, the judge rejected the argument that prosecutors could now create a "map of association" and thus impermissibly chill speech, as freedom of association and other First Amendment rights have to yield in the face of a legitimate government investigation. Furthermore, there was no intrusion on such rights here, as the subscribers had already made their posts and associations publicly available and had voluntarily provided their records information to Twitter. In a footnote, the judge also expressed "serious doubts" that the foreign petitioners residing outside the U.S. enjoyed any First Amendment protections.

With respect to Fourth Amendment rights, the court was similarly unsympathetic to petitioners, who had argued that revealing their IP addresses during particular times indicated their location, particularly within the inside of their homes, and amounted to a warrantless search. The court highlighted that the subscribers voluntarily provided their ISP information to Twitter, which defeated a reasonable expectation of privacy and placed such data in the same category as a bank customer's deposit information or the numbers dialed into a telephone. Although petitioners argued that they did not "directly, visibly, or knowingly" provide such information, the court pointed to the collection of data described in Twitter's privacy policy, which users had to accept to create an account.

The magistrate further listed several cases in support of the position that there is no Fourth Amendment interest in IP addresses. As to revealing location within the subscribers' homes, the court found no empirical support for the assertion.

The court also rejected the argument that the order

(Continued on page 33)

(Continued from page 32)

impinged on international comity by interfering with the Icelandic MP's official immunity under Icelandic law. The order, the court concluded, "does not seek information on parliamentary affairs in Iceland, or any of Ms. Jonsdottir's parliamentary acts. Her status as a member of parliament is merely incidental to this investigation."

Finally the court refused to unseal a wide swath of documents relating to the Wikileaks investigation, including

similar orders against other ISPs. "At the pre-indictment phase, law enforcement agencies must be able to investigate crime without the details of the investigation being released to the public in a manner that compromises the investigation," the judge stated. The judge did grant in large part the petitioners motion to unseal the docket in the instant case.

The petitioners were represented by the Electronic Frontier Foundation.

U.S. District Court Unseals Search Warrant Materials in Giffords Shooting Case

By David J. Bodney and Peter S. Kozinets

In the two months following the January 8, 2011 shootings near Tucson, Arizona, which killed U.S. District Judge John Roll and wounded U.S. Rep. Gabrielle Giffords, the government and the defense team have joined in the filing of motions to seal a host of records in the case – for example, autopsy reports, mug shots and search warrant records. So far, none of those motions has been successful, and one – the attempt to block access to search warrant records – has resulted in a 13-page opinion that bolsters the media's right of access to search warrant records in federal proceedings.

On March 9, 2011, U.S. District Court Judge Larry Alan Burns granted a motion to unseal search warrant records filed by Phoenix Newspapers, Inc., which publishes *The Arizona Republic*, and KPNX Broadcasting Company, which broadcasts *12 News*, in Phoenix. The Court held that there is a qualified First Amendment right of access to inspect search warrant records when the government's criminal investigation has concluded, and the indictment has been filed, but before trial and before the records have become the subject of a suppression or other similar motion in the case. *United States v. Loughner*, --- F. Supp. 2d ---, 2011 WL 876852, No. 11cr0187 TUC LAB (D. Ariz. Mar. 9, 2011). In so ruling, Judge Burns answered a question left unresolved by the Ninth Circuit for more than two decades in *Times Mirror Co. v. United States*, 873 F. 2d 1210 (9th Cir. 1989). The court held that the government and the defense – which *both* opposed public access – had failed to demonstrate that "non-disclosure is 'strictly and inescapably necessary' in order to protect the Defendant's fair trial guarantee or some

other compelling interest." *Loughner*, 2011 WL 876852 at *6 (citations omitted).

Background

On January 8, 2011, 19 people were shot – six fatally – during Rep. Giffords's "Congress on Your Corner" event at a shopping center near Tucson, Arizona. Jared Lee Loughner was arrested at the scene, and federal and state law enforcement officers jointly obtained a search warrant from a state court judge to search Loughner's home. Within days, federal investigators obtained a second search warrant, from the same judge, to search a computer and two hard drives seized during the house search. Upon return of the warrants, the state court ordered the warrants, supporting affidavits and property inventories sealed.

On January 20, *The Arizona Republic* and *12 News* filed an application to intervene in state court for the limited purpose of seeking to vacate the court's order sealing the search warrant records. The government, having already obtained a three-count federal indictment against Loughner for, *inter alia*, attempted assassination of a member of Congress in violation of 18 U.S.C. § 351(f), filed papers removing the application to the federal court presiding over the Loughner prosecution.

The Republic and *12 News* did not oppose removal, but instead proposed that the government provide copies of the search warrant records to the Court and counsel for the

(Continued on page 34)

(Continued from page 33)

Defendant within 48 hours, and that both the government and the defense submit any specific proposed redactions to the court within five business days. Judge Burns substantially adopted the proposed order, and scheduled a hearing for February 18.

At the hearing, the prosecution represented that the government's investigation remained active and ongoing, and that a superseding indictment would be filed promptly. Judge Burns found that, under *Times Mirror*, the press and the public had neither a First Amendment nor a common law right of access to the search warrant records at that time, but he expressly invited the media intervenors to renew their motion to unseal when circumstances changed.

On March 3, the grand jury returned a superseding indictment, and *The Republic* and *12 News* promptly renewed their motion to unseal. Judge Burns granted the renewed motion at Loughner's March 9 arraignment in Tucson, at which the government confirmed that its investigation had concluded and no further indictments were expected. Judge Burns then issued a detailed written opinion in support of public access to the records.

The History and Logic Test

Quoting Chief Justice Burger's observations in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 570-72 (1980), about the important role of openness when a shocking crime occurs – that “no community catharsis can occur if justice is done in the corner or in any covert manner,” and “the appearance of justice can best be provided by allowing people to observe it” – Judge Burns wrote that these concerns “resonate even louder in today's digital age.” *Loughner*, 2011 WL 876852 at *2. Judge Burns observed: “Courts today play a major role in defining rights and liberties and in shaping public opinion. Because of this, access to court proceedings has grown increasingly important and there has been a corresponding expansion of rights on the part of the general public and the media under the First Amendment to attend almost all criminal proceedings.” *Id.* The court traced the expansion of public access to criminal proceedings – “which also encompasses a qualified First Amendment right to inspect

and copy public records and documents, including judicial documents and records” – as developed in Supreme Court and Ninth Circuit decisions over several decades. *Id.* at *2-*3.

Judge Burns then turned to the “historical experience and logic test” in *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986) (“*Press-Enterprise II*”), to evaluate whether a qualified First Amendment right of public access attached to the search warrant records at issue. The court noted that “[e]ven without historical tradition or experience, the Ninth Circuit has held that logic alone may be enough to establish a qualified right of access to court documents.” *Loughner*, 2011 WL 876852 at *3 (citing *In re Copley Press*, 518 F.3d 1022, 1026 (9th Cir. 2008)).

While the government and the defense still insisted that *Times Mirror* barred public access, Judge Burns found that “changed circumstances” – the completion of the government's investigation and issuance of a final indictment – “have rendered that case inapposite.” *Id.*

The court found “plenty” of recent authority specifying that warrants must be open to the public either after they are served or after criminal charges are filed.

Trend of Allowing Public Access to Search Warrant Materials

Applying the history and logic test, Judge Burns noted that the case law on access to search warrants at the post-investigation, post-indictment, but pretrial, stage of criminal proceedings “is thin.” *Id.* at *4. Nevertheless, the court found “plenty” of recent authority – largely consisting of numerous state statutes, local rules and other post-Watergate cases – “specifying that warrants must be open to the public either after they are served or after criminal charges are filed.” *Id.* Judge Burns wrote: “Given the critical importance of the public's right to be fully informed in [a] high profile case like this one, as well as the need for robust protection of a free press, this Court opts to be guided by the more recent authority.” *Id.* at *5.

Judge Burns also found that logic supports early disclosure of search warrant records, and that openness can play a significant positive role in the functioning of the criminal justice system in numerous ways. For example, the court noted: “Search warrants are a ubiquitous part of the criminal investigatory process, and ordinary citizens are well aware of their prevalent use. The raw power implicated by

(Continued on page 35)

(Continued from page 34)

the authority to conduct a search is enormous A person whose home or property is searched pursuant to a search warrant has an obvious interest in knowing that proper procedures have been followed. The general public shares that interest. Public scrutiny of the search warrant process – even after the fact – can shed light on how and why a warrant was obtained, and thereby further the public's interest in understanding the justice system.” *Id.*

Specifically, with respect to the recent Tucson shootings, Judge Burns agreed with *The Arizona Republic* and *12 News* that public inspection “will enable the public to evaluate for itself whether the government’s searches went too far – or did not go far enough.” *Id.* at *6. Moreover, “[p]ermitting inspection of the search warrants, the accompanying affidavits, and the property inventory will further public understanding of the response of government officials to the Tucson shootings, and allow the public to judge whether law enforcement functioned properly and effectively under the hectic circumstances of that day.” *Id.*

Judge Burns disagreed with a 2004 decision by the Southern District of California in which such access rights were rejected. *United States v. Inzunza*, 303 F. Supp. 2d 1041 (S.D. Cal. 2004). Among other things, he disagreed with *Inzunza*’s conclusion that the “logic” factor of the *Press-Enterprise II* test applies only when evidence seized in a search becomes the subject of a suppression hearing. The *Inzunza* approach, he reasoned, would prohibit public access to, and scrutiny of, search warrants whenever the defense fails to raise the issue. *Loughner*, 2011 WL 876852 at *6. See also *id.* n.2 (“[T]he historical justifications for open hearings and for the right to inspect court documents strongly suggest that the phrase ‘the particular process in question’ [from *Press-Enterprise II*, 478 U.S. at 8] should be broadly construed to encompass the post-investigation, post-indictment stage of the criminal process . . .”).

Finding that the First Amendment right of access applies at this early stage, Judge Burns wrote that the government and the defense had failed to demonstrate “that non-disclosure is ‘strictly and inescapably necessary’ in order to protect the Defendant’s fair trial guarantee or some other compelling interest.” *Id.* at *6 (citations omitted). The court observed that much of the requested information had already found its way into the public domain, and that the privacy and reputational interests of third parties were unlikely to be harmed because “the only third parties mentioned in the

warrant materials are law enforcement agents and citizen witnesses who are not, and have never been, suspects in the case.” *Id.* at *7.

The court favorably considered a variety of alternatives to closure of the search warrant records, including “a comprehensive jury questionnaire,” allowing counsel to “personally and extensively voir dire prospective jurors,” and possibly permitting “additional peremptory challenges to each side” *Id.* at *8. Finally, the court “redacted a minimum of information” from the property inventory and one of the affidavits “that are likely to be inflammatory and difficult to forget, or inadmissible at trial.” *Id.*

On March 9, shortly following the issuance of the court’s opinion, the search warrant records in the *Loughner* case were made publicly available.

David J. Bodney and Peter S. Kozinets of the Phoenix office of Steptoe & Johnson LLP represented Phoenix Newspapers, Inc. and KPNX Broadcasting Co. in this matter. The government was represented by Wallace H. Kleindienst, Beverly K. Anderson, Christina M. Cabanillas and Mary Sue Feldmeier of the United States Attorney’s Office in Tucson. The defendant was represented by Judy C. Clarke, Reuben Camper Cahn and Mark Francis Fleming.



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French Court Dismisses Criminal Libel Case Between Academics

Using Criminal Proceedings in a Defamation Case Is Not Without Risk

By Jean-Frédéric Gaultier & Emmanuelle Levy

A French criminal court this month dismissed a criminal defamation case brought against a New York University law professor, holding that it lacked jurisdiction to hear the case over an online book review and, moreover, that the review was not defamatory. *France v. Weiler* (Tribunal de Grand Instance de Paris March 3, 2011). The court also fined the complaining professor for abuse of process. An unofficial English translation of the decision is available [here](#).

Background

Mrs. Karine Calvo-Goller, a French-Israeli citizen residing in Israel, author of the book “*The Trial Proceedings of the International Criminal Court – ICTY and ICTR Precedents*” brought an action for criminal defamation in Paris against Mr. Joseph Weiler, an NYU law professor and editor of the New York website www.globallawbooks.org, because he posted a critical [book review](#) written in English by German Professor Thomas Weigend.

The Criminal Court of Paris before which the action was brought held that it lacked territorial jurisdiction and ordered the plaintiff to pay 8,000 Euro for abuse of process. This judgment has become final and conclusive in the absence of appeal. The case highlights the issue of jurisdiction over online defamation cases and the potential dangers of forum shopping.

Jurisdiction over Internet Defamation Claims

In France, the plaintiff has the choice to bring a defamation action in criminal or civil court. Yet, the question of jurisdiction is not assessed in the same way before these courts.

In civil court, pursuant to Articles 42 and 46 of the Code of Civil procedure, the plaintiff may bring his or her case where the defendant is domiciled or “*the place of the event causing liability*” or “*where the damage was suffered*.”

The prevailing case law in France is that that the mere

accessibility of a website from France is not sufficient to justify the jurisdiction of French civil courts. Instead the plaintiff must establish evidence of a “sufficient, substantial or significant link” between the incriminated facts and the French territory. In order to establish such link, courts take into consideration a set of factors, such as the language of the website, the citizenship of the person editing the website, the “country code” of the website, etc. (see for example: High Court of Paris, 27 October 2010, RG no. 09/13559; Court of Appeal of Paris, 3 September 2010, three decisions, RG no.08/12820, RG no. 08/12821, RG no. 08/12822; Supreme Court of Appeal, Commercial Division, 23 November 2010, appeal no. 07-19543; Court of Appeal of Paris, 6 June 2007, RG no. 06/14890; Court of Appeal of Paris, 9 November 2007, RG no. 06/16286).

In criminal matters, French Courts have jurisdiction notably as long as one of the constituent elements of the offence occurred on French territory (Articles 113-2 et seq. of the Criminal Code and Article 689 of the Code of Criminal procedure). As for defamation, it is deemed to have been committed in any place where the written statements were made available to the public.

According to a prevailing case law, as long as the written statements are accessible in France, which is the case whenever statements are posted on the internet, French Courts have jurisdiction (See for example: High Court of Paris, 13 November 1999, Unadif v. Faurisson; High Court of Paris, 26 February 2002, Juris-Data no. 2002-169041; Court of Appeal of Paris, 17 March 2004, RG no. 03/01520; Court of Appeal of Limoges, 8 June 2000, Juris-Data no. 2000-180260). There are however some conflicting decisions where evidence of a sufficient, substantial and significant link was required between the publication and France. (See, e.g., Court of Appeal of Paris, 10 November 1999, Juris-Data no. 1999-103622; High Court of Paris, 6 July 2010, RG no. 0919808021).

In the present case, the Criminal Court ruled it lacked jurisdiction because the plaintiff had not established evidence

(Continued on page 37)

(Continued from page 36)

that the online book review was actually accessed or read from French territory within three months of the date it was posted online. This unprecedented rule adds a supplementary condition to the mere accessibility to justify jurisdiction of French Courts: the effective access of the alleged defamatory statements from France within three months of publication. This new criterion does not reflect dominant case law and seems to result from confusion with the statute of limitation: the action for defamation on the basis of statements published on the internet must be brought within a three-month time period from the date the statements were first posted online, otherwise the action will be time-barred.

In any event, we are of the opinion that the effective access of the defamatory statement in France – instead of mere accessibility – would be a sensible limit on French criminal court jurisdiction. Websites are, by definition, accessible from everywhere, save for potential geo-blocking measures which were not discussed in this matter. Effective access should not, however, be the only condition. It is too easy for a plaintiff to take the initiative of said access and create an artificial link with the French territory. As in civil court, a “sufficient, substantial or significant link” between the facts and France should be demonstrated.

Abuse of Process

The court also ordered the plaintiff to pay damages of 8,000 Euros for abuse of process finding (1) she admitted complaining in France, rather than Israel or the U.S. for economic reasons (i.e. forum shopping); (2) she was familiar with French laws having studied law in this country; and (3) there was no defamation as the statements did not exceed the limits of the academic criticism.

It is surprising that the court first declared it lacked jurisdiction, and then nonetheless gave an opinion on the merits regarding the lack of defamation.

More interestingly, it is extremely rare that an action for defamation gives rise to pecuniary compensation for abuse of process. Bringing an action may degenerate into abuse only if it constitutes an act of bad faith or at least a glaring mistake equivalent to fraud (See for example Supreme Court of Appeal, 9 march 2000, appeal no. 98-10070; Supreme Court of Appeal, 13 November 2003, appeal no. 01-13648).

The result is likely limited to the particular circumstances of the case, notably that plaintiff had apparently openly

admitted forum shopping. It nevertheless deserves to be kept in mind. Indeed, because of the opprobrium that may result from criminal conviction, French criminal procedure is often used by plaintiffs as a means of pressure in cases where there are only marginal links if any with France.

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Ethics Corner: Newspaper v. Judge = Recusal?

By Luther Munford and Gregg Mayer

In its 2008 rewording of the Model Code of Judicial Conduct, the American Bar Association retained in Rule 1.2 the noble command: A judge “shall avoid impropriety and the appearance of impropriety.”

But if your editor thinks that his newspaper can blast away at a perceived judicial numbskull and then use this rule to force recusal whenever the newspaper appears in the judge’s court, he better think again. It is going to take a lot more than some bad press to force His Honor to step aside.

As a general matter, the “appearance of impropriety” standard is almost never invoked unless the judge violated some more specific rule. For instance, Rule 2.11(A)(2) prohibits a judge from having a financial interest in the case. And the law presumes that the judge is unbiased, despite your client’s scurrilous attacks, because Rule 2.4(A) provides that a judge “shall not be swayed by public clamor or fear of criticism.” As long as the judge keeps the judicial tongue in check, recusal is out of the question.

Indeed, an *Alice In Wonderland* logic animates judicial thinking on this subject. The rationale goes: If judges recuse themselves in response to newspaper criticism, then that would just encourage more criticism, further eroding public confidence in the judiciary; thus, it is only by denying a motions seeking recusal because of bias that judges can prevent accusations of bias!

No less an intellect than Justice Antonin Scalia invoked this logic when his recusal was sought in *Cheney v. United States District Court*, 541 U.S. 913, 124 S.Ct. 1391 (2004). The Sierra Club sought his recusal because of his infamous trip with the Vice President to Louisiana to hunt ducks. It argued that 20 of the 30 largest newspapers in the country thought he should step aside. He refused to do so, saying that recusal would just “encourage so-called investigative journalists to suggest improprieties,” which would damage the people’s “confidence in the integrity of the Justices.” 541 U.S. at 927-928. See also *People v. Vasquez*, 2002 WL 399501 (Cal. App. 4th Dist.) at *13 (if a judge were to recuse because of newspaper criticism, then “there would be far more editorial attacks on judges”).

On occasion, a judge will grant the recusal motion, but go out with a backhand smack at the press. For example, when the Philadelphia Inquirer had the temerity to ask for the recusal of a judge who had vilified the paper even before he

became a judge, the judge wrote a 20-page opinion in recusing himself. But the opinion accused the newspaper of “an abuse of power,” bemoaned the judiciary’s lack of “communication equipment,” and said journalism “too frequently snaps like jackals at the heels of the judiciary.” *Sprague v. Walter*, 22 Pa. D&C.3d 564, 588 (Pa. Ct. Common Pleas, Philadelphia 1982).

It should be noted that the ABA has enhanced the judicial “communications equipment” in its new code. While the predecessor code allowed public judicial content only on court procedures, Rule 2.10(E) now says “a judge may respond directly or through a third party to allegations in pre-media or elsewhere concerning the judge’s conduct in the matter.” The only constraint is found in Rule 2.10(A) that the statement should not “substantially interfere with a fair trial or hearing.”

The forum the judge uses may be important. A judge can co-write a law review article criticizing other decisions, including decisions involving a party later before him, and not have to recuse himself. See *In re Sherwin-Williams Co.*, 607 F.3d 474 (7th Cir. 2010) (“federal judges may speak, write, and participate in other activities concerning the legal issues of the day”).

But even under the new code a judge would probably go too far if he went on national TV to tell Barbara Walters how wrong it is when people disobey his orders. *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993).

And a judge stung by newspaper comments who cannot close “eyes and ears to extraneous or irrelevant matters” should step off the case instead of issuing a gag order to stop the comments. *United States v. Scarfo*, 263 F.3d 80, 94 (3rd Cir. 2001). The same would be true for a judge tempted to hold an editor in contempt. *In re Dingley*, 148 N.W. 218 (Mich. 1914).

The editor can at least take comfort in the knowledge that there is some symmetry in this law. The law treats criticism and praise equally. Both the maligned judge and the much-praised judge can sit on the newspaper’s cases. After all “a reasonable person would not believe that a judge would be influenced in favor of a newspaper because it wrote complimentary things about her,” not even if the “newspaper” was a national news magazine. *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 919 (6th Cir. 1982).

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