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LDRC Libel Defense Resource Center

LIBEL LETTER

"COPYRIGHT REFORM ACT"

Attached is a memo prepared by Robin Davis Miller, Executive Director of The Authors Guild, on what has been denominated "The Copyright Reform Act." This set of statutory amendments to the Copyright Act passed the House of Representatives as H.R. 897 at the end of last term and is now pending before the Senate Judiciary Committee. A key provision would repeal the current copyright law's requirement that copyright owners register their copyrights with the U.S. Copyright Office in order to be eligible to recover statutory damages and attorney's fees in any copyright infringement lawsuit. Previous amendments to the copyright statute have already eliminated the prior law's requirements that a work be published and bear a "notice" of copyright ownership in order to be "copyrighted" under the federal statute.

The net result of the new proposals would be that a virtually limitless number of published and unpublished works that carry no indication of copyright ownership and are unregistered will be eligible not only for suit, but the extraordinary remedies of statutory damages and attorneys fees.

Keep in mind that virtually any work is capable of copyright protection -- including internal corporate memos, phone logs and letters. These are the grist for basic reporting, as well as significant investigative reporting and historical analysis. The fair use analysis that is done on a regular basis in all publishing and broadcasting fields would, if these provisions were enacted, have to take into account the new levels of potential liability and the incentives they provide to bring copyright claims.

As Robin suggests in her memo, copyright could well become the ultimate end run around libel claims. There is a real fear that these provisions would result in an explosion of copyright-related litigation, creating a powerful weapon for those who simply want to prevent information from ever reaching the public.

After analyzing the potential effect of these provisions, the Magazine Publishers of America ("MPA"), The Authors Guild, and the American Society of Magazine Editors, among other otherwise diverse organizations, have taken strong positions in opposition to this bill in its present form. The provisions are being urged by photographers and computer software suppliers, who chafe at the registration requirements, which they find onerous in their unique circumstances. The MPA, and its allies, are urging that the appropriate response is for the Copyright Office to look at the individual concerns of these groups of copyright owners and develop discrete proposals that endeavor to meet their needs, rather than the wholesale dismantling of registration requirements.

We at LDRC urge you and your clients to take a serious look at the bill and its potential consequences. While there was initial fear that the bill would sail through the Senate, the MPA and others have caused the Senators on the Judiciary Committee to at least take a second look at the extraordinary consequences of this bill.

If you wish to obtain more information on these proposed amendments, please contact either Robin Davis Miller or Ken Vittor, who is the current Chair of the MPA Committee on Legal Affairs, McGraw-Hill, Inc., 1221 Avenue of the Americas, 48th Fl., New York, NY 10020, (212) 512-2000, FAX (212) 512-4827. LDRC also has some materials on these amendments which will be available to our members.

LDRC wants to thank the firms that have sent us briefs in recent weeks, and urge all of you to regularly send us copies of briefs that you have filed on virtually any issue in libel, privacy and related cases. LDRC maintains a brief bank that is available to all of you as a resource in your litigation. All you need to do is call LDRC with your research requests, at (212) 889-2306.

MOLDEA V. NEW YORK TIMES CO.

The New York Times has filed a Petition for Rehearing with Suggestion for Rehearing *en banc* in the Court of Appeals for the District of Columbia with respect to the panel decision in *Moldea v. The New York Times*, the very troubling decision on the analysis of opinion in a libel context handed down on February 18, 1994. The Court of Appeals, in a two to one decision, reversing a grant of summary judgment to the

defendant, held that the evaluation by a reviewer of plaintiff-Moldea's then recent book that it contained "too much sloppy journalism" to be trusted, as well as certain of the examples given by the reviewer to bolster that view (each in turn the reviewer's characterization of Moldea's rendition of an event), were capable of implying facts -- thus creating a jury question as to whether the statements were protected opinion. The Court refused to give any weight to the fact that the statements appeared in a book review, concluding that its analysis of the case "is not altered by the fact that the challenged statements appeared in a 'book review' rather than in a hard news story."

Two *amicus* briefs were filed in support of *The New York Times*, one written by Kenneth Starr, formerly a Circuit Judge on the D.C. Circuit -- and author of the opinion in *Ollman v. Evans* -- now of Kirkland and Ellis in Washington, and joined in by 12 major publishers and media associations, and one written by Weil Gotshal & Manges on behalf of the Association of American Publishers and PEN American Center. Judge Starr's brief represents the views of those who publish various forms of reviews; Weil Gotshal's brief represents the views of those most the often subjects of reviews.

The Times' brief argues that the decision is in error on four counts: (1) failure to take context into account in the analysis of the actionability of the statements; (2) reading unstated and unintended "facts" into subjective evaluations; (3) transforming disputed literary judgments into adjudicable factual issues; and (4) failure to apply the substantial truth defense.

Judge Starr's *amicus* brief focuses primarily on the issue of "context." But both it and the Weil Gotshal brief analyze, with examples, the practical dangers the Court's analysis poses for literary criticism.

Copies of the briefs can be obtained from LDRC. The Court of Appeals decision, while also obtainable from LDRC, can be found at 22 Media Law Reporter 1321.

ABA Approves Uniform Correction Act

At its midyear meeting in early February, the American Bar Association's House of Delegates approved the Uniform Correction or Clarification of Defamation Act ("UCA") by a close margin of 176 to 130.

The UCA was passed last August by the National Conference of Commissioners on Uniform State Laws. The UCA offers incentives to both potential plaintiffs and defendants to use corrections and clarifications as a means to settle defamation claims short of litigation. A copy of the UCA can be obtained from LDRC. A late draft is contained in the "Special Report" at the front of the 1993-94 LDRC 50-State Survey.

Having gained the ABA's approval, the Conference plans to begin encouraging state legislatures to adopt the UCA during the 1995 session. The Conference has also stated that it intends to discourage state legislatures from adopting amended versions of the Act.

LDRC was intensely involved, through in-depth analysis, testimony for and negotiations with the Conference, in the rejection last summer of the Uniform Defamation Act, and the adoption of the UCA. We will continue to inform you of activity with regard to the UCA.

Disparagement Statute Update

Since the February LDRC ALERT, which raised the spectre of statutory developments in a number of states in the law of perishable product disparagement, we have learned that South Dakota has enacted a statute on the subject and that the legislatures of Florida and South Carolina are also looking at enacting new "disparagement" statutes.

The South Dakota statute, signed into law on February 23, 1994, has broad sweep to its definition of "disparagement" -- taking in not only statements that state or imply that an agricultural food product is not safe for consumption, but also those that state or imply that "generally accepted agricultural and management practices" make food products unsafe -- but the statute does require that the publisher "knows [the information] to be false."

LDRC has copies of the statutes that have been enacted as well as an interesting opinion by the Idaho Deputy General analyzing the constitutional implications of some of the worst provisions that we are seeing in these statutes, concluding that they were, indeed, unconstitutional.

TO OUR READERS: LDRC has traditionally provided its members with studies, reports, symposia and similar material through the *LDRC Bulletin*, through the analysis prepared for the LDRC 50-State Survey, through *Alerts*, *Special Alerts*, and similar publications appearing on a regular and irregular basis. With this *LDRC LibelLetter* we hope to initiate a new form of regular publication, one that has shorter notes -- from one line to one paragraph to several pages -- on current and noteworthy matters. The subject matter will range from updates on opinions (published and unpublished) to notes on litigation tactics, on troubling litigation issues, on legislative developments -- on any topic that we and you think needs to be aired within the LDRC community.

We urge you to let us know about any issue that you think should be reported here. We believe that among other services that *LDRC LibelLetter* can provide is a form of community bulletin board for our community -- a way for you, the membership, to communicate successes and concerns with your fellow LDRC members. Please contact me with any matters: Sandy Baron, Executive Director, LDRC, 404 Park Avenue South, New York, New York 10016 or (212) 889-2306 or Fax number (212) 689-3315.

Why The Copyright Reform Act Would Impose a Chilling Effect On Writers, Publishers, and the Media

By Robin Davis Miller

Those who advocate passage of the Copyright Reform Act as it presently stands would do much more than remove a technical formality in the copyright law; they would place a chilling shadow over the future publication of critical non-fiction books, journalism, documentaries and drama. Under the proposed scheme, writers who use copyrighted material (for example, in an attempt to compare a person's written statements with his actions, or to debunk a written tract by making use of text from that tract) must proceed at their own peril, for each such use might be a copyright infringement that could cost hundreds of thousands of dollars in attorneys' fees and statutory damages. Statutory damages for infringement can be awarded in amounts up to $20,000 per incident; for "willful" infringement, up to $100,000.

If this bill becomes law, copyright infringement will become the tort of choice for plaintiffs who now can only sue under theories of defamation or invasion of privacy. While writers of corporate memos, business plans and ransom notes can now, in theory, bring a media defendant or author to federal court for using their copyrighted material, the economic costs involved in such litigation prevent these suits. However, once these potential litigants can recover attorneys' fees and statutory damages for infringement, it is likely that this class of plaintiff (and the accompanying swell of plaintiffs' attorneys with contingency fee arrangements) will begin to flood the courtroom halls. The fact that victorious plaintiffs will be able to recover fees gives them a giant club to wield during settlement negotiations; the nuisance value of a suit would increase at least tenfold.

Although on the face of the bill the "fair use" doctrine is untouched, the effect on the Copyright Reform Act's deletion of §412 is, in a very practical sense, to take the teeth out of "fair use." By dramatically increasing the stakes if a defendant loses a "fair use" case, publisher judgements concerning whether a use is fair will become much more conservative, and authors will be told to paraphrase.

As any lawyer who deals with this issue regularly will admit, these decisions can be close calls. In practice, many close "fair use" cases are not brought; the work in question is not registered and therefore an award, if the claimant is victorious, would not be enough to cover attorneys' fees and the energy involved in bringing a suit. This reality does figure into decisions to publish works containing material that the author, publisher and their attorneys are reasonably sure is covered by the "fair use" doctrine. If the proposed bill becomes law, this calculus on whether to publish (or indeed, whether to write) works in which copyrighted material is used in what is thought to be "fair use" would be changed.

Proponents of the bill disingenuously argue that only actual infringers need to worry about the prospect of attorneys' fees, since those users whose use is found to be "fair use" will not lose their suit (and therefore will not have to pay attorneys' fees or statutory damages.) This would make sense only if there was a bright line to advise authors and publishers as to what was permissable and what was not. But, as any practitioner in this area knows, there is no litmus test for what constitutes "fair use." For this reason, educated guesses about whether a use is fair is only part of the equation; to make a good decision, the prudent writer or publisher will also think about the penalties for making what a judge could later determine was the "wrong" decision. The lower the penalties, the freer the use; as penalties for what all admit is a close call escalate, a chilling effect will tend to make the user omit the work in question.

Another fallacy frequently put forth by proponents of the bill is that frivolous and vexatious copyright infringement suits will be stemmed by the threat of judicial sanctions. This is mere wishful thinking. Judges are extremely unwilling to grant sanctions, even in the most blatant of nuisance suits, and therefore the statement that the threat of sanctions will curb all but the legitimate infringement suits is untenable.

Finally, proponents of the bill try to portray their efforts as merely decoupling the technicality of registration from punishment imposed for infringement. But in reality they would be responsible for changing the way political, historical and personal public analysis is done in this country.

The Copyright Reform Act is dangerous legislation. Writers, publishers, historians, librarians and scholars are banding together to fight the chilling effect that this legislation would impose, and those that care about journalism and literature should do likewise.

Robin Davis Miller is the Executive Director of The Authors Guild and can be reached at:

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LDRC DEFENSE COUNCIL SECTION COMMITTEES

Brief Bank Committee

The Brief Bank Committee will be undertaking to assess and evaluate how the LDRC Brief Bank is functioning and the extent to which it is meeting the needs of the LDRC media and Defense Counsel Section membership. The Committee will be soliciting comments from the LDRC community on the Brief Bank's operations and working with LDRC staff to implement appropriate modifications and improvements.

Conference and Education Committee

The Conference and Education Committee is responsible for planning and implementing the Bi-annual LDRC/NAA/NAB Conference on Defamation and Related Claims. The next Bi-annual Conference is scheduled for September 1995 at the Ritz-Carlton in Tysons Corner, Virginia. Planning for each conference commences approximately one year in advance.

Expert Witness Committee

The Expert Witnesses Committee is in the process of collecting information and pleadings concerning: (1) all types of expert witnesses and categories of expert testimony used in defamation lawsuits; (2) motions *in limine* dealing with expert witness issues; and (3) resumes and testimony of expert witnesses, including depositions, declarations, treatises, and other information helpful for direct and cross-examinations.

Please forward any such information and *in limine* motions you have regarding *expert witnesses* to:

Guylyn R. Cummins, Esq.
Gray, Cary, Ware & Freidenrich
401 B Street, Suite 1700
San Diego, CA 92101-4297

The Expert Witness Committee of the Defense Counsel Section will be working with LDRC staff on a study of expert witnesses for future publication, including an analysis of *in limine* motions. We hope that you respond as fully and as promptly as possible to this request for information by the Expert Witness chair.

Pre-publication/Pre-trial Committee

All matters pertaining to pre-publication and pre-broadcast review and pre-trial procedures come within the jurisdiction of this Committee. The Committee has published a survey of cases dealing with pre-publication and pre-broadcast review, including its impact on the malice issue and on attorney-client privilege. The Committee also has conducted and compiled results of a survey of the practicalities of practice in these areas by both in-house and outside counsel for various media organizations, the allocation of time and resources to various problems in these areas, and common agreement as to "red

flags" and practice pointers. The Committee has considered other surveys and projects, including pre-trial procedure studies, research into various retraction and discovery issues relating to trial practice and reasons for disqualification of counsel. The Committee stands ready, willing and able to undertake new projects as requested by the Defense Counsel Section or its Executive Committee.

Advisory Committee on New Legal Developments

The Committee intends to assist LDRC staff in identifying significant judicial and legislative developments in libel and privacy law in the United States and, when pertinent, in foreign jurisdictions. For the more significant occurrences, members of the Committee will prepare articles or memos which can be circulated to the members of the full DCS and to LDRC's media members. The Committee plans to work closely with the Executive Director of LDRC in not only learning about new cases, statutes, and regulations, but also assisting the Executive Director in preparing portions of any informational newsletters sent to LDRC members. Members of the Committee may assist in conducting a panel discussion on new legal developments at the biennial LDRC/NAA/NAB Conference. In connection with legislative proposals, the Committee may prepare position papers on particular legislation.

Jury Instructions Committee

Under discussion as areas to be covered by the Jury Instructions Committee are (1) working with LDRC staff to collect sample jury instructions for libel from as many jurisdictions and recent jury trials as possible, (2) developing model jury instructions to be used nationwide for the constitutionalized elements, e.g., actual malice and burden of proof of falsity, (3) collecting and developing jury instructions in privacy and new torts for key jurisdictions and collecting instructions in recent jury trials of these torts, and (4) urging Section members to examine the process by which their states develop pattern jury instructions, in those states like New York which have such a process, and encouraging participation by Section members in that process.

Tort Reform Committee

The mission of the Tort Reform Committee of the LDRC is to work with LDRC staff to monitor local or national proposals in the tort reform movement affecting broadcasters and publishers, to mobilize task force support from Defense Counsel Section membership to respond to any such proposals, and to insure that any such tort reform proposals are publicized for comment to the LDRC membership.

Trial Techniques Committee

The Trial Techniques Committee has discussed an interest in preparing a model brief concerning innovative techniques used or recommmended by trial judges to guide the jury throughout the trial (e.g., bifurcation, sequential issues, trial instructions, and mid-trial summations) in understanding the *New York Times* rule and its application. We have also discussed expanding such a brief to include common subjects of motions *in limine*, in which the defendant relies in whole or in part upon federal law.