



LIBELLETTER

April 1995

NORTH DAKOTA FIRST STATE TO ENACT UNIFORM CORRECTION ACT

North Dakota became the first state to enact the Uniform Correction or Clarification of Defamation Act (UCA) when Gov. Edward T. Schafer signed the measure April 3, 1995. It became law Aug. 1, 1995.

The measure, Senate Bill 2101, was introduced in January in North Dakota's 54th Legislative Assembly by the North Dakota Legislative Council's Interim Judiciary Committee at the request of the North Dakota members of the National Conference of Commissioners on Uniform State Laws. The Interim Judiciary Committee had studied the measure in 1994 and recommended its introduction.

The North Dakota Newspaper, Broadcasters and Cable Television Associations supported SB 2101 and worked hard for its passage. The associations' lobbyist, Jack McDonald, testified on the bill before the Interim

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TELEVANGELIST RICO CLAIM DISMISSED

Holding that the investigation and airing of an ABC News *PrimeTime Live* report did "not constitute or threaten long-term criminal activity," U.S. District Judge Robert B. Maloney recently dismissed a RICO claim brought by the Church of televangelist, Robert Tilton, against ABC and the Trinity Foundation. *Word of Faith World Outreach Center Church, et al., v. Diane Sawyer et al.*, No. 3:93-CV-2310-T, (N.D. Tex. Feb. 6, 1995). The suit is one of two brought by the Church or Tilton against ABC in response to a report that alleged the minister led an extravagant lifestyle and

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MAY 15 IS THE DEADLINE FOR ORDERING THE NEW LDRCLIBEL 50-STATE SURVEY: MEDIA PRIVACY AND RELATED CLAIMS

Editing of the new volume of the LDRCLIBEL 50-STATE SURVEY is well underway. The book is shaping up as a very sizeable, informative and well-organized reference tool. The preparers are to be commended for their incredibly thorough reviews of the many claims analyzed in this new volume. The issues include:

Privacy • False Light • Private Facts • Intrusion/Trespass • Misappropriation/Right of Publicity • Infliction of Emotional Distress • Breach of Contract/Promissory Estoppel • Injurious Falsehood • Interference with Contract • Prima Facie Tort • Conspiracy • Conversion • Lanham Act • Fraud • Negligent Publication • Damages and Remedies • Procedural Issues • SLAPP Suits • Confidential Sources • Eavesdropping

But in order for you to obtain a copy, we need your order form and your payment before **MAY 15** so that we can print enough copies and have them shipped to you in June. A copy of the order form is enclosed with this LDRCLIBEL Letter.

If you need an order form, call us at (212)889-2306.

We don't want you to miss out on this premier edition of the new LDRCLIBEL 50-STATE SURVEY 1995-96.

The LDRCLIBEL 50-State Survey: Media Libel Law 1995-95, due out in October, can be ordered at the same time and with a discount if ordered and paid for by May 15th. This volume will continue to offer extended and extensive material on libel in all 50 states, U.S. territories and the District of Columbia. It will also offer again this year, outlines of the law in the federal circuits, summary issue charts at the end -- all of the features that have made the LDRCLIBEL 50-State Survey so valuable in years past.

PERFORMER CLAIMS FOR COVER PHOTO

By Alasdair J. McCullan

In a decision that could seriously impact industries that utilize the names and likenesses of performers to identify their performances on recorded entertainment product, a U.S. District Judge in the Southern District of New York has denied a motion for summary judgment, letting stand a claim against a record company based upon that company's "literally true" use of the name and likeness of a recording artist on compact discs. *Rostropovich v. Koch Int'l Corp.*, 94 Civ. 2674 (JFK) (S.D.N.Y. March 7, 1995).

In his opinion and order, Judge John F. Keenan held that even where the

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North Dakota to Enact UCA

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Judiciary Committee in 1994, and convinced the Committee to delete the source identification requirement in certain retractions.

McDonald proposed another amendment before the Senate Judiciary Committee, substituting "defamation" for "harm to personal reputation" in the scope section of the Act. This amendment was made both to conform the section to the language in the rest of the Act, according to McDonald, but also because North Dakota has no precedent for recognition of non-defamation claims. The Senate adopted the amendment and passed the bill unanimously.

However, it ran into trouble in the House Judiciary Committee where, because McDonald was the only person testifying for the bill, it was viewed with suspicion as a "media" bill. The Committee amended the bill to provide that punitive damages could still be awarded, even with a retraction, if there was actual malice. It was passed by the House and went to a Conference Committee where the house conferees were finally convinced to recede from the House amendments. The bill was passed by both chambers without the malice amendment.

Gov. Schafer had some reservations about the bill giving the media "too much of a break", but was convinced after some discussions with McDonald that the goal of encouraging retractions and discouraging lawsuits was a worthy one.

McDonald said the toughest sell on the bill is to show legislators it isn't just a media bill and that its not just a method for getting out of punitive damages. He said it will be essential that a broad range of support be shown for the bill if its to be passed by other states. A big plus for the bill, he said, is that it includes all defamation by all types of media and non-media sources. North Dakota's present retraction statute only covers newspapers.

McDonald, an attorney with Bismarck's Wheeler Wolf Law Firm, is the North Dakota correspondent for the LDRC 50-State Survey.

Televangelist Rico Claim Dismissed

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lifestyle and made false promises to his followers.

The Church's RICO claim alleged that as a result of the PrimeTime Live broadcasts, "the Church, its pastor, and the Church's ministries have been subject to public scorn and derision, subjected to numerous investigations by local, state, and federal authorities, the Church's television ministry has been forced to close—resulting in the loss of employment and personal financial hardship for approximately 800 Church employees and their families, and the Church's membership and outreach ministries have been significantly reduced." *Id.* at 2.

Specifically, the Church claimed that the investigation, airing and subsequent rebroadcast of the report satisfied RICO's requirement of a "closed pattern of acts extending over a substantial period of time." *Id.* at 4. Further, Tilton contended that "the number, scope, and nature of the predicate acts alleged demonstrate a threat of future criminal activity." *Id.* at 4-5. In the alternative, Tilton argued that the "whether predicate acts constitute a pattern of racketeering activity is a fact question." *Id.* at 5.

Countering these arguments, ABC maintained that the complaint did not, "(1) allege injury to Plaintiff's business or property caused by RICO violations; (2) allege a RICO pattern; (3) allege that the ABC defendants are RICO persons; (4) satisfy Fifth Circuit standards for pleading a RICO claim; (5) allege a scheme to defraud; and (6) state a RICO violation." *Id.* at 3. Further, ABC asserted that the complaint should be dismissed because "it is an attempt to evade constitutional and statutory restrictions on libel actions." *Id.* at 3.

Addressing the debate, Judge Maloney stated that RICO claims pursuant to 18 U.S.C. Sec. 1962 necessitate: "1) a person who engages in 2) a pattern of racketeering activity, 3) connected to the acquisition, establishment, conduct, or control of an enterprise." *Id.* at 5, citing *In re Burzynski*, 989 F.2d 733, 741 (5th Cir. 1993). In addition, Judge Maloney pointed out that "a pattern of racketeering

activity has two components: 1) predicate acts—the requisite racketeering activity, and 2) a pattern of such acts," which requires that plaintiffs "plead both that the predicate acts are related to each other and that they either constitute or threaten long-term criminal activity." *Id.* at 5.

Agreeing with ABC's contention that "the focused acts of newsgathering and broadcasting directed at a single public figure over a short span of time and the focused injury they allegedly caused do not amount to the kind of continuous criminal activity required for a RICO pattern," *Id.* at 4, Judge Maloney held that "the conduct in this case does not constitute or threaten long-term criminal activity." *Id.* at 6. He did not reach the issue of whether any of the dozens of alleged acts by ABC actually constituted "predicate acts."

The Church has filed a notice of appeal.

For Tilton, the loss follows the dismissal in November 1993 of claims brought against ABC under 42 U.S.C. Secs. 1985 (2) and (3) which alleged that ABC conspired to deprive Tilton and the church of the right to freely exercise their religious beliefs, as well as, conspiring to prejudice them in federal courts. *Word of Faith World Outreach Center Church, et al., v. Diane Sawyer, et al.*, No. 3:93-CV-2310-T (N.D.Tex. Mar. 15, 1994). The Church amended its complaint the same day, thereby preserving the suit, and asserting the RICO claims.

ABC, however, is not free of the litigation arising out of the report on Tilton. A libel action commenced by Tilton in November 1992 in the Northern District of Oklahoma is scheduled to be tried in June. ABC has a summary judgment motion pending, while Tilton has a partial summary judgment motion also pending.

Tilton, meanwhile, is suffering his own legal problems with five lawsuits brought by former followers pending, and a decision last April holding Tilton, his former wife, and the church liable for \$1.5 million for fraudulently obtaining support for his ministry.

N.Y. COURT BARS USE OF CONFIDENTIAL SOURCES IN LIBEL DEFENSE

Underscoring the danger inherent in relying on confidential sources, a Troy, NY daily newspaper and its reporters have been barred from relying on such sources to establish lack of actual malice in defense of a libel suit, under a protective order of a New York trial court affirmed by a panel of the New York Appellate Division. *Collins v. Troy Publishing Company*, 1995 WL 111 701 (N.Y. A. D. 3d Dep't.).

Acting on information from confidential sources, The Troy Record published an incorrect report that the Plaintiff, an newly-appointed assistant district attorney, had resigned because he had earlier been convicted of drunk driving, public lewdness and larceny. Although the Plaintiff had in fact resigned due to a record of several prior arrests, he had actually pled to the non-criminal offenses of disorderly conduct and driving while impaired. The Plaintiff brought a libel action for \$34 million against the newspaper, which had printed a front-page retraction. Plaintiff conceded that he was a public figure and had to prove actual malice.

The defendants asserted the right to protect the identity of their sources from

discovery under New York's "Shield Law" (Civil Rights Law 79-h). They also moved for summary judgment dismissing the complaint arguing the absence of clear and convincing evidence of actual malice. In response, the Plaintiff moved for an order to strike defendants' answer and affirmative defenses for their failure to permit discovery of the sources, or in the alternative, precluding the defense from relying upon the existence of their confidential sources:

The trial court refused to consider information obtained from the confidential sources or their reliability in its decision to deny the summary judgment motion. Further it granted plaintiff's alternative motion to preclude defendants from relying on their undisclosed confidential sources at trial.

The appellate court affirmed. It concluded that "...by attempting to rely on their confidential sources to prove that they acted without malice, defendants deprive plaintiff of access to valuable material evidence that comprises a critical element of plaintiff's cause of action", citing *Greenberg v. CBS*, 419 NYS2d 988 69 A.D. 2d 693 (1979). Finding that the protective order went no further than was

reasonably necessary to protect legitimate interests, the appellate panel noted that the order "appropriately prevents defendants 'from using as a sword the information which they are shielding from disclosure'."

The panel states that because the defendants offered no support for the published assertions about plaintiff other than the confidential sources, and because defendants could have confirmed their facts from the court records, from plaintiff or his family, that plaintiff has established a triable issue of fact sufficient to defeat the summary judgment motion.

It should be noted that defendants had put before the court the fact that they had tried to reach the plaintiff several times to confirm the information obtained from their sources, and had spoken to the District Attorney who confirmed the resignation, but would neither confirm nor deny any of the specifics about plaintiff's record.

Defendants have sought re-argument or leave to appeal to the New York Court of Appeals, New York's highest court. Those motions are pending.

NAA/NAB/LDRC LIBEL CONFERENCE

You should all be receiving a mailing on the NAA/NAB/LDRC Libel Conference within the next few weeks. The Conference will be held September 20-22, 1995 at The Ritz-Carlton Tysons Corner, located in McLean, Virginia.

While called a "Libel Conference", this session will explore issues in privacy and many of the related newsgathering, publication/telecast areas.

As in prior years, the Conference has been planned by and for media defense attorneys. Terry Adamson (Kaye, Scholer, Fierman, Hayes & Handler) and Dan Waggoner (Davis Wright Tremaine) are co-chairs of the Defense Counsel Section Conference and Education Committee, responsible for planning the substance of the Conference.

The format of the 1995 Conference will include extensive use of break-out sessions on such significant areas as:

- * Pre-Publication/Telecast Review and Handling of Pre-Litigation Complaints
- * Early Disposal of the Case (e.g., motions to dismiss, summary judgment, limiting discovery, sanctions, cost-effective management)
- * Trial Strategies (e.g., voir dire, expert witnesses, jury instructions, jury consultants, special verdicts)

Dinner on Wednesday night, September 20, will feature a panel discussion with journalists and with public figures and officials who have experienced intense coverage, highlighting their experiences and their attitudes. The panel will include Bert Lance, George Stephanopoulos, Tim Russert, William Safire and Jonathan Alder.

Judge Abner Mikva, Counsel to the President of the United States, will be the featured speaker at dinner on Thursday night, September 21.

JURY INSTRUCTIONS SOUGHT

As some of you may be aware, LDRC and its Jury Instructions Committee are compiling an updated compendium of defamation jury instructions. Thanks go to those who have already submitted proposed and/or actual defendants' jury instructions from recent cases. The Jury Instructions Committee is seeking additional instructions, both defendants' proposed instructions and those that have actually been charged to a jury, for defamation cases from 1985 to the present. Anyone wishing to contribute should send the instructions to LDRC c/o Charles Glasser or to Committee Chair, Robert Lloyd Raskopf, Esq., White & Case, 1155 Avenue of the Americas, NY, NY 10036. The Committee would greatly appreciate receiving all proposed and actual charges by no later than May 22, 1995, since preparations are under way to assemble materials to be presented at the upcoming NAA/NAB/LDRC Libel Conference in September, 1995.

NO LIBEL BY IMPLICATION RULE FROM N.Y.'s HIGHEST COURT

In *Armstrong v. Simon & Schuster*, (N.Y. Law J., 3/29/95, p.25) the New York Court of Appeals declined, for the moment, to decide the issue of libel by implication.

Armstrong is an action arising out of defendants' publication of the bestseller *Den of Thieves*, which chronicled the investigation and prosecution of participants in the Boesky/Milken insider trading schemes of the 1980's. Plaintiff, an attorney who simultaneously represented several figures during the government's investigation, claimed he was libeled by a passage in the book that described his efforts to obtain an exculpatory affidavit from one client on behalf of another.

Defendants sought dismissal of the action, arguing that plaintiff's own verified complaint established the truth of the passage at issue. However, the Appellate Division, First Department,

the intermediate appellate court, held the complaint should survive the motion to dismiss because of various "implications" which a reader "might not irrationally attach" to the text. The Appellate Division then granted defendants leave to appeal to New York's highest court on the first-impression issue of "libel by implication". In this case, as in so many libel by implication claims, the cause of action for defamation is based on publication of statements which are literally true, but which are said to create false suggestions, impressions or implications.

At the Court of Appeals, defendants -- joined by *amici* which included the Association of American Publishers, the Author's Guild and Pen-American Center as well as the New York Times Co. and Dow Jones -- argued that holding the press responsible for

potential implications drawn from accurate facts places an intolerable burden on the editorial process. Defendants and *amici* proposed that libel by implication claims be dismissed on the pleadings unless the so-called "implication" is (1) clear and inescapable and (2) could not be considered protected opinion as the author's commentary or "gloss" on the facts presented.

The Court of Appeals, however, found that the complaint at issue did not fall within the rubric of libel by implication because "plaintiff had alleged that at least one of the explicit statements in the passage was false. Thus, the Court concluded that the "choice of an appropriate test for claims of defamation by implication . . . must wait for another day."

UPDATE: DISPARAGEMENT

The proposed agricultural disparagement bill introduced this term in Washington State legislature appears to have quietly died in committee.

MEDIA AMICUS BRIEF IN *BMW OF NORTH AMERICA, INC. v. GORE*

On March 23, eighteen major media organizations and associations of journalists filed a First Amendment amicus brief in *BMW of North America, Inc. v. Gore*, the U.S. Supreme Court's latest expedition into the largely unmapped terrain of possible due process limitations on the award of punitive damages.

The brief was designed to "ensure that the Court has before it [the media's] views concerning the special considerations that apply to punitive damages in libel cases as the Court considers a case in which it may find it appropriate to enunciate general standards for evaluating the constitutionality of punitive damages awards." Commenting on the brief, Cam DeVore said, "Our message to the Court is 'do no harm -- and do some good' by enhancing First Amendment/Due Process rules in speech-related cases."

The underlying action was brought by a doctor in Alabama, the purchaser of a \$40,000 BMW. The car had been refinished at a cost of approximately \$600 because of acid rain damage in transit from Germany. Damages of \$4,000 were awarded to compensate for reduction in the value of the car, and \$2,000,000 in punitive damages after remittitur of \$2,000,000 from the jury's \$4,000,000 award. BMW's internal policy -- consistent with statutory requirements in several states -- did not require it to disclose to purchasers that it had performed low-value repairs to a new car. The jury's original award of \$4,000,000 in punitive damages was based on multiplying the diminution in value of plaintiff's automobile by the total number of cars BMW had refinished and sold anywhere in the United States over the previous ten-year period.

BMW is the Court's sixth grant of certiorari in the last several years in punitive damages cases from state courts, testing various possible constitutional restraints on such damages. Thus far, the Court has not perceived any important limits in the excessive-fines clause or the Due Process clause. Media amicus participation in the majority of these cases

has noted the continuing unchecked upsurge in punitive damages awards against the press, documented by reference to specific substantial verdicts and to the periodic LDRC studies of defamation judgments nationwide.

The media's briefs to the Court in these cases have also asserted the constitutional impropriety of not applying First Amendment standards to evaluate the validity of punitive damages awards in defamation cases based on speech and matters of public concern. There have been occasional brief references in the Court's recent nonmedia punitive damages decisions to the special sensitivity of First Amendment issues. For example, Justice Scalia, in his concurrence in *Pacific Mutual Life Ins. v. Haslip*, 499 U.S. 1 (1991), observed:

[P]rocedures demanded by the Bill of Rights . . . must be provided despite historical practice to the contrary. Thus, it [the principle of historic validation] does not call into question the proposition that punitive damages, despite their historic sanction, can violate the First Amendment. *Id.* at 38.

Except for such dicta, the recent punitive damages decisions by the Court provide little guidance on the inherent conflict between constitutional speech protection, which generally forbids government limits on expressive activity, and punitive damage awards, which in the context of defamation and similar cases punish speakers based on the content of their speech and aim to deter future speech. This conflict is most extreme in cases involving speech on matters of public concern.

The conflict was specifically recognized but not resolved in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 at 359 (1974), the Court held that "the states may not permit recovery of . . . punitive damages at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." (emphasis added). The Court observed that in cases

involving matters of public interest "punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury." (emphasis added).

This was further spelled out in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), holding that the only state interest to be accommodated in defamation cases is compensation for actual injury to reputation. Where the subject speech is "at the core of First Amendment concerns [i.e., involves matters of public concern] the state interest in awarding . . . punitive damages . . . [is] not 'substantial'." *Id.* at 766. The logic of these cases is that no state interest adequate to support award of punitive damages in a speech tort case is present when the plaintiff is a public official or public figure or when the subject of the speech is a matter of public concern.

The media's brief in *BMW* illustrates the problem faced by the media, in the absence of better due process or First Amendment direction from the Court, with the multimillion dollar verdicts against media defendants in *Sprague v. Walter*, 1995 WL 38187 (Pa. Super. Ct., February 1, 1995), where a three-judge appellate panel reduced to \$21.5 million a jury award of \$31.5 million in punitive damages against *The Philadelphia Inquirer* for a series concerning the plaintiff's role in investigation of a homicide. An earlier jury imposed a punitive award of "only" \$3 million on the same set of facts. Also cited was *Fezell v. Belo Broadcasting Corp.*, Nat'l. L.J., May 6, 1992, at 22 (Tex. Dist. Ct., April 19, 1991), reporting a jury award of \$41 million in punitive damages against a local television station for a series of broadcasts critical of the plaintiff's performance as district attorney, and *Srivastava v. Harte-Hanks Communications, Inc.*, *Comm. Daily*, May 7, 1990, at 5 (Tex. Ct. C.P., May 15, 1990), involving a jury award of \$17.5 million in punitive damages in a

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libel action against a local television station for a series of broadcasts reporting revocation of a doctor's hospital privileges and detailing his alleged mishandling of several cases.

The **BMW** media brief argues that the "dampening effect" of such awards on the media's performance of its core function "is compounded when a publisher or broadcaster espouses unpopular views." The news media are particularly vulnerable to the abuses of unrestrained punitive awards, which are "by their very nature a court-sanctioned invitation to punish the publisher or broadcaster and to deter future speech." For example, the brief cites a district court judge who recently characterized a defendant's publication as "what reasonable jurors might find as muck, mire and slime spewed forth by defendant." *People's Bank & Trust Co. v. Globe Int'l., Inc.*, 786 F. Supp. 791, 795 (W.D. Ark.), *aff'd* in part and remanded in part, 978 F.2d 1065 (8th Cir. 1992).

In conclusion, the brief asks the Court to recognize that punitive damages as currently awarded in libel cases "are fundamentally inconsistent with First Amendment values," and that such awards "are a remedy that society cannot afford and that the Constitution does not permit."

Support for the media's brief was organized by Douglas P. Jacobs of CBS, Inc., and the brief was written by P. Cameron DeVore, Marshall Nelson, and Gregory J. Kopta of Davis Wright Tremaine.

**THANK YOU...
LDRC WISHES TO THANK
THE FOLLOWING SPRING
INTERNS FOR ALL OF
THEIR HELP IN
CONTRIBUTING TO THIS
MONTH'S LIBELLETER:
John Maltbie, Robert Sommer,
Charles Glasser, and Gary
Wong.**

PLAINTIFF CLASS ACTION LIBEL SUIT IN OKLAHOMA

The tort reform movement has engendered an attempt to bring a libel plaintiffs class action suit. In an Oklahoma District Court, Jessie Huff Durham and Beau Williams, two local Oklahoma attorneys purporting to represent personal injury trial lawyers who are members of the Oklahoma Bar Association and the Oklahoma Trial Lawyers Association, filed a class action libel suit against Citizens Against Lawsuit Abuse ("CALA"), in response to allegedly libelous statements contained in its newsletter about the need for tort reform in Oklahoma. Joined with CALA as defendants are two local businessmen who support CALA and World Publishing Company and Gaylord Entertainment Company, two Oklahoma newspapers that printed editorials in favor of CALA's position.

CALA and its president, John A.

Brock, are heading a tort reform movement designed to limit punitive damages and contingency fees which in their view are means by which to curb "frivolous" litigation. The newsletter in question concerned a fundraising and petition drive to assist with the move for tort reform legislation. The plaintiffs state that both the newsletter and newspaper articles, none of which identify any specific lawyer, use false, deceptive, fraudulent and defamatory representations of fact relating to the professional conduct and accomplishments of the plaintiff class.

On March 9, 1995, motions to dismiss were filed by both newspapers. The motions, as would be expected, argue that the class of all Oklahoma lawyers fails the group libel doctrine -- the statements at issue are not "of and concerning" the plaintiffs.

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LDRC would urge LDRC members to notify the LDRC Executive Director of any new cases, opinions, legislative and other developments in the libel, privacy and related claims fields. LDRC welcomes submissions from LDRC members for the *LDRC LibelLetter*.

LDRC members are encouraged to make copies of the *LDRC LibelLetter* for distribution to colleagues within their organization.

PERFORMER CLAIMS FOR COVER PHOTO

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packaging of a compact disc accurately identifies the featured performer on the disc, it may nonetheless violate the Lanham Trademark Act by confusing the public into believing that the performer not only performed on the disc, but also "endorsed" the release of the discs.

In the action, the famous cellist, conductor and Soviet dissident Mstislav Rostropovich brought suit against Russian Disc America Inc. and its distributor for, among other things, violations of the Lanham Act, the New York Civil Rights Law, the New York common law of unfair competition, Section 3344 of the California Civil Code and the California common law right of publicity arising out of the distribution of ten compact discs of feature performances of Rostropovich that were recorded in the 1950's and 1960's in Russia.

Russian Disc contended that it obtained the rights to distribute the recordings, which were made when Rostropovich was employed as a solo cellist for the Moscow State Philharmonic, from a company which had, in turn, acquired the rights from the All Union Recording Studio -- a Soviet governmental agency that had been privatized. The discs, which were released in the United States, prominently displayed Rostropovich's name and in some cases, a portrait of the cellist.

Although a number of the state law claims were directed to the issue of whether the defendants had properly acquired the rights to distribute the recordings at all, the federal claims arising under the Lanham Act were directed solely to whether the use of Rostropovich's name and likeness would confuse the public.

The Court granted summary judgment dismissing one claim under § 43(a) of the Lanham Act which alleged the use of false representations, as well as a number of the state law claims.* However, the Court refused to dismiss a § 43(a) claim alleging that the public was likely to be confused into believing that Rostropovich had "endorsed" the discs.

The decision is notable because

Rostropovich indisputably was the featured performer on the discs and the Court found that every representation made on the discs' packaging was literally true. Indeed, while other courts have let stand claims for false advertising based on literally true statements which nonetheless implicitly mislead the public, the law of false advertising in the Second Circuit based on such facially truthful statements requires the plaintiff to prove, by admissible reliable extrinsic evidence (usually in the form of a consumer survey) that confusion has occurred.

The Court did not follow this precedent, but rather relied on only two cases -- *Geisel v. Pointer Products, Inc.*, 283 F. Supp. 261 (S.D.N.Y. 1968) and *Jackson v. MPI Home Video*, 694 F. Supp. 483 (N.D. Ill. 1988). In both of those cases, courts had preliminarily enjoined distribution of products where packaging or labeling had inaccurately implied a connection with the plaintiffs. In *Geisel*, a toy company was enjoined from using Dr. Seuss' name in a misleading fashion on toys which were based on some of his early drawings. In *Jackson*, a company was enjoined from using the name and likeness of Jesse Jackson to sell videotapes of his speech at the 1988 Democratic National Convention.

In relying on *Jackson* and *Geisel*, however, the *Rostropovich* Court ignored such recent cases as *Storball v. 20th Century Fox Film Corp.*, 30 U.S.P.Q.2d 1394, 1395-96 (S.D. Cal. 1993) ("[m]ere use of a sound recording in a motion picture of audio/visual presentation, with truthful attribution of the performance to the performers in the credits, does not constitute a representation that the performers in the sound recording approve, sponsor or endorse the motion picture"), and *Philadelphia Orchestra Ass'n v. Walt Disney Co.*, 27 U.S.P.Q.2d 1107, 1114-15 (E.D. Pa. 1993) (use of the Philadelphia Orchestra's name in connection with the home video of the movie *Fantasia*, on which the Orchestra performed, did not establish "that the Orchestra endorsed the home video... only that the Orchestra's performance is

contained in the home video.").

More importantly, Judge Keenan's decision ignored the Second Circuit Court of Appeals' discussion of false endorsement and its relation to the First Amendment in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), as well as that case's progeny.

In *Rogers v. Grimaldi*, plaintiff Ginger Rogers brought a § 43(a) false endorsement claim against the producers of the movie "Fred and Ginger". In affirming the grant of summary judgment dismissing her claim, the Second Circuit Court of Appeals held: "[i]n the context of allegedly misleading titles using a celebrity's name, that balance [between the public interest in avoiding confusion and the public interest in free expression] will not normally support application of the [Lanham] Act unless that title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or content of the work". *Id.* at 999. There, the Court ultimately decided -- after reviewing survey evidence that indicated that some members of the public might be confused -- that, because the title did not explicitly indicate that Rogers had endorsed the film, she raised no genuine showing of material fact. *Id.* at 1001.

The *Rogers* precedent has been applied outside the context of movie titles. See, e.g., *Yankee Pub. Inc. v. News America Pub. Inc.*, 809 F.Supp. 267, 276-82 (S.D.N.Y. 1992) (applying *Rogers* to magazine covers); *Pirone v. MacMillan, Inc.*, 984 F.2d 579, 584 (2d Cir. 1990) (grant of summary judgment affirmed in context of use of photos of Babe Ruth in calendar); *New Kids on the Block v. News America Pub., Inc.*, 745 F.Supp. 1540, 1541 (C.D. Cal. 1990), *aff'd*, 971 F.2d 302 (9th Cir. 1992) (summary judgment granted dismissing § 43(a) claim addressed to "nominative" use of recording group's name where no explicit endorsement language). The Court did not address any of these arguments or these cases in its decision -- leaving the entertainment and advertising

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industries with a new precedent that may put them in a precarious position.

The decision is troubling because the Lanham Act has traditionally been construed without regard to contractual relations. Thus, even where a company has the contractual right to utilize a performer's name, by reference to this decision, a performer could nonetheless maintain a false endorsement claim against it. Indeed, the decision subjects all packaging of recorded product to scrutiny, placing the burden on the distributor of such product to prove not only that the packaging is literally true, but that it does not mislead the public implicitly. As specific exemptions to statutes governing the use of a name and likeness such as those indicated in California Civil Code 3344 and New York Civil Rights Law Section 51 do not apply to a Section 43(a) claim, even where an artist has parted with control of a particular performance, he can still seek to hamper the distribution of the product

-- or apply pressure to renegotiate contracts long settled -- by reference to the Lanham Act.

While the existence of conflicting precedents in various courts throughout the country may soften the impact of this decision, it certainly will cause an increase in artists' seeking to recapture rights through the back door in federal court in New York. Thus, entities utilizing name and likeness rights should be mindful of this precedent and might consider, if they wish to minimize claims, packaging product in a way to obviate explicitly any public confusion regarding endorsement, if the particular product is not "endorsed" by the accurately credited artist.

As the opinion and order arose in the context of a denial of a motion for summary judgment, it is not immediately appealable as of right. However, Russian Disc has moved to certify for immediate appeal the question of whether in the absence of extrinsic evidence of confusion, a plaintiff can maintain a claim

for false endorsement against literally truthful packaging. The motion is pending before Judge Keenan.

* The court did not dismiss claims for misappropriation and unfair competition under New York law, nor for violation of New York Civil Rights Law, Section 51 (which provides a remedy for use of living person's name, portrait or picture for "advertising" or "purposes of trade" without his/her written consent), although it did find portions of the §51 claim barred by the one-year statute of limitations. As to both claims, the Court found issues of fact precluded summary disposition. Both claims turn on whether plaintiff retained any rights in the performances at issue.

Alasdair J. McMullan is an associate with the firm of Cowan, Liebowitz & Latman, which represents defendants Russian Disc America, Inc. and Jeff Joneikis in this suit.

THE LDRC ANNUAL DINNER

Presenting LDRC's William J. Brennan, Jr. Defense of Freedom Award to

JUSTICE HARRY A. BLACKMUN

LDRC is truly honored to be able to invite all of you to spend this evening with Justice Blackmun as our esteemed guest.

PLEASE NOTE NEW DATE, TIME AND LOCATION:

NOVEMBER 9, 1995

THURSDAY EVENING

7:30 P.M.

THE ANNUAL DINNER HAS MOVED --

*** New Night: Thursday**

*** New Location: The Sky Club Atop the Metropolitan Life Building**

As in past years, however, the Annual Dinner will be preceded by a cocktail reception sponsored by Media/Professional Insurance.