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LDRC Libel Defense Resource Center

LIBELLETTER

Reporting Developments Through April 20, 2001

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Editor's Note:
Can We Get Your Attention Please,

for the **LDRC BULLETIN 2001:2** on ***A New Battleground in the Clash of Ownership and Free Expression: The Expanding Definition of Commercial Speech***. From the very first moment that the courts developed claims of misappropriation and right of publicity, they failed to account adequately, systematically or rationally with First Amendment principles. A large part of the problem is the faulty understanding of what is, or is not, commercial speech and thus subject to lesser protection.

Because First Amendment counsel often fall into the trap, we suspect, of believing that "commercial speech" is not a core problem for them or their clients, they have ignored the encroachment of these claims and limitations on what is simply ***not*** commercial speech.

The **LDRC BULLETIN** focuses on right of publicity/misappropriation, but also notes the problems associated with the application of any commercial speech limitation (e. g., Lanham Act, false advertising regulations) as it is done today, without clear defining terms for the speech to which it can be applied. Book covers, lithographs, magazine content, musical shows, all have been treated at one time or another as "commercial" for purposes of applying right of publicity/misappropriation and other limitations associated more directly with commercial speech.

The First Amendment bar needs to take greater note of these issues and work to develop a coherent strategy for bringing order and genuine boundaries to these claims. We would ask you to take a look at the **LDRC BULLETIN** this month when it arrives and think with us how we can all work to "take back the streets," so to speak, from those who would

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In Retrial, S&L Investor Wins $2.25 Million Verdict From New York Times Co.

By Kelli Sager

On March 29, 2001, a Los Angeles jury awarded Los Angeles businessman Leonard Ross $2.25 million in the retrial of a defamation case against The New York Times Company. *Ross v. Santa Barbara News-Press,* No. C 744 583 (Cal. Super. Ct. jury verdict Mar. 29, 2001). The verdict, which followed a ten-week bifurcated trial, included a finding that there were false statements and implications in two articles published in 1988 and 1989 by the *Santa Barbara News-Press*. See *LDRC LibelLetter*, March 2001, at 5. The New York Times Company, which then owed the *News-Press*, was named as a defendant along with a former editor and a former reporter for the Santa Barbara newspaper.

Article's Alleged Implications

The first of the two articles at issue related to Ross's application to buy a substantial share in a local savings & loan company, and included more than 100 paragraphs detailing various business dealings, lawsuits, and government investigations involving Ross and Barry Marlin, a former business partner. The lawsuit claimed that this article falsely implied that Ross and Marlin had both been investigated for investor fraud in the mid-1970s, and that a statement in an accompanying sidebar "Chronology Box" falsely linked Ross to the investigation and subsequent conviction of Marlin for fraud.

In his suit, Ross admitted that he had been investigated by federal agencies in the early 1970s for extortion based on claims made by Marlin, and that there had been civil investor fraud suits against them both. Ross' suit denied, however, that he was the subject or target of a separate federal investor fraud investigation, unrelated to the earlier joint ventures between Ross and Marlin, that resulted in Marlin's conviction.

Ross' libel suit also claimed that a second article, which reported on Ross' withdrawal of the application to buy the S&L shares, repeated the false allegations about the federal fraud investigation in summary fashion.

First Trial Verdict Vacated

Early in the case, the trial court ruled that Ross was a private figure.

In 1993, following a three-week trial, a jury awarded Ross $7.5 million in general damages, but the award was vacated by the trial judge on the ground that the amount was excessive and the jury's special verdict was inconsistent. *Ross v. New York Times Co.*, No. C 744 583, 22 Med. L. Rptr. 1733 (Cal. Super. Ct. motion granted Jan. 14, 1994). Years of legal wrangling through the California courts of appeal resulted in a decision affirming the trial judge's order of a new trial. No. B082419 (Cal. Ct. App. 1997), *review de-*

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limit the ability to speak with misuse of commercial speech regulation.

And please note the implications of this case...

By the same token, the First Amendment bar should read the recent opinion of the Ninth Circuit, written by Judge Alex Kozinski, in *Planned Parenthood of Columbia/ Willamette, Inc. v. American Coalition of Life Activists* and reported on at page 39 of this LDRC LIBELLETTER. The Supreme Court of the United States undoubtedly will be asked to review this decision. And, should the Court decide to hear the case, the First Amendment bar and the Media should strongly consider *amicus* entries.

Whether the courts can allow punishment of speech such as that here — the names and addresses of doctors who perform abortions placed on a website, information that violence prone men and women may use to assault or murder the doctors and others — has potential consequences way beyond the specifics of this case. Every day we read of those who would regulate or limit access to speech because of the harm done by those who read/see/hear it. Perhaps less directly implicated by the decision, but lurking in the grass, are those who would regulate the Internet distribution of information not otherwise or historically "private," but which is perceived to do great harm when on the Internet. Keep all of that in mind when you read this article and the opinion upon which it reports.

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nied, No. S061098, 1997 Cal. LEXIS 3358 (Cal. 1997); *see LDRC LibelLetter*, April 1997, at 13. The Court of Appeal also affirmed the trial court's ruling that Ross was a private figure, and affirmed the trial court's refusal to grant summary judgment or JNOV on either substantial truth or fair report grounds.

Lower Damage Award Second Time

At the second trial, which began in January 2001 before Los Angeles County Superior Court Judge Joseph Kolin, plaintiff's defamation claim was limited to three statements and one alleged implication contained in the two *News-Press* articles. (Claims based on various other statements and alleged implications also had been resolved prior to the second trial.) Plaintiff also pursued a claim for intentional interference with prospective economic advantage, based on statements he claimed that the *News-Press* reporter had made to various people in the course of preparing the first article.

At the end of the liability phase of the bifurcated trial, the jury found that both articles implied that Ross had been investigated along with his former partner for investor fraud, and by a 9-3 vote, found that the implication was false. The jury also found, on a split vote, that three individual statements in the two articles that related to the fraud investigation were false. The jury found, however, that Ross had not proved his claim for interference with prospective economic advantage, thereby limiting the damages phase to plaintiff's defamation claim.

Before the second trial, Ross claimed damages in excess of $400 million, primarily relating to business opportunities he claimed to have lost as a result of the articles. All of the special damages claims and Ross' claims for medical injuries were rejected by the trial court on motions *in limine* and were not presented to the jury. Ross' claim for punitive damages was dismissed by the trial judge on defendants' motion following the liability phase, on the ground that there was no showing that the defendants had acted with constitutional actual malice.

As a result of these rulings and jury's verdict on the interference claim, in the damages phase of the trial Ross was restricted to recovery for alleged injured feelings and reputational damage resulting from his defamation claim. One of the significant issues during this phase of the trial was whether Ross could demonstrate that any of the harm he claimed to have suffered was caused by the three statements and alleged implication at issue, rather than by the numerous unchallenged statements about his background.

In closing argument, plaintiff's counsel asked for an award of $30 million for these alleged damages. On a split vote, the jury found that two of the three statements and the alleged implication caused damage, and awarded Ross $2 million for alleged harm to his reputation, and $250,000 in emotional distress damages.

Gary Bostwick and Kelli Sager of Davis Wright Tremaine, LLP represented the New York Times Company. Tony Glassman of Glassman, Browning & Saltsman, Inc. of Beverly Hills represented Ross.

Injunction Denied to Death Row Inmate in Suit Over Book

On April 10th, Judge Loretta Preska of the Federal District Court for the Southern Distrct of New York refused to grant a preliminary injunction to Mumia Abu-Jamal, an African-American political activist and Pennsylvania death row inmate, who sought to enjoin publication by St. Martin's Press of a book on his case by one of his attorneys, death penalty expert Dan Williams. Judge Preska ruled from the bench, finding that Abu-Jamal could not meet the showing of certain and irreparable harm to his Sixth Amendment fair trial rights from publication of the book, as required under *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

In addition to the fact that the only pending matter in the case is a habeas petition sub judice in federal court, Judge Preska found that Abu-Jamal had failed to show that anything in the book was confidential, and found it highly unlikely that Abu-Jamal could succeed in his claims that Williams breached any fiduciary duty to him (and that St. Martin's Press, as publisher, had assisted).

The book makes the argument, in strong and passionate terms, for a new trial for Abu-Jamal, and Williams has said that he feels the book will help his client's case. Williams and Leonard Weinglass have been representing Abu-Jamal, but, according to press reports, are to be replaced.

Judge Preska's decision is not as yet available. A more complete article on the matter will be found in next month's LDRC *LibelLetter*.

Fired Reporter Wins Libel Award From Former Paper

After a seven-day trial, a former reporter for Gannett-owned *Florida Today* in Melbourne has won a $410,500 judgment on libel and other claims against her former employer, a *Florida Today* editor, and Gannett's senior vice president for news, after she and a colleague were fired for entering a murder suspect's home and removing papers they believed were relevant to the murder. *Reakes v. Cape Publications Inc.*, No. 96-0681-CA-H (Fla. Cir. Ct., 18th Jud. Dist. jury verdict March 13, 2001).

The libel suit was based on comments by the newspaper's editor discussing the firing with an assistant in which she described the entry and removal as "criminal acts" and a speech by the Gannett executive to editors stating that the fired reporters had admitted breaking the law. The defendants have announced that they will appeal the verdict.

Papers Taken From Suspect's Home

In January 1996, reporters Kathy Reakes and John McAleenan were assigned to work on a story about Anita Gonzalez, who at the time was under arrest for murder. They went to Gonzalez's apartment. They walked to the rear of the apartment building and noticed that the back door to Gonzalez's apartment was ajar. They walked inside.

Neither Gonzalez nor anyone else gave the reporters permission to enter the Gonzalez home.

Once inside the Gonzalez apartment, both reporters explored the interior, and saw papers, furniture and other personal effects in disarray. They moved some things, and plaintiff picked up papers to look at them. During their search McAleenan removed a paper containing names and phone numbers. Although the reporters had notebooks with them, they did not copy the information from the list. Instead, the reporters took the paper from the apartment believing it to be valuable.

The pair later returned to the newspaper's offices, made photocopies of the confiscated paper, and began to call the numbers on the list. They did not return the original material to its owner.

As she left the newspaper office later that day, Reakes encountered an editor who asked plaintiff about the Gonzalez story. Plaintiff told the editor that she and McAleenan had broken into the apartment and taken papers from it: "John and I kicked the door in. Yeah, right. We broke in, Shelly. We kicked the door in."

Plaintiff claimed at trial that her confession to the editor was a joke. According to the testimony plaintiff admitted the same activities to another editor, Melinda Meers (whom she sued) later that evening.

The next morning, after the editors had again conferred among themselves and with legal counsel, they fired plaintiff and McAleenan.

Creating A "Buzz"

In response, plaintiff made her termination, and the reasons for it, a topic of discussion among the newspaper staff. She announced her firing and the reason for it to fellow reporter Maurice Tamman, who immediately re-broadcast it to the newspaper staff, creating a "buzz" in the building.

And it was in light of and in response to this "buzz" which, defendants argued, effectively established plaintiff as a public figure in the confined universe of the newsroom and led Ms. Meers to feel compelled to advise a deputy editor of what had happened during his absence. It was during this one-on-one conversation that Ms. Meers allegedly said that the plaintiff had committed "criminal acts." Meers denied using the phrase.

Plaintiff contended that her termination was unwarranted. She met with several editors from around the country at a local motel, spoke to and was quoted in the *Los Angeles Times*, and also spoke with reporters for the *Orlando Sentinel*, *Florida Today*, and the *Columbia Journalism Review*, in addition to participating in "defense fund" fund raising activities. In her publicity campaign she took the view that *Florida Today*, in firing her, was concerned with "the bottom line, not the story." That criticism found support in a *CJR* article, which quoted a professor as stating that:

> [T]he aggressive investigative reporter of the past

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> is going to become extinct, because the people running newspapers are becoming more and more corporate. They're business people, not journalists. They're afraid of lawsuits, they're afraid of offending the public and their advertisers.

Gannett VP Responds To The Controversy

In response to the press articles which were generally supportive of the plaintiff, Gannett V.P. Phil Currie determined to answer the rhetoric generated by plaintiff. In a speech to Gannett's editors and publishers, he observed that:

> we are still committed to doing strong First Amendment journalism, that we will still do investigative journalism, that we will still do things you have to do to get stories.

In his talk, Mr. Currie opted to quote and respond directly to the *CJR* article, which itself quoted McAleenan as saying that "we trespassed and we took something in the course of that trespass." Quoting verbatim the facts as they were set out in the *CJR* article, Mr. Currie made the statement for which he was sued:

> Frustration: Reporting and commentary on a case in Brevard involving two *Florida Today* journalists. The story has become so twisted that editors appear wrong for believing that newspaper people should not break the law, and the reporters appear to be heroes for admittedly having done so.

Defense Argues Truth

Reakes sued the newspaper, Meers, and Currie for their statements that she had acted criminally, alleging that the statements defamed her and prevented her from working as a reporter.

Defendants argued that it was beyond serious question that the facts — as testified to by plaintiff — supported the respective opinions of her editor Ms. Meers and of Mr. Currie that she committed "criminal acts," or admitted "breaking the law":

- she entered a dwelling without authorization, and thereby committed the crime of trespass, a second degree misdemeanor. §810.08, Fla. Stat.
- she appropriated the property of another for her own use, committing petit theft of the second degree, a second degree misdemeanor. §812.014(1)(b), (3)(a) , Fla. Stat.;
- knowing that an active homicide investigation was underway, she nonetheless sequestered potentially relevant records for her own purposes, thus tampering with physical evidence, a felony of the third degree. §918.13(1)(a), Fla. Stat.;
- she entered a private dwelling without permission and, once inside, took something which did not belong to her, thus engaging in burglary, a felony of the second degree. §§810.02 (3)(b), 810.07(1), Fla. Stat.; and
- her unsanctioned entry potentially exposed her and the newspaper to civil trespass and invasion of privacy claims.

During the trial, a state prosecutor testified that the Reakes' acts, as described by the police, were crimes. But Judge Edward J. Richardson refused efforts by the newspaper's attorney to present similar testimony by an expert criminal defense lawyer.

The judge also refused to instruct the jury on the public/private figure distinction and constitutional malice, using instead an instruction based on state common law of slander. The instruction asked jurors to determine whether the statements were privileged, "substantially true" and made with "good motives."

After two hours of deliberations, on March 13 the

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six-member jury found that Meers' statement was not necessary, was not "substantially true" and was not made with "good motives." Currie's statements, the jury found, were not "substantially true" and were not made with "good motives." It awarded Reakes a total of $410,500 - $400,000 from the newspaper for Meers' defamatory statement, $500 from Currie, and $10,000 from *Florida Today* for failing to return personal items that Reakes kept in the newsroom, including notes for a book on a serial rapist.

All the defendants filed post-trial motions for JNOV, and all but Currie asked for a new trial. The motions were argued on April 18, 2001. The defendants argued, among other things, that the statements were true, constituted protected opinion, were privileged, were not published with "fault," and that no damages were shown to have been caused by the statements (as compared to plaintiff's termination).

If the post trial motions are denied, an appeal will be filed.

Jack A. Kirschenbaum of Gray, Harris and Robinson in Melbourne represented *Florida Today* and Meers; Robert Bernius of Nixon Peabody in Washington, D.C. represented Currie. Douglas Beam of Melbourne represented Reakes.

Now you can...

Access the *LibelLetter* Index via the Web.

• Beginning this month, the Index to the *LibelLetter* will be available for reference on LDRC's web site (www.ldrc.com). Hard copies of the Index are still available upon request.

Federal Judge Upholds Award Against *New York Times* Reporter

By Adam Liptak

Last June, a New Hampshire jury issued a curious split decision. It awarded $480,000 to a businessman on a false light claim even as it rejected his defamation-by implication claim. On March 20, 2001, the federal judge who tried the case — Judge Steven McAuliffe of the New Hampshire District Court — reconciled the inconsistency through some semantic heavy lifting that was both interesting in itself and in illuminating how libel-by-implication and false light claims can interact. *Howard v. Antilla*, No. 97-543-M (D.N.H.). (A report on the trial verdict appeared in the June 2000 issue of the *LibelLetter*).

The case arose from a 1994 *New York Times* article about Robert Howard, the founder and former chairman of a controversial company called Presstek Inc. The article discussed a rumor then in wide and universally conceded circulation — that Howard was actually Howard Finkelstein, a convicted felon. The article presented the rumor neutrally, setting out evidence for and against it. The rumor, it will not surprise you to hear, turned out to be false. In an editors' note the next day, *The Times* said as much and expressed regret for having printed the rumor.

Rulings Help Defendant

Howard sued only the reporter, Susan Antilla. Notwithstanding the republication doctrine, which might have allowed Howard to argue that the mere neutral presentation of a false and defamatory rumor was sufficient to trigger liability if fault was shown, Judge Steven J. McAuliffe made a number of pre-trial rulings helpful to Antilla.

He held Howard to be a public figure, declined to force Antilla to disclose her sources and, crucially, charged the jury that Howard had to prove that the article implied the rumor was true, that Antilla intended or endorsed the defamatory implication and that she entertained at least serious doubts about its truth. That is, the

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judge protected not only the truly neutral presentation of an ugly rumor but also its presentation with an implied endorsement so long as that endorsement was either unintended or made without actual malice. Those rulings were the key to defeating the defamation claim.

The jury charge on false light, a version of the Restatement formulation of the tort, tracked these requirements, but at a much more general level. The case was litigated by all concerned on the question of whether the article implied that Howard was Finkelstein and, if so, whether Antilla intended and believed the implication. No one suggested that these elements varied depending on whether the legal theory asserted was libel or false light. The jury's split decision was therefore a head-scratcher.

The court said, "[W]hether Howard is, in reality, Finkelstein is a reasonable, and as yet unresolved, question — a factual mystery worth pondering."

Trying to Reconcile the Verdicts

Howard initially attempted to reconcile the verdicts by reference to the most obvious difference between the two torts. Given that libel requires proof on injury to reputation while false light requires only proof of offensiveness, Howard argued that the jury must have found that calling someone a convicted felon was not harmful to reputation but merely offensive. He thought better of this argument in time, and he submitted on a new one on sur-reply. It carried the day.

The new argument was that the jury must have distinguished between an implied statement that Howard "*was*" Finkelstein and an implied statement that Howard "*might be*" Finkelstein. Having made this distinction, which was never argued or suggested to it, the jury must have then attributed the "Howard was Finkelstein" implication to the libel claim and the "Howard might be Finkelstein" implication to the false light claim.

After doing all of this ambitious and independent work, according to the court, "the jury reasonably could have concluded that, while not precisely defamatory, the article held Howard out in a false light" in implying "that whether Howard is, in reality, Finkelstein is a reasonable, and as yet unresolved, question — a factual mystery worth pondering."

That is slicing the disctinction between the two implied statements awfully fine. For libel purposes, according to the court, the jury must have found that the article either did not imply the factual assertion that Howard *was* Finkelstein or that Antilla did not intend it or that, in any event, she believed it. But for false light purposes, the reasoning continues, the article did imply that Howard *might be* Finkelstein and Antilla not only intended that implication (which was essentially conceded) but actually believed something different.

This distinction would be easier to follow if the case had not been litigated and the jury had not been instructed on the theory that, whatever the factual assertion at issue, it was an assertion generated by an implication, and the only factual assertion litigated was that Howard *was* Finkelstein. But the assertion that Howard *might be* Finkelstein is not the product of an implication at all but the very point of the article. In a sense, then, the trial court retreated from its pretrial rulings and thus the law of the case in reconciling the verdicts. It converted the implication case back into a republication case.

Antilla will appeal.

Adam Liptak is senior counsel in the Legal Department of The New York Times Company. Susan Antilla is represented by Jonathan M. Albano of Bingham Dana and William C. Chapman of Orr & Reno. Robert Howard is represented by Charles G. Douglas III of Douglas, Robinson, Leonard & Garvey.

Trial Court Sanctions *Boston Globe* for Non-Disclosure of Confidential Sources in Libel Case

Judgment Entered Against Paper

By Jonathan M. Albano

Ignoring pending summary judgment motions, a Massachusetts Superior Court Judge, Peter Lauriat, has entered judgment against *The Boston Globe* in favor of a libel plaintiff as a contempt sanction for the *Globe's* refusal to disclose confidential sources allegedly relevant to non-libel claims brought by the plaintiff against her former employer and a former *Globe* reporter. As a further sanction, the court entered judgment for the plaintiff on her claims against the reporter for infliction of emotional distress and interference with business relations. *Ayash v. Dana-Farber Cancer Institute, et al.*, Suffolk Superior Court Civ. No. 96-565-E (April 2, 2001). An assessment of damages hearing is to be held to determine the extent of the plaintiff's recovery.

Libel Claim Failed to Justify Disclosure

The plaintiff in *Ayash* was the protocol chair of an experimental breast cancer treatment administered at the Dana-Farber Cancer Institute. In November 1994, two patients enrolled in the protocol, including *Globe* health columnist Betsy Lehman, accidentally received four-fold overdoses of chemotherapy. The overdoses were not discovered by Ayash until almost two months after Lehman's death and were the subject of an award-winning series of articles written by then-*Globe* medical reporter Richard Knox and published in and around May 1995.

After settling a malpractice claim brought by Lehman's estate, Ayash sued the *Globe* and Knox for libel and sued Knox for infliction of emotional distress and interference with business relations. She also sued the Dana-Farber hospital for sex discrimination and violation of her privacy and confidentiality rights. Her complaint alleges that she was scapegoated for the overdose incidents and that the hospital leaked confidential medical peer review information about her.

The Superior Court initially ordered the *Globe* to disclose all of the confidential sources relied upon in connection with the overdose articles on the ground that the sources' identities were relevant to Ayash's libel claims against the *Globe*. As a sanction for non-disclosure, the court imposed escalating fines that, but for a stay pending appeal, within three months would have exceeded one million dollars. That judgment of contempt was vacated by the Massachusetts Appeals Court, which held that the plaintiff had failed to demonstrate that she needed the sources in order to pursue her libel claims. The case was remanded to the Superior Court, however, for a determination as to whether the plaintiff needed the sources in order to pursue any of her other claims against the *Globe*, Knox, or the Dana-Farber. *Ayash v. Dana-Farber Cancer Institute*, 46 Mass. App. Ct. 384, 706 N.E.2d 316 (1999).

Alternative Arguments Adopted on Remand

On remand, the Superior Court held that the sources were relevant to Ayash's claim that Knox had inflicted emotional distress on Ayash by receiving but not publishing, two confidential peer review documents about her, and despite Knox's willingness to stipulate that his defense to the claim did not depend at all on the identity of the sources. The court also found the sources were needed for Ayash's breach of confidentiality claims against the hospital, notwithstanding that (a) the plaintiff had deposed only five of seven employees identified by the hospital as having had contact with Knox during the relevant time period; (b) the confidentiality provisions relied upon by the plaintiff were intended to promote frank discussion by peer review committee members, not to protect the sensibilities of doctors under investigation; and (c) the hospital admitted issuing a press release concerning the results of the "confidential" investigation just five months after the *Globe* reported that the investigation was underway.

Neither the disclosure order nor the contempt sanctions entered by the court addressed the foregoing considerations. Moreover, the court refused to delay consideration of the contempt motion until the defendants'

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Court Sanctions *Boston Globe*

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motions for summary judgment were ruled upon. Instead, the court focused on the *Globe* defendants' ongoing refusal to disclose the sources. The court criticized the *Globe* for not complying with its first disclosure order (without mentioning that the order had been vacated on appeal). Ruling that the refusal to identify the sources constituted an "ongoing, but imminently avoidable" harm to the participants in the case, the court cited as support for its decision the *Globe's* record as an advocate for public access to governmental records and the fact that a *Globe* employee had died at the hands of Dana-Farber doctors:

> The *Boston Globe*, long a champion of the freedom of information and of unfettered access to public (and even not-so-public) records, has unilaterally and unnecessarily interrupted the free flow of information that may be critical to Ayash. It is ironic that the *Globe* defendants' conduct may serve to effectuate the interests of the very hospital, as well as the hospital's former chief executive, where the *Boston Globe's* own reporter was treated and died. It is not a legacy of which the *Globe* defendants should be proud.
> Slip op. at 5.

Happily, the true legacy of the *Globe's* decision to honor its commitment to confidential sources will not be decided by the Superior Court. To paraphrase Justice Jackson, however, if the protections for confidential sources are as ephemeral as the Superior Court has ruled, then the legacy of *Branzburg* and its progeny is "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J. concurring).

The Boston Globe and Richard Knox are represented by Jonathan M. Albano of Bingham Dana LLP in Boston. Joan Lukey of the Boston firm of Hale and Dorr represents the plaintiff Dr. Lois J. Ayash.

UPDATE: Court Upholds Dismissal of *Dr. Elliot Gross v. New York Times*

On March 22, the Appellate Division of the New York Supreme Court upheld the dismissal of a 15-year old libel case against *The New York Times* brought by a former New York City chief medical examiner. The court ruled that the case brought by Dr. Elliot M. Gross, a public figure, was properly dismissed because he could not raise a triable issue as to whether *The Times* acted with actual malice or reckless disregard for the truth. *Gross v. New York Times Co.*, 2001 N.Y. App. Div. LEXIS 3027 (2001).

In affirming a lower court's 1999 grant of summary judgment for *The Times*, the appellate panel found that the plaintiff could not meet what the court called its "daunting" burden of showing that a jury could find actual malice by a standard of "convincing clarity."

The lawsuit, filed in 1986 seeking $250 million in damages, stemmed from a four-part series of investigative reports published by *The Times* in January and February of 1985. The series, which was based on more than 250 interviews with a variety of professionals, quoted pathologists and others who charged that Dr. Gross had produced autopsy reports that were inaccurate or misleading. Four criminal investigations resulted from the articles, each of which ended with findings of no professional misconduct or criminal wrongdoing by Dr. Gross. *See LDRC LibelLetter*, December 1999 at 11.

The appellate panel consisted of Presiding Judge Joseph P. Sullivan and judges Angela Mazzarelli, Tom Nordelli and Ernst Rosenberger.

The New York Times was represented by Dean Ringel and Janet A. Beer of Cahill, Gordon & Reindel; Steven Lieberman of Rothwell, Figg, Ernst & Manbeck and George Freeman of the *Time's* Legal Department. Leon Segan of Segan, Nemerov & Singer represented Gross.

North Carolina Court of Appeals Adopts Fair Report Privilege

Case of First Impression

Jonathan E. Buchan and John A. Bussian

For the first time, a North Carolina appellate court has ruled that a newspaper has near- absolute protection for publishing information obtained from public government records. On March 20, 2001, the North Carolina Court of Appeals, in *Lacomb v. Jacksonville Daily News Company*,____ S.E.2d ____, 2001 WL 290519, applied the common law fair report privilege for the first time in North Carolina, affirming a trial court's grant of summary judgment dismissing defamation claims brought against *The Jacksonville Daily News*.

The decision was important for several reasons. It was the first time the North Carolina appellate courts had addressed the existence or contours of the fair report privilege. Second, the court held that a "substantially accurate" report is protected, as a matter of law, under the fair report privilege. Third, the Court of Appeals did not suggest that the privilege could be defeated — at summary judgment or otherwise — by evidence that the publication was unfair, made with common law malice, or made for the sole purpose of harming the plaintiff.

The court specifically held that a newspaper is not held to a standard of "absolute accuracy" but is instead subject to the fair report privilege when it conveys to those who read the newspaper "a substantially correct account" of information contained in a warrant.

The Arrest Warrants and the News Article

On November 6, 1998, Daniel William Lacomb and Gail Ann Lacomb were arrested on warrants for arrest issued by a state magistrate which charged each of the Lacombs with two misdemeanor counts of contributing to the delinquency of a minor, one count for each minor victim named in the warrants. The warrants each read that both Lacombs, on September 26, 1998, did unlawfully, willfully and knowingly "cause, encourage and aid [the named juvenile] to commit an act, drinking beer and smoking cigarettes, and engage in a sex act, whereby that juvenile could be adjudicated delinquent."

On November 10, 1998, *The Jacksonville Daily News* published a three-paragraph article about the Lacombs' arrest in the "Blotter" column of the newspaper's local section. The article noted that both had been charged with contributing to the delinquency of a minor and stated: "The two [Lacombs] were both accused of encouraging cigarette smoking; beer drinking and engaging in sex acts involving a 15-year-old boy and a 16-year-old girl." On May 25, 1999, all charges against Daniel Lacomb were dismissed and on the following day, Gail Lacomb pleaded no contest to one count of giving cigarettes to a minor.

Libel Suit Says Misplaced Semi-Colon Made Report Inaccurate

On October 15, 1999, the Lacombs sued *The Jacksonville Daily News*, claiming that the article was false and defamed them because it allegedly accused the Lacombs of "engaging in sex acts with minors." They contended that the actual charge against them was encouraging two minors to have sex with each other and that such a charge materially differed from the charge of engaging in sex

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with a minor. Mr. Lacomb, a Marine, complained that his military superiors had denied him a promotion because of the news article's characterization of the charges.

On November 10, the *Daily News* filed its Answer along with its Motion for Summary Judgment and supporting affidavits. That motion was heard by the trial court on December 6, 1999. At the summary judgment hearing, plaintiffs' counsel objected to the application of the "substantial accuracy" test.

> You talk about substantially accurate," the plaintiffs' lawyer argued, "it's like, it is or it's not. It's like being pregnant, a woman is substantially pregnant, either she's pregnant or she's not. Either they were accused of engaging in a sex act or they weren't. . . .

He also argued that the newspaper's publication of a clarification should be considered evidence that the newspaper itself did not consider the article to be substantially accurate.

And he argued that he was improperly denied any opportunity for discovery from the newspaper prior to the hearing on the motion for summary judgment.

On December 10, 1999, the court entered its Order granting defendants' motion for summary judgment based on the fair report privilege. The trial court found that the publication was a substantially accurate report of the arrest warrants and that any ambiguity contained in the news story arose from the wording of the warrants themselves. Plaintiff appealed solely on the issue of whether the article was substantially accurate. (Plaintiff did not raise the discovery issue on appeal.)

Appeals Court Says Semi-Colon Significant, But No Cigar

The North Carolina Court of Appeals focused on the ambiguity of the language in the arrest warrants and noted that the arrest warrants themselves gave "the potential impression that the sex act may have been a separate allegation from the other acts." While critiquing the newspaper's punctuation efforts — finding that the semicolon in the article's key sentence was "misused" and gave a potentially different meaning than the arrest warrant — the court held that the article did not fail the substantial accuracy test when compared to the warrant. The court specifically held that a newspaper is not held to a standard of "absolute accuracy" but is instead subject to the fair report privilege when it conveys to those who read the newspaper "a substantially correct account" of information contained in a warrant.

Because the Court of Appeals' opinion affirming summary judgment was unanimous, it is not subject to an appeal as of right to the North Carolina Supreme Court. Plaintiffs' only avenue for review is to petition that court for discretionary review.

John A. Bussian and Jonathan E. Buchan are partners with Smith Helms Mulliss & Moore and represent the Jacksonville (N.C.) Daily News. Plaintiffs were represented by Jeffrey S. Miller and John W. Ceruzzi.

Drop in Stock Price Is Not Recoverable Special Damages

Utah's Libel Per Quod Rule Warrants Dismissal of Libel Case

By Charles J. Glasser, Jr.

The United States District Court for the District of Utah dismissed a $100 million libel claim against Bloomberg L.P. on March 28, 2001, looking to Utah's definition of libel *per quod*, and relying upon Utah's law of special damages. *Computerized Thermal Imaging v. Bloomberg L.P.*, No. 1:00CV98K (DAK) (March 28, 2001, D. Utah). The case may be the first time a federal court has held that a drop in stock price is not the type of "realized and liquidated loss" recoverable as special damages.

Articles Probed Company's Stock Placement

In late June of 2000, Bloomberg News reporter David Evans published a series of articles about Computerized Thermal Imaging ("CTI"), a publicly-traded Utah company which had been developing a medical breast examination device using thermography to detect potential tumors. The article detailed how CTI's NASDAQ listing had been delayed, and that several sales deals had collapsed at the last minute. The article included quotes from medical experts questioning whether the technology would ever replace mammography, and most significantly for purposes of the libel suit, the mentioned fact that the company had offered 11 million shares of stock through a private placement at a 72 percent discount. The company is headed by retired General Richard V. Secord, erstwhile Iran-Contra convict and unsuccessful libel plaintiff. (*See, e.g., Secord v. Cockburn*, 747 F. Supp. 779 (D.D.C. 1990)).

The private placement offered 11 million shares for sale at $2.81. On the day of the closing of the private placement, CTI stock was trading at $9.875. Accordingly, Evans reported that the private placement shares "were sold at a 72% discount" to fund "money losing operations." CTI claimed that the shares were instead trading for $3.47 at the time the placement *began*, therefore, the private placement represented a considerably smaller discount. In turn, CTI argued, this statement intentionally implied that "there was something wrong" with the stock, the company, its products, or all three. CTI also argued that while it was true that it had never turned a profit and had burned through more than $30 million in capital, it was a "development stage" company, and thus, it was expected by investors to lose money.

Articles Could Not Have Harmed Company

Bloomberg argued in its motion to dismiss that the SEC records attached to CTI's Complaint proved that CTI had in fact discounted the shares to various degrees, and had offered similar discounts in previous private placements. Therefore, the statements were true, substantially true, or opinion based on disclosed facts. In addition, Bloomberg argued that under Utah's common law, statements which are not defamatory on their face are at worst, libel *per quod*, subject only to recovery for special damages. In turn, Bloomberg argued, the damages claimed by CTI — loss of future contracts and a drop in market capitalization — could not constitute special damages.

Loathe to dismiss a case under Fed R. Civ. P. 12(b)(6) on a factual determination, Judge Kimball assumed the falsity of the statements under traditional dismissal analysis, and found at least some technical basis for viewing the "discount" statement as potentially false. Judge Kimball, a former corporate litigator, noted that the discount rate at the opening of the private placement was in fact lower than that reported by Evans, and thus "a jury would have to determine whether such statements are patently false." *Slip Op. at* 5. The court also disregarded the opinion defense by

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Drop in Stock Price Is Not Recoverable Special Damages

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briefly citing to *Milkovich v. Lorain Journal*, 497 U.S.1 (1990) for its well-known implication-of-fact proposition.

Court Looked to Utah Common Law

Nonetheless, the court paid close attention to Utah common law on defamatory meaning. Under that narrow common law, a statement is only defamatory on its face when charging "criminal conduct, loathsome disease, conduct incompatible with exercise of a lawful business, trade or occupation, or office, or unchastity of a woman." *Baum v. Gilliam*, 667 P.2d 41 (Utah 1983).

The court agreed with defense counsel that if a statement does not subject a plaintiff to such allegations, it is at worst, libel *per quod*. By contrast, it took CTI's complaint more than a dozen paragraphs to explain exactly why the "discount share" and "money losing" statements were defamatory. Bloomberg argued that the need for so much explanation meant that the statements were at worst libel *per quod*.

Agreeing, the court noted that "a publication is not defamatory simply because it is nettlesome or embarrassing to a plaintiff or even because it makes a false statement about a plaintiff," citing *Cox v. Hatch*, 761 P.2d 556 (Utah 1988). The court held that "it is clear that the alleged libelous statements do not constitute libel *per se*" and at the same time, acknowledged the possibility that a jury could find them defamatory. Thus, reasoned the court, the statements were at most libel *per quod*, requiring pleading and proof of special damages. *Slip Op. at* 4.

Drop in Stock Price Is Not Special Damages

CTI claimed that Bloomberg's publications were responsible for a drop in CTI's share price resulting in the "loss" of $100 million of market capitalization, the company's being rejected for listing by NASDAQ, and the cancellation of unspecified future business deals. The Court found instead that these kinds of claims were "only conjecture and do not result in the kind of realized and liquidated losses required under Utah law." *Slip Op. at* 7.

Significantly, this case represents the first time that a federal court has adopted the holding in *Salit v. Ruden, McClosky, Smith, Schuster & Russell*, 742 So.2d 381 (Fla. App. 1999) which held that a drop in stock prices does not represent a "realized loss" to a corporate libel plaintiff, and that because special damages are a "crucial element of the cause of action" the complaint failed to state a cause of action. *Slip Op. at* 7. The court also explained that while diminished market capitalization might impact shareholders' interest, it is not a loss to the issuer of that security.

In its opposition to the motion to dismiss, plaintiff did not seek leave to amend the complaint to include any concrete and provable damages, and instead relied on ancient "slander of title" cases to argue that it should be allowed to amend the complaint to include attorney's fees incurred in "clearing its name" as a result of the alleged libel. The court rejected this request, citing case law holding that plaintiffs' attorneys fees are not "special damages." *Anglo-Medical v. Eli Lilly*, 720 F.Supp. 269 (S.D.N.Y. 1989). "Such a rule," held Judge Kimball, "would eviscerate the requirement that special damages be pleaded and proven, because every plaintiff necessarily incurs attorneys fees in pursuing a lawsuit." *Slip Op. at* 8. Finally, the court held that the request to amend for attorneys fees but not special damages "only bolsters the court's conclusion that the alleged special damages are too speculative and cannot be proven. Thus the libel claim must fail as a matter of law." *Id*.

Bloomberg L.P. was represented by partners Richard L. Klein and Thomas H. Golden and associate Charles Glasser of Willkie Farr & Gallagher in New York City, and Randy L. Dryer of Parsons Behle Latimer in Salt Lake City, Utah. The plaintiff was represented by Robert R. Wallace and Lisa J. Watts of Plant, Wallace, Christensen & Kanell of Salt Lake City and Daniel J. Becka, Carl F. Schoeppl and Andrew H. Kayton of Schoeppl & Burke P.A. of Boca Raton, Florida.

Rare Seventh Circuit Libel Decision Affirms Dismissal of Libel Suit Against *Forbes*

By David P. Sanders and Gregory M. Boyle

In one of its relatively infrequent media libel decisions, the Seventh Circuit has affirmed the dismissal of a libel and false light lawsuit brought by real estate developer Marc Wilkow against *Forbes* magazine, arising out of its October 5, 1998 issue. *Wilkow v. Forbes, Inc.*, 241 F.3d 552 (7th Cir. 2001). The Seventh Circuit opinion was written by Judge Frank Easterbrook. It found that the statements at issue were not provably true or false. Of note, the panel incorporated implicitly, if not explicitly, First Amendment principles into Illinois common law.

[P]rivileges are conduct-regulating, and the state where the defendant engages in the allegedly tortious conduct has a greater interest in privilege issues than the state where the plaintiff resides.

The plaintiff controlled a real estate partnership that owned a Chicago office building and went into bankruptcy. The article dealt with a controversial bankruptcy law issue, known as the "new value corollary" to the absolute priority rule, which the plaintiff's partnership had litigated against its bank lenders in its bankruptcy case. The litigation over that issue spawned three lengthy judicial opinions, and led to the United States Supreme Court, where the case raising the new value issue was pending at the time of the article.

Forbes published a 641-word article describing the key facts from the bankruptcy opinions showing how the partnership had used the new value corollary in the case pending in the Supreme Court to defeat the pro-creditor absolute priority rule. *Forbes* used these facts as the basis to criticize pro-debtor courts, like the lower courts in the bankruptcy case involving the plaintiff, and debtors who rely on the new value corollary, whom *Forbes* described as "unscrupulous business owners" who "rob," "stiff," and "shaft" creditors.

The plaintiff's complaint purported to state claims for libel *per se*, libel *per quod* and false light invasion of privacy. All of his claims were based on the theory that the language used in the article, coupled with its omission of key facts from the record in the bankruptcy proceeding, falsely accused him of having financial problems, of causing his lenders to suffer a loss when their loss was caused by factors unrelated to him, and of portraying him as an unscrupulous businessman.

District Court Grants 12(b)(6)

Forbes filed a Rule 12(b)(6) motion to dismiss. It argued that many of the statements in the article and the omissions upon which the plaintiff relied were not actionable under the fair report privilege because the article was an accurate, albeit brief, summary of the lengthy judicial opinions addressing the litigation over the new value corollary. *Forbes* also argued that the Court should dismiss the action even if the fair report privilege were inapplicable, because the statements upon which the claims were based were not libelous *per se* under the Illinois innocent construction rule; the complaint did not state a *per quod* or false light claim because it did not allege special damages with particularity; and certain of the statements were not actionable under the First Amendment because they could not reasonably be understood as stating provably false facts.

Choice of Law: New York

As a threshold matter, the District Court Judge Blanche Manning was required to resolve whether New York or Illinois law governed the fair report privilege. *Wilkow v. Forbes, Inc.*, 2000 WL 63144 (N.D. Ill. 2000). The choice of law issue was crucial, because the privilege for fair reports under New York law was absolute, while it arguably could be divested by proof of malice under Illinois law.

The District Court agreed with *Forbes*' position

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Rare Seventh Circuit Libel Decision Affirms Dismissal of Libel Suit Against *Forbes*

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that the court must make a choice of law using an issue-by-issue interest analysis rather than selecting one state's law for all issues in the case; employing this approach, the court decided that the law of New York (where *Forbes* prepared the article) governed the privilege issue, even if the state of the plaintiff's residence (Illinois) governed the elements of the plaintiff's claim and remedies, because privileges are conduct-regulating, and the state where the defendant engages in the allegedly tortious conduct has a greater interest in privilege issues than the state where the plaintiff resides. The District Court then dismissed the entire action with prejudice. The court held that the statements in the article about the bankruptcy proceeding upon which the plaintiff based his claims were not actionable under New York's absolute fair report privilege because they were an accurate summary of the key facts from the record relating to the narrow subject upon which *Forbes* chose to report — the dispute over the new value corollary — and that *Forbes* was entitled to omit facts from the record favorable to the plaintiff that did not bear directly on that narrow issue.

That the Seventh Circuit appears to view Illinois common law rules governing defamation claims as incorporating the First Amendment protection appears to be a positive development for cases in Illinois.

The court also held that the portions of the article that were not protected by the fair report privilege were protected by the First Amendment because they were not provably false. The District Court did not reach *Forbes'* other arguments that each count of the complaint failed to state a claim under Illinois common law.

On Appeal: It Wasn't Defamatory

The plaintiff appealed. A unanimous Seventh Circuit panel affirmed, without expressly deciding most of the issues that the parties had briefed and argued, including those relating to whether the statements at issue were libelous *per se*, the fair report privilege, the requirement of special damages pleading for *per quod* claims, the First Amendment opinion doctrine, and the applicability of the First Amendment to false light claims. Instead, the court of appeals held that the statements were not defamatory at all under Illinois common law because they were mere characterizations conveying *Forbes'* opinions on business ethics.

The Court held that:

> in Illinois, a 'statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion' but if it is plain that speaker's expressing a subjective view, an interpretation, a theory, a conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.' [citations omitted]

The court cited to three previous Seventh Circuit cases applying Illinois law, and one Illinois Supreme Court opinion which addressed the application of First Amendment principles, but the Seventh Circuit interpreted them as stating Illinois common law.

That the Seventh Circuit appears to view Illinois common law rules governing defamation claims as incorporating the First Amendment protection appears to be a positive development for cases in Illinois.

Forbes was represented by David P. Sanders, Michael T. Brody and Gregory M. Boyle of the Chicago office of Jenner & Block, LLC, and Tennyson Schad of the office of Norwick & Schad in New York.

The Plaintiff's counsel was Bruce Sperling of Sperling & Spitz in Chicago.

California Supreme Court Grants Review in Renounced O.J. Witness' Libel Case

Application of the Rule of Discovery At Issue

On March 28, the Supreme Court of California granted review of an appellate court decision that reinstated the libel action of a woman claiming she had been defamed by a book analyzing the O.J. Simpson criminal trial. *Shively v. Bozanich, review granted*, 2001 Cal. LEXIS 1565, 2001 Cal. Daily Op. Service 2542 (Cal. Mar. 28, 2001). In a break with what was thought to be established California law, the Court of Appeal held that the "rule of discovery" applies to toll the statute of limitations when a non-media defendant's allegedly libelous statements are published in the mass media. *Shively v. Bozanich*, 85 Cal. App. 4th 363 (2000).

The case was brought by Jill Shively, who sued individuals quoted in Joseph Bosco's book *A Problem of Evidence: How the Prosecution Freed O.J. Simpson*.

Shively testified before a Grand Jury in 1994 that she had seen Simpson leave the crime area shortly after Nicole Brown and Ronald Goldman were killed. When she later sold her story to *Hard Copy*, the prosecutors renounced her allegations. In his book, Bosco quotes Los Angeles Deputy District Attorney Peter Bozanich explaining that the real reason Shively was never called to testify before the Grand Jury had nothing to do with her selling her story. According to Bozanich, his wife, who was also a Deputy District Attorney, had received a call from an ex-boyfriend of Shively, Brian Patrick Clarke, who allegedly said that Shively was a "felony probationer." Bozanich claimed that after he recounted the allegation to the O.J. prosecution team and told them to investigate Shively, which they did, they decided not to call Shively as a witness. *See LDRC LibelLetter*, June 2000 at 17.

Shively sued Bozanich, Clarke, the County of Los Angeles, publisher William Morrow & Company, and the author. The author was never served and the publisher was dismissed from the case.

The trial court dismissed the complaint, ruling that California's one-year statute of limitations for libel and slander claims had expired. In reinstating the case, the appellate court accepted Shively's argument that the statute of limitations had not begun to run either when the comment was first uttered or when the book was published; instead, the discovery rule operated to toll the statute of limitations until the plaintiff knew or should have known that she had been injured. According to the appellate court, the discovery rule operates to toll the statute of limitations in defamation cases as well as when the allegedly defamatory remarks are republished by mass media publications.

At the appeals court, Shively was represented by Monique Shand Hill and Gregory Hill of Hill & Hill of Playa Del Rey, California. Cindy S. Lee of Franscell, Strickland, Roberts & Lawrence in Pasadena represented prosecutor Bozanich and Los Angeles County. Clarke was not represented.

Wisconsin Man Charged With Crime of Making False Statements About Candidates

Invoking a rarely used state election law statute, an Ozaukee County, Wisconsin prosecutor filed criminal misdemeanor charges against a man who criticized town board members running for reelection in a letter to his local newspaper. *Wisconsin v. Lord*, (Wis. Cir. Ct., Ozaukee Cty. 2001). The letter writer, Carlton Lord, was charged under a Wisconsin statute that provides that "No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election." Wis. Stats. §12.05 (2001). The statute provides for up to six months in jail and a $1,000 fine.

Letter Criticized Town Spending

Lord's letter to the editor was published in the *Random Lake Sounder* newspaper on March 23, 2000, two

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Wisconsin Man Charged With Crime of Making False Statements About Candidates

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weeks before elections for the Fredonia Town Board. The letter erroneously charged that board members authorized spending $19,000 to study installing sewer and water service in a neighboring town. Although the incumbent board members were reelected, town officials complained to the local district attorney, Sandy Williams, who acted on their complaint. According to a report in the *Milwaukee Journal Sentinel*, the first hearing in the case is scheduled for April 19th before County Circuit Judge Tom R. Wolfgram. *See* J. Cole, "Prosecution for letter unconstitutional, experts say," *Milwaukee Journal Sentinel*, April 2, 2001 (available online at www.jsonline.com.).

Rarely Used Statute

While this article notes that there has been no successful prosecution under the statute in its 90 year history, and no other prosecution since 1965, a 1993 Wisconsin Supreme Court decision seems to endorse the law as a viable remedy for false statements about political candidates– albeit in dicta. *Tatur v. Solsrud*, 498 N.W.2d 232 (Wis. 1993). In *Tatur*, the court affirmed dismissal of a defamation claim brought by a group of election candidates over allegedly misleading letters and advertisements about their voting records. The court found that the alleged false statements about the candidates' records on spending and tax issues were not defamatory as a matter of law since even if false they were not harmful to reputation. But in response to the plaintiffs' argument that election candidates would be without a remedy for such falsehoods, the court, without noting any of the obvious constitutional problems on the face of the law, stated that §12.05 provides a criminal penalty for false (but not defamatory) statements and that this remedy is exercisable in the discretion of the state's district attorneys and the State Attorney General. Interestingly, prior to filing their civil defamation suit these candidates had sought criminal prosecutions under §12.05 but were refused by their local district attorney and the State Attorney General. *Id*. at 739 n.3.

Prosecutorial Mischief

A former Wisconsin Election Board member describes the statute as an anachronism that simply remains on the books "because no legislator wants to be accused of condoning lying." *See* J. Cole, *supra*. But as this case shows the statute remains a threat to free speech in the hands of an aggressive prosecutor. The prosecutor refused to explain why charges were brought against Lord, but the *Milwaukee Journal Sentinel* notes that this same prosecutor gained notoriety in 1998 for creatively charging a teenager with sexual assault for getting his teenage girlfriend pregnant. *Id.*

A hearing in the case was scheduled for April 19, but was postponed until May 24 at the request of both parties.

Another Criminal Libel Case

This past month a Minnesota man was convicted by a jury of criminal defamation for complaining to the state dentistry board that his neighbor was treating patients while drunk. *Minnesota v. Obermoller. See* R. Franklin, "Old law convicts neighbor for complaining about dentist," *Minnesota Star Tribune*, March 19, 2001 (available online at www.startribune.com). The state dentistry board received anonymous complaints which were later linked to Obermoller. The board investigated and found no basis for the charges. Obermoller is scheduled to be sentenced on April 24, 2001 after which he will be able to file an expected appeal. This case is the first reported use of the state's criminal defamation law, Minnesota Statute §609.765, since 1935. *See also* LDRC *LibelLetter*, March 2001 at 5, reporting on a recent increase in criminal libel cases.

Talk Radio Defamation Case Dismissed on Opinion, Actual Malice Grounds

By Jay Brown

Concluding that the context of the broadcasts was determinative, a Maryland Circuit Court judge has held that on-air condemnation of a local police officer as a "murderer" who "planted evidence" is not actionable because the comments would not be understood by reasonable listeners as statements of fact. (*Cheney v. Lyrad Productions*, No. CAL 00-01312, Md. Cir. Ct. P.G. County, April 6, 2001) In addition, the court ruled that the plaintiff had failed to offer clear and convincing evidence of actual malice, and also held that the so-called "*Falwell* principle" required dismissal of causes of action for invasion of privacy and emotional distress.

Controversy Over Shooting

Archie Elliott III, a 24-year-old African-American, was shot and killed by two police officers. Elliott had been stopped for drunk driving and had been searched, handcuffed, and strapped into the police cruiser with both lap and shoulder belts at the time he was shot. The officers later claimed that, while they were standing outside the cruiser, they saw Elliott twist his arms free and point a gun at them, leading them to open fire, shooting Elliott at least a dozen times. Although Elliott had been wearing only a pair of shorts and sneakers when he was arrested, the officer who searched him claimed to have missed the handgun that the officers said they found inside the cruiser after Elliott was shot.

Various state and federal investigations failed to result in any charges against the officers, and the Elliott family's wrongful death action was dismissed on appeal on qualified immunity grounds. A sharply divided U.S. Court of Appeals for the Fourth Circuit refused to rehear the case *en banc*, with the five dissenting circuit judges joining the trial judge in observing that a jury properly could disbelieve the officers' version of events because it was facially "incredible."

On-the Air Comments

Joe Madison, a well-known African-American activist and talk show host based at a station owned by Radio One, Inc., in the Baltimore-Washington area, began an on-air crusade to reopen the official investigations into Elliott's death. During numerous broadcasts, Madison and his various guests and callers debated and, for the most part, decried the performance of the justice system in the Elliott case. And, at least as later alleged by Officer Wayne Cheney, they repeatedly labeled him a "murderer" who had engaged in "police brutality," "planted evidence" on Elliott's body, and who was "racist" and "illiterate." Another Radio One talk show host, Les Brown, allegedly made similar comments in the course of urging his listeners to join Madison and others in public protests over the Elliott case at the courthouse, statehouse, and elsewhere.

Cheney — but not the second officer — brought an action against Radio One, Madison, Brown, and various others alleging defamation, invasion of privacy and intentional infliction of emotional distress. Defendants moved for summary judgment, arguing that all of the allegedly defamatory statements constituted nonactionable opinion, plaintiff had failed to produce evidence of actual malice, the First Amendment barred the non-defamation causes of action, and plaintiff could not prove the essential elements of his various tag-along claims.

"Urban" Radio Cited

In particular, defendants pointed out that the alleged statements were made (i) in the general context of "urban" or "black talk radio," a subcategory of the larger genre of talk radio especially known by members of its intended audience for heated debate, highly charged rhetoric, and hyperbole; (ii) by hosts well-known for their firebrand activism and strongly-held viewpoints; (iii) regarding a wide-spread and long-running public debate over Elliott's death; and (iv) for the purpose of inducing officials to reopen their investigations. In such circumstances, defendants argued, reasonable members

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Talk Radio Defamation Case Dismissed on Opinion, Actual Malice Grounds

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of Radio One's audience would have understood the alleged statements as expressions of subjective viewpoints, not unvarnished statements of fact. Alternatively, defendants pointed out, the statements constituted pure opinion based on the disclosed or widely available facts in the public record concerning Elliott's death.

The defendants also pointed out the absence of any evidence in the record that they had broadcast the statements with actual malice.

In addition, based on the line of authority starting with *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), defendants argued that the First Amendment prohibited plaintiff from seeking recovery for harm to his reputation from the alleged statements under the guise of his other causes of action.

Judge Jackson held that, viewed in the context of "talk radio" broadly construed, and in light of the public controversy surrounding Elliott's death, reasonable listeners would have understood the alleged statements as reflecting subjective views, not as allegations of fact.

Statements Not Opinion

Officer Cheney responded with two principal arguments: First, he contended, the "official conclusions" purportedly reached by the various state and federal investigating agencies and the Fourth Circuit in the wrongful death action established that he was not culpable in Elliott's death. This, Cheney argued, necessarily rendered the defendants' later statements suggesting that he was culpable obviously false, and that they therefore had been reckless in making them. Second, Cheney argued that defendants' prolonged and strenuous advocacy of their views, coupled with their failure to disclose in each broadcast "all" of the facts surrounding Elliott's death, rendered their comments actionable, not protected expressions of opinion.

Ruling from the bench after oral argument, Judge Dwight Jackson rejected Cheney's contentions. Judge Jackson held that, viewed in the context of "talk radio" broadly construed, and in light of the public controversy surrounding Elliott's death, reasonable listeners would have understood the alleged statements as reflecting subjective views, not as allegations of fact. In particular, he rejected Cheney's argument that, because defendants had advocated that their audience adopt their view of events, their statements should be deemed ones of fact. As Judge Jackson pointed out, the defendants were entitled to try to persuade the public that their own version of the "facts" was correct, so long as the audience members would have understood that what the defendants were presenting was, indeed, their own subjective view of what likely had happened to Elliott. In addition, Judge Jackson held that Officer Cheney, as a public official, was required to come forward with clear and convincing evidence of actual malice to defeat defendants' motion and that he had failed to do so. Finally, in what appears to be its first application in a Maryland court, Judge Jackson ruled that the "*Falwell* principle" precluded Cheney's other causes of action in light of his inability to overcome the First Amendment-based limitations on his defamation claim.

To date, it is unclear whether Judge Jackson will issue a written opinion or simply incorporate the comments he made from the bench into his order dismissing the case.

Jay Ward Brown and Audrey Billingsley, of Levine Sullivan & Koch, L.L.P. in Washington, DC, represented the defendants in this case. Plaintiff was represented by Clinton Allgair of Joel Katz & Assocs. in Annapolis, Md.

Texas Federal Court Dismisses Internet Libel Suit for Lack of Personal Jurisdiction

By John T. Gerhart

Last month, a federal district court in Dallas, Texas dismissed for lack of personal jurisdiction a libel suit based upon an Internet posting on a passive website. The suit was brought by a Dallas resident against a Harvard medical school professor and Columbia University. *Revell v. LiDov*, No. 3:00-CV-1268-R 2001 U.S. Dist. LEXIS 3133 (N.D. Tex. Mar. 20, 2001).

The plaintiff, Oliver "Buck" Revell, is a former senior FBI official. The suit related to an article Dr. Hart LiDov, a Massachusetts resident, authored and posted on a website bulletin board maintained by Columbia University's Journalism Review in New York. The article concerned the 1988 bombing of Pan American World Airways flight 103 over Lockerbie, Scotland and set forth LiDov's opinions about the actions of Revell and other high-ranking members of the United States government.

Motion Asserts Lack of Jurisdiction

In his complaint, Revell asserted the Dallas federal court had specific jurisdiction over LiDov and Columbia University based solely on the posting of the article on the Internet. LiDov and Columbia University each moved to dismiss the suit for lack of personal jurisdiction. Defendants cited numerous Internet jurisdiction cases, including *Mink v. AAAA Development LLC*, 190 F.3d 333 (5th Cir. 1999), *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790 (W.D. Tenn. 2000), *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999), *Mallinckrodt Medical, Inc. v. Sonus Pharmaceuticals, Inc.*, 989 F. Supp. 265 (D.D.C. 1998), and *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 925 F. Supp. 1119 (W.D. Pa. 1997), in support of their position that the mere act of posting an article on a "passive" Internet website is insufficient contact with Texas for a court to exercise specific jurisdiction.

In response, Revell argued the "effects test" set forth by the United States Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984), and *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), dictated that a court in Revell's state of residence could exercise specific jurisdiction over LiDov and Columbia University.

Not Truly Interactive

District Court Chief Judge Jerry Buchmeyer disagreed with Revell and granted the motions to dismiss. The court applied the "sliding scale" test first set forth by a Pennsylvania federal court in *Zippo* and adopted by the Fifth Circuit Court of Appeals in *Mink* to evaluate the minimum contacts that may be established by Internet activities. The court concluded "this case fits perfectly into the passive website extreme of the *Zippo* sliding scale." Although parties could post articles and comments on the website, the court found the website was not "truly interactive in that the site did not send anything back — there is no direct contact between the website, the people who send the information, or the people who read it. Once the information is posted, the site is completely passive . . . ."

The court applied the "sliding scale" test first set forth by a Pennsylvania federal court in Zippo and adopted by the Fifth Circuit Court of Appeals in Mink.

The court then looked to *Bailey* and *Barrett*, two defamation cases from other circuits involving passive websites, which ruled the mere act by a defendant of posting alleged defamatory statements on a passive website does not establish that the defendant possessed the intent to target residents of the forum state. As noted in *Barrett*, to hold otherwise "would subject anyone who posted information on the Web to nationwide jurisdiction." The district court concluded:

> [t]he reasoning by the courts in *Barrett* and *Bailey* applies equally to the case at bar. The article

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Texas Federal Court Dismisses Internet Libel Suit for Lack of Personal Jurisdiction

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about Plaintiff was posted on Columbia University's website where it could be viewed by anyone in the world who had Internet access. If anyone in Texas happened to read the article, such an occurrence would be "merely fortuitous" and could not provide grounds for personal jurisdiction absent any other contacts between the Defendants and this forum. The Defendants, who did not even know where the Plaintiff resided, could not have anticipated "being haled into court" in Texas just because one of the people mentioned in the article happened to reside here.

No Texas Contacts Shown

The court also mentioned two other factors that cautioned against the exercise of jurisdiction over LiDov and Columbia University. First, there was no evidence that any individuals in Texas ever read LiDov's article. Second, like the plaintiff in *Barrett*, Revell himself highlighted his national and international reputation. The article criticized Revell in his role as the Associate Deputy Director for the FBI and had nothing to do with the Revell's position as a resident, community member, or community leader in the state of Texas.

Finally, the court refuted Revell's reliance on *Calder* and *Keeton* and found the cases distinguishable "because they concerned printed media that was knowingly and purposefully sold and circulated in the forums at issue." It also noted the courts in *Bailey* and *Barrett* had rejected similar attempts to apply *Calder* and *Keeton* to defamatory statements posted on passive websites.

Paul Watler and John Gerhart of Jenkens & Gilchrist in Dallas, Texas represented Defendant Hart LiDov. Chip Babcock and Kimberly Chastain of Jackson Walker in Dallas, Texas represented Defendant Columbia University. Joe Tooley and Brad Goodwin of Tooley & Voss in Dallas, Texas represented Plaintiff Oliver Revell.

Utah Passes Anti-SLAPP Legislation

After failed attempts in 1999 and 2000 to pass anti-SLAPP legislation, the Utah Legislature finally achieved enough votes to pass an anti-SLAPP statute through both the state Senate and the House on February 28. Governor Mike Leavitt signed the bill into law on March 15.

House Bill 112, sponsored by Rep. Becky Lockhart, R-Provo, is similar to laws passed in other states, and will be available to defendants who believe that lawsuits were filed primarily to harass them in their participation in the process of government. The bill, which goes into effect April 30, stays all discovery upon the plaintiff's motion for judgment on the pleadings, allowing the judge to rule early in the case whether there was clear and convincing evidence that the purpose of the suit was to stifle the defendants' First Amendment rights. If the judge finds the case to be a SLAPP action, the judge could dismiss the suit, ordering the plaintiff to pay costs, attorney's fees, and other compensatory damages.

At least 11 other states have also adopted anti-SLAPP statutes. Several have recently passed anti-SLAPP laws, and others are currently considering them.

Pennsylvania's anti-SLAPP provision, signed into law in December 2000, is more restricted in scope than traditional anti-SLAPP laws. Rather than protecting any type of governmental participation, Pennsylvania's statute only protects those who petition or speak regarding "an issue related to enforcement or implementation of [an] environmental law or regulation." In addition, the Pennsylvania legislation specified that certain types of speech and action would not fall under the provision: conduct determined to be "immaterial" or "irrelevant" to the implementation of the environmental law or regulation, communications that are either knowingly false or made with reckless disregard for the truth, or communications that amount to an abuse of process.

Last June, Florida passed a weakened anti-SLAPP law. While Pennsylvania's law is restricted by the topic that receives protection, Florida's law only protects defendants who are sued by the government. Defendants sued by other plaintiffs receive no immunity under Florida law.

Colorado, New Mexico, and Oregon are currently considering anti-SLAPP legislation.

Online Defamation Law Abroad: Developments in the United Kingdom

By Patrick J. Carome and C. Colin Rushing

Internet Service Providers ("ISPs") in the United States enjoy broad immunity from civil liability for the tortious online speech of their subscribers or other third parties, but the situation in Europe is much less certain. The European Union's E-Commerce Directive, which member states must comply with by January 2002, mandates a regime that is similar to United States law in some respects, but very different in others. However, because the details of that Directive will be left in large part to the member states themselves, ISPs may have an opportunity to help shape any future implementing legislation. Toward that end, a leading industry group in the United Kingdom, the Internet Service Providers Association ("ISPA"), recently held a conference to discuss how the U.K. might comply with the E-Commerce Directive while at the same time providing a favorable regime for ISP liability.

ISPs may have an opportunity to help shape any future implementing legislation for the European Union's E-Commerce Directive

ISP Liability in the United States

In the United States, state and federal courts continue to recognize that a federal statute, 47 U.S.C. § 230, generally prevents suits against ISPs based on their subscribers' illegal or defamatory online speech — even when the ISP allegedly was on notice of the speech at issue. Beginning with the Fourth Circuit in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), appellate courts have consistently recognized that Section 230 actually ensures *greater* protection from harmful communications than would a notice-based liability regime, while at the same time preserving an environment that fosters vibrant speech. Most recently, the Supreme Court of Florida held that AOL could not be sued for allegedly failing to stop one of its subscribers from advertising child pornography in AOL chat rooms, even when AOL was allegedly notified about the conduct. *See Doe v. America Online, Inc.*, No. SC94355 (Fla. March 8, 2001).

Without the threat of tort liability for their users' speech, ISPs do not have to adopt stringent speech codes for their services or regularly monitor their users' activities out of fear that the service provider will be held liable for a user's online speech. And, by removing the threat of notice-based liability, Section 230 encourages ISPs to establish whatever protections they — and their users — think is appropriate without a risk that such protections will create the potential for liability by putting service providers on notice of allegedly harmful speech.

ISP Liability in the United Kingdom

The United Kingdom has not, to date, followed the lead of the United States in this regard. In *Godfrey v. Demon Internet Ltd.*, a highly-publicized case discussed in these pages before, *see* Carome & Heymann, *Recent Developments in Online Defamation Law*, LDRC *LibelLetter* (June 2000) at 15, a professor demanded that a U.K. ISP remove a defamatory third-party post available on its Usenet news server, and then sued the ISP when it failed to do so. *See Laurence Godfrey v. Demon Internet Ltd.,* No.1998-G-No.3 (High Court of Justice, Queen's Bench Division, 1999) available at <www.haledoor.com/internet_law/godfrey_demon.html>.

The *Godfrey* court, applying the Defamation Act of 1996, determined that Demon Internet could be liable for the defamatory post because it did not remove the post upon notification. In particular, the *Godfrey* court rejected the cases in the United States holding that ISPs enjoyed qualified immunity from third party material under common law, and also concluded that Parliament did not intend the Defamation Act of 1996 to provide the same protection that Congress intended with Section 230. One year later, Demon settled the case, agreeing to pay more than $24,000 in damages and $320,000 in costs.

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The impact of this decision and, in particular, the settlement that followed, was immediate. According to one report, the March 2000 settlement triggered a "flood" of user complaints, so that "[i]n one week in early April Demon received more complaints than in the entire previous history of the company." Richard Clayton, *Judge and Jury?: How "Notice & Takedown" gives ISPs an unwanted role in applying the Law to the Internet* (July 26, 2000), available at <http://www.cl.cam.ac.uk/~rnc1/>.

A rule that requires an ISP to respond to, and judge the merits of, such complaints could impose a crippling burden on ISPs. The *Godfrey* rule also encourages over-enforcement of speech laws, because ISPs may have no way of knowing whether a particular post will be held to be defamatory and may choose to err on the side of removal. Finally, the *Godfrey* rule encourages ISPs to limit their capacity to receive customer complaints, to avoid the risk that a failure to act on any particular notice will lead to ISP liability.

The EU E-Commerce Directive

Now, U.K. ISPs have an opportunity to seek a regime that takes into account the practical burdens and unintended consequences of the *Godfrey* rule. The recently adopted EU E-Commerce Directive requires member states, including the U.K., to adopt laws limiting ISP liability in certain key respects. Under Article 12 of the Directive, a member state may not impose liability on an ISP for tortious or illegal information when the ISP is responsible only for the "transmission" of the information or "the provision of access to a communication network." Similarly, under Article 13 of the Directive, an ISP may not be held liable for information that it merely stores in its cache "for the sole purpose of making more efficient the information's onward transmission."

However, under Article 14, an ISP that hosts illegal or defamatory third-party content on its own network "at the request of a recipient of the service" is free from liability for that content only if the following conditions are met:

(a) [T]he provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or,

(b) [T]he provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.Article 15, on the other hand, establishes that ISPs may not be charged with a duty to "monitor the information which they transmit or store." Thus, under the framework required by the EU E-Commerce Directive, it appears that an ISP that hosts defamatory content may be liable for illegal material once it learns about that information, for example upon notification, and it may escape liability for that content only if it quickly removes the material from its network.

"Notice & Take-Down" Requirements Key

The Directive's "notice and takedown" requirement appears at first blush to mimic the holding in *Godfrey*, in which knowledge of the post was imputed to the ISP because it received a faxed notification from the complainant himself. However, EU member states may have significant leeway to determine what constitutes adequate "notice" requiring an immediate "takedown" of the material.

A leading U.K. trade association, the Internet Service Providers Association ("ISPA"), recently sponsored a forum to address the question of ISP liability under the E-Commerce Directive. In that conference, participants identified alternatives to the *Godfrey* rule that would nonetheless constitute a "notice and takedown" regime. For example, ISPs could be required to take down material only after a court determined that the information was, in fact, illegal or defamatory. In that event, the court's order would constitute the only valid notice of "illegal activity or information." Under another approach, the ISP would grant every properly-executed request to remove material, and it would also grant every properly-executed request to replace the removed material. After this cycle, if neither the author nor the complainant concedes, the parties — and not the ISP — would go to court to resolve the dispute. The ISP would have no discretion throughout the entire procedure, and no

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responsibility once the matter is taken to court.

It remains to be seen, however, whether any notice-and-takedown regime for defamatory or otherwise harmful content can avoid the potentially huge costs, risk of overenforcement, and disincentives to establish self-regulatory regimes that Section 230 was designed to avoid.

Conclusion

In short, ISPs in the U.S. remain largely secure from liability for third-party content, but the rules of ISP liability in Europe remain unsettled. In particular, ISPs in the U.K. continue to operate under the risk that courts will hold them to notice-based liability for defamatory or otherwise allegedly harmful information on their services. The recent E-Commerce Directive provides an opportunity for ISPs to ask Parliament to revisit the rule in *Godfrey* in order to establish a regime that takes into account the realities of operating an ISP and encourages the continued development of online media.

Patrick J. Carome is a partner and C. Colin Rushing is an associate at Wilmer, Cutler & Pickering in Wash-

Newly Published: *Media Law & Human Rights* by Andrew Nicol QC, Gavin Millar QC & Andrew Sharland (Blackstone Press Ltd. 2001).

This recently published book by three media law specialist barristers reviews European Court media law decisions to analyze how this jurisprudence will impact UK media law following the incorporation of the European Convention on Human Rights into UK law. The book offers a comprehensive overview of the Convention's defamation and privacy provisions as applied to defamation, privacy and confidentiality, hate speech, obscenity, commercial speech and other press laws. More information and ordering details are available through the publisher's web site www.blackstonepress.com

Foreign Cases Highlight Potential Hyperlink Liabilities

By Mark Sableman

A recent German decision holding certain Internet hyperlinks illegal — and several other foreign cases grappling with creative claims against linking — hold interest for U.S. lawyers who advise web publishers on the legality of linking. These foreign cases are a reminder that there is no universal treatment for hyperlinks and other standard Internet associational techniques, like framing. In fact, these techniques may raise potential legal liabilities, at least where one business links to a competitor's website, or to websites containing illegal content.

German Courts Bar Links

The German decision, issued in late January, holds the greatest interest, because it adopted a novel theory against linking, based on the European Union database directive. Since the United States has been considering similar database legislation, this theory could spread to this country.

The plaintiff was a Norwegian-based company, StepStone, which is engaged in online recruitment. It sued OFiR.com, A.S., a smaller Danish-based competitor, in Germany, protesting OFiR's deep links to StepStone's site. Deep links are links that bypass the target website's home page, and take one directly to subsidiary pages. On StepStone's site, those subsidiary pages contained StepStone's online job advertisements.

News accounts of the case indicate that StepStone raised a series of arguments against OFiR's deep links, many similar to arguments that have been made in deep-linking cases in the United States. One is that the deep links, by bypassing StepStone's home page, caused StepStone to lose viewership of its home page advertisements. No U.S. court has yet found this argument persuasive, and apparently the German court did not adopt it either.

But StepStone also made a kind of "passing off" claim, with a European twist. It claimed that OFiR passed off StepStone's advertisements as its own. Tra-

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ditional "passing off" under our law focuses on consumer understanding and would require some proof that consumers were misled into believing that StepStone's ads were really OFiR's ads.

StepStone, however, sued under the European Union Database Directive and its German implementing legislation, claiming that OFiR had included StepStone's ads in its claims about the advertisements accessible from the OFiR site. Thus, StepStone claimed, OFiR had used StepStone's data without authorization, and since the EU Database Directive prohibits such substantial use of another's protected database, that use constituted a violation of StepStone's database rights. The issue was simply use of another's data, not likelihood of consumer misunderstanding.

[T]here is no universal treatment for hyperlinks and other standard Internet associational techniques, like framing.

The EU Database Directive broadly defines "database" as "a collection of works, data or other independent materials arranged in a systematic or methodical way," and even before the StepStone decision, some commentators had predicted that information available on a page on the world wide web would qualify as a protected "database." In the StepStone case, the German court concluded that StepStone's ads were indeed protected as a database, and granted an injunction against the OFiR hyperlinks.

As of now, the theory of the StepStone decision would not work in the United States since our law does not recognize database protection, and the U.S. Supreme Court's 1990 decision in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991), held that databases are not protected under U.S. copyright law. However, Congress has been considering database protection for several years. In addition to lobbying by the database industry, Congress may come under pressure because the EU directive contains a reciprocity clause, meaning that U.S. companies will not get protection under the EU database law unless we enact similar protection here. So far database bills have been tied up in Congress because of the differing interests of database owners, like legal publishers and telephone companies, and database users, like financial and media analysts and Internet services.

Dutch Courts Allow Newspaper Headline Links

Another European decision of interest is a Dutch decision last August, upholding the right of a news headline site, Kranten.com, to list the headlines of various newspapers, and to link directly to the full-text of the articles on the newspapers' websites. The plaintiffs, a group of Dutch publishers, raised the traditional anti-deep-linking arguments that such deep links cost the publishers in lost advertising revenue at their website front doors. They also raised the database argument. In response, the defendant stressed that hyperlinks are the functional core of the world wide web, and that deep links are common on the Internet, and are often displayed in search engine results.

The court in Rotterdam rejected the publishers' challenge, holding that the publishers could have prevented the deep links by technical means, that the publishers' home pages were still accessible, and that the publishers probably suffered no real damage, given the increased traffic to the publishers' site due to Kranten.com's links. Also, the publishers had other alternatives for their advertising, including placing the ads next to the news articles themselves.

The court found no copyright violation in the use of the newspapers' headlines in the hyperlinks, essentially because of fair use and generally accepted practices. In this respect the decision differed from a preliminary ruling in the famous *Shetland News* case in Scotland in 1996, the first case to assert liability based on an Internet hyperlink. The ruling in the

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Foreign Cases Highlight Potential Hyperlink Liabilities

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Shetland News case, holding that use of a news headline as a hyperlink constituted copyright infringement, was widely criticized.

On the database issue, the Dutch court found that the data used by Kranten.com — a list of headlines — did not technically qualify under the database law, since the newspapers had made no "substantial investment" in money or effort in developing that list of headlines, as opposed to the typical time, effort and energy entailed in developing and arranging the contents of a typical database. (Under the EU directive, databases are protected only if the producer of the database made a qualitatively and/or quantitatively substantial investment in creating them.) Thus, the Dutch decision recognized the database law as a possible ground for an anti-deep-linking claim, but rejected that claim solely on the factual grounds that the information assembly involved did not qualify as a protected "database."

The court in Rotterdam rejected the publishers' challenge, holding that the publishers could have prevented the deep links by technical means, that the publishers' home pages were still accessible, and that the publishers probably suffered no real damage, given the increased traffic to the publishers' site.

Other Linking Decisions

Other foreign decisions have found linking violations in other contexts. Decisions in Belgium and Japan have reportedly found liability for those who provided links to illegal content such as illegal software, obscene material, or copyright infringement. In India, a search engine operator was criminally charged with making available links to obscene material. And a Swedish decision involving links to MP3 music files recognized the possibility of hyperlink liabilities.

In the United States, two courts have found liability for linking to illegal content, although both in somewhat narrow and special circumstances: *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F.Supp. 2d 1290 (D. Utah 1999) (ordering defendants to remove links to other sites containing the copyrighted material that they had previously been ordered to remove from their site) and *Universal City Studios, Inc., v. Reimerdes*, 111 F.Supp.2d 294 (S.D.N.Y. 2000) (enjoining defendants from posting DVD-decryption program, and from linking to other sites containing the program).

Additionally, a case filed in England in January raises the issue of framing as a "passing off" violation. In the case, Haymarket, a United Kingdom publisher, sued Burmah Castrol PLC, a BP Amoco subsidiary, in January over a website that framed two of Haymarket's websites within a Castrol-branded border. The case thus appears quite similar to the claims brought four years ago by several U.S. newspapers against Total News, operator of a website that indexed news sites, and imposed its own advertising frame over any news site selected by the viewer. Total News settled with the publishers, and agreed not to frame their sites, before the court made any rulings on the plaintiffs' framing claims.

Just as the Internet reaches around the world, so also Internet policy and precedent can come from anywhere in the world. The recent foreign cases deserve attention from both Internet lawyers interested in the laws of Internet linking, and media and other web publishers who are concerned about the rights and restrictions on using Internet linking tools.

Mark Sableman is a partner with Thompson Coburn LLP in St. Louis, Missouri. He is the author of "Link Law: The Emerging Law of Internet Hyperlinks," published in 1999 by Communication Law and Policy and the LDRC Cyberspace Law Project.

In the Matter of Hybrid Films, Inc. v. James Combest

By Cameron Stracher

On March 12, 2001, New York's Appellate Division, Second Department, held that the media does not relinquish its right to contest the disclosure of outtakes once it has submitted those outtakes for *in camera* inspection. *In the Matter of Hybrid Films, Inc. v. James Combest,* 721 NYS. 2d (N.Y. App. Div. Mar. 13, 2001).

In *Hybrid*, petitioner documentary filmmaker filed a motion to quash a subpoena for outtakes made in connection with the filming of a documentary about the Brooklyn North Homicide Task Force. The Supreme Court (Juviler, J.) ordered that Hybrid submit certain portions of the outtakes, under seal, for possible *in camera* review should it become necessary during the course of the underlying criminal trial. The matter was then transferred to Justice Knipel, who ordered the outtakes released to the parties. "[The outtakes] are directly relevant," Knipel ruled. "It's [sic] defendant talking to the police and apparently others." Judge Knipel held that because Hybrid had submitted the tapes for possible *in camera* inspection, Hybrid's motion to quash "is moot at this point in light of the fact [the outtakes] have already been turned over to the Court." Hybrid moved, via a Order to Show Cause, to appeal the court's order and to stay the release of the outtakes.

The Appellate Division granted an emergency stay, and also stayed the criminal trial until it could hear oral argument on March 11. The next day, it reversed the court's order. It held that Justice Knipel effectively denied Hybrid's motion to quash without consideration of the three-part test set forth in New York's Shield Law, N.Y. Civ. Rights Law § 79-h(c). The Appellate Division ordered that the Supreme Court maintain possession of the outtakes until such time, if any, that an issue concerning their release arose at trial. At that time, the appellate court ruled, the trial court should hold a hearing to determine whether respondent Combest could meet his burden under the Shield Law. The Appellate Division rejected Justice Knipel's contention that Hybrid had waived its right to object to the disclosure because it produced the outtakes under seal and objected to their disclosure.

On March 15, following testimony from the police detective who interrogated defendant, the Supreme Court heard argument on the motion to quash, and found that defendant had failed to meet his burden under the Shield Law.

Cameron Stracher, of Levine, Sullivan & Koch, L.L.P., represented Hybrid Films. Bruce Yerman of Cromwell & Yerman represented Combest.

Media Wins Rare Victory in "Ride-Along" Case

By Nathan Siegel

In the past few years, "ride-along" cases have produced a seemingly endless wave of bad news for media defendants. However, Philadelphia station WPVI-TV recently bucked that trend when a federal judge granted it summary judgment in *Robinson v. City of Philadelphia, et.al.*, Civ. No. 99-1158 (E.D. Pa., March 28, 2001). The case presented some novel issues about the consequences of a ride-along onto a crime scene and onto commercial property.

The Ride-Along

The case arose out of a police raid on a suspected "chop shop" in Philadelphia. On March 26, 1997, police entered an auto parts and repair shop as part of a routine inspection. After police identified several allegedly stolen cars and parts, they treated the premises as a crime scene. Consequently, police seized the entire premises, closed the business and ejected the owners (a married couple) and their employees for more than 24 hours. During that period, police obtained a search warrant, and conducted a search.

Several hours after police seized the premises, an officer called WPVI-TV anchor/reporter Rob Jennings, and invited him to come to the location the following morning. The following morning, Jennings and a cameraman met a police officer in front of the shop. The officer led Jennings and the cameraman down a gated driveway, into an outdoor junkyard behind the shop, where police were sorting through vehicle parts. Cinderblock walls surrounded the junkyard. Jennings and the videographer spent about twenty minutes interviewing the officer and videotaping police searching the yard. They never entered the indoor portion of the business.

The owners were not on the premises when Jennings entered the yard, and were not permitted to return until the police search was completed. The owners were never subsequently arrested or charged with any crime.

A month later, about fifteen seconds of footage from the ride-along was used in a two-part WPVI special news report on stolen cars. The footage included a police officer describing a car door with a missing identification number, and some brief shots of police searching the junkyard.

The Lawsuit

In March 1999, the shop owners sued Philadelphia police and WPVI. As to WPVI, they alleged that the news story defamed them, and that the WPVI crew trespassed, violated their Fourth Amendment rights, and invaded their privacy.

Early in the case, the claims for defamation and common-law invasion of privacy were dismissed, because they were time-barred. *Robinson v. City of Philadelphia, et.al.*, Civ. No. 99-1158 (E.D.Pa., July 22, 1999). Following discovery, Judge Petrese Tucker granted WPVI's motion for summary judgment on the remaining "ride-along" claims for trespass and civil rights violations. The Court agreed with WPVI that this case was factually distinguishable from other "ride-along" cases like *Berger v. Hanlon*, 188 F. 3d 1155 (9th Cir. 1999), for three primary reasons: (1) the premises entered by the media was outdoor, commercial property, (2) police had seized the premises and ejected the owners the day before the media arrived, and (3) the degree of prior coordination between the media and law enforcement was minimal.

Trespass, No Broadcast Based Damages Allowed

Federal District Judge Petrese Tucker found that Jennings' entry was not a trespass, for two independent reasons. First, the Court found that because police had seized actual, exclusive possession of the property from the owners, WPVI was entitled to rely on police consent to enter it. If in fact police wrongfully seized possession, the Court held, the

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Media Wins Rare Victory in "Ride-Along" Case

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plaintiffs' recourse lay in their claims against the police.

Alternatively, the Court found that even if Jennings and the videographer committed a technically unauthorized entry, the plaintiffs had suffered no cognizable damages from their presence on the property. The plaintiffs admitted in their depositions that the only actual damage allegedly attributable to WPVI (as opposed to the police) resulted from the news story, not the entry itself. The Court concluded broadcast damages were not available because the plaintiffs should not be able to "to use the law of trespass as an end-run around" its earlier ruling dismissing their defamation claim. This holding represents the first time any court has explicitly concluded that broadcast damages should not be available through a ride-along trespass claim.

The Court acknowledged that the ordinary rule in Pennsylvania law is that proof of actual damage is not a necessary element of a claim for trespass. Generally, nominal damages may always be awarded for any unauthorized entry. However, it concluded that the particular circumstances of this case warranted an exception to that rule. The Court noted that another media trespass case, *Lal v. CBS, Inc.*, 551 F.Supp. 356 (E.D. Pa. 1982), *aff'd*, 726 F.2d 97 (3rd Cir. 1984), also recognized a similar exception. In *Lal*, the owner of a rented apartment sued a local Philadelphia television reporter after she entered the apartment, with the tenant's permission. *Lal* held that even if the tenant was not authorized to consent to the media's entry, under general principles of landlord-tenant law "an owner who is not in possession cannot maintain an action for trespass absent an injury to his reversion." Id. at 363. Because no actual damage to the value of the property was alleged in *Lal*, the landlord's trespass claim was dismissed. Judge Tucker found that the same principle should apply in this case.

Civil Rights Violation

Next, Judge Tucker found that WPVI was not jointly liable with police for any alleged violations of the Fourth Amendment. First, she concluded that Jennings and the cameraman were not state actors for purposes of a claim arising under 42 U.S.C. § 1983. Without much explanation, she found that the facts alleged did not "demonstrate the level of public-private coordination necessary to make WPVI-TV a state actor."

In addition, she found that even if WPVI had become a state actor, its employees' entry probably did not violate the plaintiffs' Fourth Amendment rights. Judge Tucker noted that outdoor commercial premises carry with them reduced expectations of privacy, and the plaintiffs testified they did not feel a sense of privacy in their junkyard. Taken together, these facts suggest no infringement upon their Fourth Amendment rights, or "unreasonable" violations of the search warrant.

The plaintiffs' claims against the police officers that conducted the search remain ripe for trial.

While the result in *Robinson v. City of Philadelphia* is unusual in the current climate, it is consistent with an implicit distinction evident in prior caselaw. Courts have consistently found that ride-alongs into private residences or home businesses constitute a trespass, and occasionally hold the media liable for civil rights violations as well. However, no reported decision to date has found a ride-along onto a crime or accident scene to be a trespass. While few such cases have been litigated, the only two prior reported cases dealing with crime or accident scenes reached the same result as *Robinson*, albeit for different reasons. *See Fletcher v. Florida Publishing Co.*, 340 So.2d 914 (Fla. 1976); *Wood v. Fort Dodge Messenger*, 13 Media L. Rptr. 1610 (BNA) (Iowa Dist. Ct. 1986). Taken together, these cases provide a possible basis for a defense of future claims arising out of crime scene ride-alongs.

Nathan Siegel of ABC, Inc. represented WPVI-TV, with Frederick Herold and Thomas Kenyon of Dechert in Philadelphia. Margaret Boyce of Philadelphia represented the plaintiffs

Florida Appeals Court Affirms Dismissal of "Tortious Newsgathering" Claim

Rejects Intentional Interference Claim Over Receipt of Confidential Information

By Allison Steele

In *Seminole Tribe of Florida v. Times Publishing Company*, 2001 WL 273828 (Fla. Dist. Ct. Ap. March 21, 2001), Florida's Fourth District Court of Appeal affirmed a trial court order dismissing for failure to state a cause of action the Seminole Tribe of Florida's "tortious newsgathering" case against the *St. Petersburg Times* and two of its staff writers. The opinion is one of a few in the nation addressing a journalist's liability for the common law tort of "intentional interference with advantageous business relationships" when he or she convinces a source to provide confidential documents or information for a news story.

[T]he court held the Tribe's allegations failed both to satisfy the traditional common law elements of the tort and to surmount the First Amendment's protections for "routine newsgathering techniques.

Focusing on the public interest in the subject matter of the *Times'* news stories and absence of deceit by the journalists in obtaining information, the court held the Tribe's allegations failed both to satisfy the traditional common law elements of the tort and to surmount the First Amendment's protections for "routine newsgathering techniques." The court "question[ed] whether this common law cause of action could ever be stretched to cover a case involving news gathering and publication."

"Classified Information"

The Tribe's central allegations were that *Times* reporters Brad Goldstein and Jeff Testerman convinced "employees and agents of the Tribe" (unidentified in the Tribe's pleadings) to hand over highly confidential — indeed, according to the Tribe, "classified"— documents about the Tribe's income, expenditures, and business ventures. The Tribe reasoned that because these unidentified sources were bound to the Tribe by "fiduciary duties" not to reveal information, and because the journalists induced them to breach these duties, the *Times* and its staff writers were liable for the tort of "intentional interference with advantageous business relationships" and therefore for damages that included public embarrassment and loss of better bargaining positions in the Tribe's dealings with potential business partners. A particularly disturbing aspect of the original and amended complaint was the allegation that the *Times* and its reporters were motivated by "anti-Indian racism" in pursuing their investigation of the Tribe's gambling establishments and use of federal and state government housing and education money.

The Florida circuit (trial) court in Broward County, Hon. J. Leonard Fleet presiding, had dismissed the original complaint in part because the Tribe had failed to allege to his satisfaction actual damages the Tribe was claiming. He dismissed the first amended complaint with prejudice primarily because the Tribe had not pleaded facts supporting the existence of "fiduciary duties" between the unnamed disloyal "employees and agents" and the Tribe.

Central to the Tribe's legal theory were the United States Supreme Court's remarks in *Branzburg v. Hayes*, 408 U.S. 665 (1972), to the effect that the First Amendment does not insulate "newsmen" from liability for crimes or torts committed in the course of newsgathering. The Tribe sought to liken its case to *Food Lion*, where, it claimed, the newsgathering itself was found to be tortious.

However, a three-judge panel of the Florida

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Florida Appeals Court Affirms Dismissal of "Tortious Newsgathering" Claim

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Fourth District Court of Appeal (Hon. Robert M. Gross, Hon. W. Matthew Stevenson, and Hon. John W. Dell), focused instead on the portion of the *Branzburg* opinion for which that case is better known: "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681.

No Tort, Not Racist

Judge Gross's opinion reasoned that the Tribe's allegations did not fit the traditional elements of the interference tort in that the journalists did not induce anyone to leave an employment relationship with the Tribe or try to influence people not to "deal with" it. Moreover, the court reasoned, the journalists did not resort to methods tortious in themselves — such as bribery, violence or misrepresentation — to obtain sources' cooperation. Rejecting the Tribe's allegations that the news stories themselves showed media "racism," the court concluded that even if they did, a "racist" motive was not enough to satisfy the elements of the tort because of the obvious matter of public concern addressed in the news stories.

> It is important to this analysis that the Tribe's principal business is gambling. The existing casinos are the camel's nose of casino gambling in Florida's proverbial tent. The proper response of the state to the expansion of organized gambling has been the subject of debate for the past twenty-five years. Therefore, the manner in which the Tribe operates its existing casinos is a matter of public concern which is a proper subject for news stories.

Seminole Tribe of Florida v. Times, — WL — , Slip Op. at 6.

Newsgathering Protected

Underlying the court's conclusion was its belief that the First Amendment has been and must be interpreted to protect "routine newsgathering techniques," citing *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). And while that phrase is poorly defined in the court's view, it "certainly includes the practice alleged in this case of asking potential witnesses for information." *Seminole Tribe*, Slip Op. at 6.

Citing Sandra Baron's, Hilary Lane's, and David Schulz's article *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 Wm. & Mary Bill Rts. J. 1027 (1996), the court held that "there should be no liability under this tort action" considering the public interest in the free flow of information, the routine news gathering techniques used, the public concern in the subject matter, and "the limited intrusion into the relationship between the Tribe and its employees and agents." *Seminole Tribe*, Slip Op. at 7.

Interesting to note was that even though the Tribe's complaints itemized for the most part damage specifically flowing from *publication* of its confidential information, the Tribe all along had explicitly disclaimed any intent or desire to sue the *Times* for defamation. In the Tribe's view, such a claim would have opened up to discovery the very information it contended was "confidential." Of course, in defense counsel's view, the same was true of the novel tort claim the Tribe actually brought and in fact, the Tribe was attempting a creative "end run" around the established constitutional protections afforded the news media in defamation and invasion of privacy cases. It was accordingly gratifying to read in the appeals court's opinion its view that this was " a defamation case in the clothing of a different tort," and should therefore be subject to similar limits.

The Fourth District Court of Appeal's opinion is presently available on Westlaw and for free on that court's website: http://www.4dca.org.

Donald Orlovsky of Kamen & Orlovsky, West Palm Beach, Florida, represented the Seminole Tribe of Florida. Mr. Orlovsky has suggested that the Tribe may seek review of the case in the United States Supreme Court.

Alison Steele, a partner in Rahdert, Steele & Bryan, P.A., (formerly Rahdert, Anderson, McGowan & Steele, P.A.), St. Petersburg, Florida, represented the Times

Summary Judgment Against TV Star's Privacy and Misappropriation Claims

Legitimate to Use Public Figures' Pictures in the Context of Reporting

On February 27, 2001 the US District Court for the Central District of California entered summary judgment for *Playgirl* magazine in a case concerning the unauthorized publication of pictures of the *Baywatch* star Jose Solano. The actor sued the magazine for false light invasion of privacy, misappropriation of likeness under the California Civil Code and common law misappropriation of likeness. Judge Dickran Tevrizian entered judgment in favor of Playgirl on all claims. *Solano, Jr. v. Playgirl Inc.*, No. CV 00-01242 DT (Ex) (C.D. Cal., Feb. 27, 2001).

The Publication at Issue

Jose Solano was a regular actor on the *Baywatch* television show from 1996 to 1999. In its January 1999 issue, *Playgirl*, a women's magazine usually containing nude pictures of men, published an article about ten television actors accompanied by their pictures which were acquired from photo stock houses. One of the actors featured in the article was Mr. Solano whose non-nude picture appeared inside the magazine as well as on the cover where it was surrounded by the phrases "Primetime's Sexy Young Stars Exposed", "12 Sizzling Centerfolds Ready to Score With You", "Hot Celebrity Buns" and "Baywatch's Best Body Jose Solano".

Statute of Limitations

District Judge Dickran Tevrizian began his analysis by rejecting *Playgirl's* claim that all three causes of action were barred by the one-year statute of limitations. According to the court "the statute of limitations does not begin to run until the publication was actually sold on newsstands or received by a substantial majority of its subscribers", *id.* at 13, and under this standard the plaintiff had filed his complaint on time.

General Purpose Public Figure

Subsequently, the court addressed the issue of the plaintiff's status as a public figure. At first, it rejected *Playgirl's* claim that the plaintiff was a limited public figure because he had been involved in the public debate about whether television is worth watching. The court noted that not only there had been no particular debate of that kind in which the plaintiff was involved, but also that television watching in general could not be considered a matter of pubic debate.

The plaintiff, however, was found to be a general purpose pubic figure. The court recognized that actors do not automatically become public figures but also found, as have other courts, that "there is a public interest which attaches to people who by their professional calling, such as actors, create a legitimate and widespread attention to their activities. Thus the actions of such public figures may legitimately be mentioned and discussed in print or on radio or television." *Id*. at 17.

Solano's 3-year role on a television show reaching 1.6 billion people in 140 countries, and in 32 languages, as well as his other television, film and magazine appearances as a "celebrity participant" at charity events established him as a public figure. The court noted that Solano's access to the media to refute any alleged false impression — on a televised talk show and in magazines and on newswires — supported the finding; such access was one of the reasons that the U.S. Supreme Court, in *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974), reduced protection for public figures against defamation and invasion of privacy.

False impression

The court started the examination of the privacy claim by pointing out that it was not sufficient for the plaintiff to maintain that he was put in a false light because his picture appeared in a magazine he considered pornographic. Citing *Brewer v. Hustler Magazine* 749 F.2d 527 (9th Cir. 1984), the court said that since the plaintiff was a public figure and

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Summary Judgment Against TV Star's Privacy and Misappropriation Claims

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had consented to the sale of his photographs to the photo stock houses he had "no right to choose the forum in which his republished photograph [was] displayed". *Solano* at 25. The court further noted that the plaintiff himself had sought publicity by participating in a very popular television show and had availed himself of the opportunities associated with it; the result was that "he relinquished a certain amount of control over the publication of events of his life." *Id*. at 25.

The court specifically distinguished two cases that could have supported the plaintiff's claim. The first one, *Douglass v. Hustler Magazine*, 769 F.2d 1128 (7th Cir. 1985), was distinguished because it concerned pictures which were not previously published or available to the public; the second, *Braun v. Flynt*, 726 F.2d 245, (5th Cir. 1984), because the plaintiff was not a public figure, and because later case law in the circuit questioned the holding.

Thus, the court concluded that the publication in question did not put the plaintiff in false light. This conclusion made the examination of the actual malice element unnecessary, but the court addressed the issue and found that since there was no evidence that any senior editor of *Playgirl* had serious doubts about the publication the actual malice element was missing.

Misappropriation - statutory and common law

The plaintiff claimed damages under section 3344 of the California Civil Code, which provides for a cause of action for the unauthorized use of one's photograph, arguing that he had been injured by the publication of his photographs in *Playgirl*. The magazine submitted that the use fell within section 3344(d), which protects uses made "in connection with any news, public affairs, sports broadcast or account…". *Id*. at 30.

The court agreed noting that "public affairs means something less important than news and includes things that may not event [*sic*] be important, but are of interest." *Id*. at 31 (citation and internal quotation marks omitted). The court found that there was a legitimate interest in the life and activities of a television star, so the use of his photographs in the context of an article about famous actors was newsworthy and, as such, protected under section 3344 (d).

A similar reasoning led to the same conclusion on the issue of common law commercial misappropriation. The use of the photographs was, the court said, a "protected news and public interest account", *id*. at 33, which is synonymous with the "public affairs" protection of section 3344(d).

It is worth noticing that the same judge reached a different conclusion in *Hoffman v. Capital Cities/ABC Inc.*, 33 F.Supp. 2d 867 (C.D. Cal. 1999). Dustin Hoffman sued *Los Angeles Magazine* because it had published in a fashion spread a photograph of his from the 1982 film *Tootsie* which was electronically altered to make him appear as if he was wearing modern designer clothes and shoes. Judge Tevrizian opined that the feature in question was of a purely commercial character without any substantive editorial content, found that the section 3344 (d) "public affairs" defense was not applicable and awarded the plaintiff actor both compensatory and punitive damages. That decision is on appeal.

Solano has filed a notice of appeal of the summary judgment with the Ninth Circuit Court of Appeals.

The plaintiff was represented by John M. Gatti and Keri E. Borders of White, O'Connor, Curry, Gatti & Abanvzado. The defendant magazine was represented by Kent R. Raygor and Amy Johnson Harrell of Sheppard, Mullin, Richter & Hampton.

Georgia Trial Court Rejects Breach of Promise Claim By Neighbor of Murder Victims

By Tom Clyde

On March 13, 2001, a Georgia trial court granted summary judgment to *The Atlanta Journal-Constitution* in a lawsuit in which the plaintiff claimed the newspaper breached a promise of confidentiality and thereby exposed him and his family to the risk of retribution from murderers. The plaintiff, Jerome Crawl, claimed the newspaper violated its promise when it published his name in conjunction with statements he had made about a possible get-away car involved in a double homicide next to his home. Despite conflicting testimony between the reporter and the plaintiff – the only two witnesses to the interview – Fulton County Superior Court Judge Susan B. Forsling granted summary judgment to the newspaper on the trio of tort claims set forth in plaintiff's complaint. *Crawl v. Cox Enterprises, Inc.*, No. 00VS2088F (Fulton County Superior Court, March 6, 2000)

The news event underlying the alleged breach was a brutal double homicide discovered on Easter weekend in 1999. In a quiet suburb of Atlanta, an all-too-typical Atlanta home became a crime scene when the occupants, a mother and her teenage son, were reported missing and the police discovered pools of blood in the house. The mother's body was soon found beneath burning tires at a nearby rail yard.

As police searched for the killer, The Journal-Constitution sent one of its veteran crime reporters to canvass the neighborhood. Crawl, the next-door neighbor of the victims, spoke freely to the reporter and mentioned, in particular, an unusual car that he had spotted parked in front of the victims' home. Not only did plaintiff *not* request confidentiality, he made a special effort to make sure his name was spelled correctly, telling the reporter "Crawl, like a baby."

Nevertheless, when the article was published, plaintiff called the newspaper claiming that the publication of his name violated his agreement with the reporter and placed him and his family in mortal danger — such danger that the newspaper should immediately fork over financial compensation. When that request was politely declined, a lawsuit followed.

> ***[P]laintiff called the newspaper claiming that the publication of his name violated his agreement with the reporter and placed him and his family in mortal danger.***

Discovery brought a number of valuable admissions from plaintiff. Although he claimed emotional distress as a result of his fear that the killer or killers would attempt to eliminate him as a witness, he conceded he could show no pecuniary damages. Plaintiff also conceded he had told others about the get-away car, including his neighbors, police, and the television media (albeit off-camera).

On summary judgment, the trial court dismissed each of plaintiff's claims relying on both constitutional and Georgia law. With respect to the alleged breach of a promise, the trial court held that the United States Supreme Court had made clear in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), that the constitutional viability of such claims depended on the plaintiff's ability to demonstrate damages other than injury to reputation and state of mind. Citing the growing body of decisions recognizing this distinction under the First Amendment, the trial court held that because plaintiff's claims were solely for emotional distress damages, they could not survive constitutional muster.

In addition to the First Amendment obstacles blocking his claims, the trial court held Georgia law also independently required dismissal. Citing a number of reported Georgia appellate decisions emphasizing the importance of proof of falsity in speech based actions, the trial court observed that "Georgia courts have repeatedly rejected claims premised on the contention that a reporter breached an alleged

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Freedom of the Press Under Fire On College Campuses

Ed Note: The college students of today are the readers, voters and jurors of tomorrow. We ignore their trashing of free speech and press at our peril. The rise of this activity needs to be addressed.

The recent publication of a controversial advertisement in a number of college newspapers led to strong protests from enraged students groups in many campuses around the country.

The ad, written and paid for by conservative author David Horowitz, is titled, "Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks – and Racist Too." In the ad, Horowitz expresses his disagreement with the payment of reparations for slavery, suggesting, among other reasons, that only a small percentage of white American were slave holders; that African-Americans are better off today than the populations in Africa; that the claim for reparations victimizes African-Americans; and that reparations have already been paid in the form of welfare benefits and racial preferences.

The publication of the ad triggered protests at many universities, including the University of California at Berkeley, the University of California at Davis, Arizona State University, the University of Wisconsin at Madison and others. At Brown University students went as far as to steal and destroy 4,000 copies of the university newspaper, while thefts were also reported at Berkeley and Wisconsin. The editors at UC Davis and Berkeley issued for apologies for publishing the ad, but their colleagues at Brown and in Madison refused to give in to protesters' demands, and defended their right to publish the ad.

A number of prominent free speech organizations, including the National Coalition Against Censorship, the Student Press Law Center and the American Association of University Professors, expressed their concern, pointing out that a free society guarantees the expression of even the most controversial of ideas, which should be countered by argument and not by suppression.

The thefts associated with the Horowitz ad are the recent episodes in a series of similar incidents on university campuses where students or administrators who were upset over certain articles tried to silence the press by seizing newspapers.

The Student Press Law Center has compiled a list of 23 cases involving thefts and confiscations since the beginning of the current academic year. In some cases the thefts were reported to university authorities and penalties were imposed, but many of them were not even investigated.

What makes these events particularly disconcerting is that they take place in academic institutions that are, at least, supposed to encourage independence of mind and freedom of expression.

Georgia Trial Court Rejects Breach of Promise Claim By Neighbor of Murder Victims

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promise to a source where the source failed to produce evidence indicating the resulting publication was false."

The Court also rejected outright plaintiff's claim that the publication of his name in this context could rise to the level of intentional infliction of emotional distress:

> Publishing the identity of witnesses to noteworthy crimes occurs on a daily basis in news reporting. Even assuming that on this occasion plaintiff's name was published in violation of a promise, the publication of plaintiff's name with statements that he admittedly made to a newsreporter is not sufficiently outrageous to state a claim.

Plaintiff filed a timely appeal, which will likely be heard by the Georgia Court of Appeals next year.

Tom Clyde is a member in the Atlanta office of Dow, Lohnes & Albertson, PLLC, which represents The Atlanta Journal-Constitution in this case. The plaintiff is represented by Neal H. Howard of Atlanta.

NBA-NY Times Litigation is Settled

The litigation brought in State Supreme Court in New York by the National Basketball Association against *The New York Times* has been settled. The case was one of a series of litigations in recent years between professional sports leagues and newspapers in which the leagues have attempted — without much success — to enforce restrictions upon the distribution of information by the press to the public.

Alleged "Contract" Violation

In this case, the NBA claimed that the *Times* violated its "contract" with the league by violating one term of the credential which was given to *Times* photographers at NBA games. The NBA credential said that "the use of any photographs taken by a newspaper shall be limited to news coverage of the game." Because the *Times* has been displaying and marketing for over a year, five photographs of the 1999 New York Knick playoff campaign on its online store, the NBA claimed breach of contract.

The case was one of a series of litigations in recent years between professional sports leagues and newspapers in which the leagues have attempted — without much success — to enforce restrictions upon the distribution of information by the press to the public.

The Terms

Under the settlement agreement, the *Times* is free to continue displaying and selling its photos online, and no money was exchanged or royalty paid. Instead, the league and the newspaper entered into a marketing agreement. Its principal terms were that the *Times* would link from its online store page displaying the NBA photos to the NBA's web site and that the *Times* would include the NBA's web site address in any print ads it publishes advertising its basketball photos. Though the *Times* is not required to run such ads (or keep its NBA photos online), if such a print ad appears, it is to include the NBA logo. In addition, the *Times* agreed to give the NBA aggregate demographic information, to the extent that it possesses such information, regarding visitors to the *Times's* online basketball page.

A Case of Principle

According to the *Times*, it has sold hardly any basketball photos in the period that they have been online, and the likely legal bills in the case — Skadden Arps represented the NBA and David Boies represented the *Times* — were likely to dwarf the gross revenues of the *Times* by about a thousandfold. Hence, the case dealt solely with the principle of whether the newspaper could keep its photos online, a result it has achieved in the context of ending the costly litigation. (The revenues generated by the $195 per photo prints were such that George Freeman, inside counsel to the *Times*, said that he had considered the strategy of removing the entire case to small claims court.)

Though the NBA filed the case as a simple contract action, the *Times*' defenses and counterclaims opened up many more issues. It cited general First Amendment defenses, including denying that the NBA had the ability to limit press access on the terms they wished because access by the press to news events such as NBA basketball games was protected by the First Amendment. The *Times* also defended on the ground that the sale of its photographs came within the meaning of "news coverage" as stated on the credential.

Credential Equals Contract?

With respect to the contract claim directly, the *Times* answered that the credential itself was not a contract (neither its photographers, editors nor lawyers had read or been aware of it), and that to the extent there was a contract, it was not signed and therefore was not in compliance with the Statute of Frauds. The

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NBA-NY Times Litigation is Settled

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Times also noted that to the extent there was a contract, it was one of adhesion since to cover the games it had no choice but to agree to its terms. The *Times* also defended on the ground of laches, since it had been selling *Times* photographs — albeit not on the supposed gold mine of the Internet — since the 1970s.

The *Times* made a motion to dismiss on the only two legal grounds available to it at that preliminary juncture. It argued that the contract was pre-empted by federal copyright law, and that since the contract was not signed it did not meet the Statute of Frauds. Despite over 100 pages of briefing, the state court trial judge disposed of both arguments in one sentence, a sentence which included his view that this really was a contract claim and not a copyright claim, and that a contract had probably been formed.

The *Times* then counter-claimed on antitrust grounds. It claimed that the NBA's scheme violated the antitrust laws for three reasons: (1) since all 29 teams agree on the same restrictions on their credentials, this constituted an illegal horizontal restraint of trade; (2) the NBA had unlawfully leveraged its monopoly in the market of top-flight basketball games to artificially create a monopoly in the market for photographs of such games; and (3) since the basketball arenas are "an essential facility," the NBA was unlawfully conditioning the use of such facilities on an anti-competitive condition.

Two weeks later the settlement was announced, with both sides heralding it as a "win-win" resolution.

Baseball and News Organizations Settle Credentials Dispute

Major League Baseball (MLB) and news organizations settled a credentials dispute centering on the use of game information and photographs, ending several weeks of negotiation period in which sports reporters and photographers were generally working under temporary passes. In the latest of several incidents of sports leagues trying to impose contractual restrictions in an effort to protect their new media interests, MLB issued new credentials shortly before Opening Day that would have prohibited the transmission of real time game information and photographs of games in progress. The credentials also would have significantly restricted news organizations use of game photographs in marketing and promotional materials. News organizations rejected the new credentials on First Amendment grounds as well as concerns that the credentials sought to impose contractual restrictions on the organizations' own intellectual property rights in photographs and information.

Under the new MLB credential, the status quo has largely been restored as most of MLB's proposed restrictions have been eliminated. The only prohibitions which remain in the credential relate to usage of game information, photos, audio and video during a game. The credential permits real time, play by play reports of "occasional and historic" newsworthy events, such as record breaking player achievements. Otherwise, game progress reports are limited to those given every half inning. News organizations are also permitted to publish up to seven photographs simultaneously during a game in progress on their Web sites. Finally, while there is no longer a blanket prohibition on the use of game audio and video, the credential does prohibit transmission or broadcast during the game of any video and audio obtained by the credential holder at the park.

As for the controversy regarding "commercial use" of photographs, the two sides largely reserved their respective positions, leaving the dispute regarding First Amendment and intellectual property rights for resolution under existing precedents. MLB's credential does, however, resolve one potential controversy by granting a license for the use of photos in the context of a full newspaper page in connection with marketing and promotional ventures such as t-shirts and coffee mugs. In exchange, credential holders agree to license to MLB (for news coverage purposes only) any published photos the news organization sells to third parties on the best terms available.

Ninth Circuit Reverses $107 Million Verdict Against Anti-abortion Web Site

By Steven D. Zansberg

On March 28, 2001, the Ninth Circuit Court of Appeals issued its decision in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, the widely-reported case brought by several abortion-providing doctors against anti-abortion advocates (the "ACLA") who had created posters and a web site that identified abortion-providing doctors nationwide by name, address, with pictures and other information, and offered financial rewards for information leading to their arrest and conviction for alleged "war crimes."

The plaintiffs alleged that the ACLA's posters and "Nuremberg Files" web site constituted unprotected threatening speech and violated both state and federal law, including the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248. After a trial, presided over by Judge Robert E. Jones in the United States District Court for the District of Oregon, the jury found ACLA and other defendants liable and awarded plaintiffs $107 million in actual and punitive damages.

In addition, the district court enjoined the defendants from making or distributing the posters, the web page, or anything similar. See 41 F. Supp. 2d 1130 (D. Or. 1999).

"True Threats" Found

The district court had instructed the jury that liability could only be imposed upon the defendants if their statements were "true threats" and therefore unprotected by the First Amendment. In a special verdict, the jury found that all of the statements were true threats. The case was noteworthy for several reasons, only one of which was that the A.C.L.U. of Oregon had filed an amicus brief in support of affirming the jury verdict.

In a strongly speech-protective opinion, Circuit Judge Alex Kozinski, writing for a unanimous Ninth Circuit panel, vacated the judgment and remanded with instructions to the district court to dissolve the injunction and to enter judgment for the defendants on all counts. Animating the panel's opinion is the conviction that "[p]olitical speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party."

The analysis portion of Judge Kozinski's opinion begins with the statement, "Extreme rhetoric and violent action have marked many political movements in American history," citing the patriots' entreaties in favor of the Revolutionary War, abolitionists murderous acts in pursuit of their cause and "[in] more modern times, labor, antiwar, animal rights and environmental movements all have had their violent fringes. As a result, the opinion continues, "much of what was said even by nonviolent participants in these movements acquired a tinge of menace."

"Defendants can only be held liable if they 'authorized, ratified, or directly threatened' violence."

The Ninth Circuit panel then sets forth the standard that will determine whether such unquestionably menacing speech can be deemed a "true threat": "Defendants can only be held liable if they 'authorized, ratified, or directly threatened' violence." Here, the panel found, the ACLA's speech at issue is fully protected by the First Amendment.

Incitement Test

Judge Kozinski's opinion relies principally upon the United States Supreme Court's decision in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In that case, the Supreme Court applied the test for incitement of "imminent lawless conduct," first set forth in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and found that the N.A.A.C.P. and its local chapter leader, Charles Evers, could not be held civilly liable for economic losses suffered by white-owned businesses as a result of a civil rights boycott organized by Evers and the N.A.A.

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C.P.

At rallies in support of the boycott, Evers had threatened members of the black community that they would be disciplined if they violated the boycott and specifically threatened that "if we catch any of you going in any of them racist stores, we're going to break your damn neck." Moreover, when names of black patrons of stores subject to the boycott were read aloud at NAACP meetings and published in the newspaper, a few acts of violence were committed against them.

Despite acknowledging that Evers' statements "could be interpreted as inviting violent retaliation, 'or at least as intending to create a fear of violence whether or not improper discipline was specifically intended,'" because Evers' speech was not found to constitute incitement of imminent lawless conduct and because there was no evidence that Evers had "authorized, ratified, or directly threatened violence," his speech was protected by the First Amendment. Notably, the plaintiffs in *Claiborne Hardware* were not the individuals who were the "targets" of Evers' threats.

"[p]olitical speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party."

Applying the holding of *Claiborne Hardware Co.* to the case at bar, the Ninth Circuit held that "the jury would be entitled to hold defendants liable if it understood the statements as expressing [the defendants'] intention to assault the doctors but not if it understood the statements as merely encouraging or making it more likely that others would do so." First, the Ninth Circuit faulted the district court's jury instruction which defined a "true threat" as a statement that would reasonably convey "a serious expression of an intent to bodily harm or assault" without requiring that the statement indicate *who* would be committing the violence (the speaker or other third parties acting in conjunction or in association with the speaker).

No Threat

Next, the Ninth Circuit applied independent appellate review of the record evidence to determine whether any of the ACLA's statements could reasonably be construed to say that ACLA (or its agents) would physically harm doctors who did not stop performing abortions, and found that none of the ACLA's statements could reasonably be so construed. The Ninth Circuit noted that none of the ACLA's statements directly conveyed any threat of violence or any other illegal conduct (whether by the ACLA or any of the offerees of ACLA's financial rewards): "Neither the posters nor the web site contained any explicit threats against the doctors. But the doctors knew that similar posters prepared by others had preceded clinic violence in the past. By publishing the names and addresses, ACLA robbed the doctors of their anonymity and gave violent anti-abortion activists the information to find them." Doctors whose names were on the list responded by donning bullet-proof vests, drawing the curtains on the windows of their homes, and instructing their children to duck down in the bathtub if they heard gunfire. The Court held that even in this context — and where there had been previous shootings of abortion-providing doctors (including three on the web site's list) — it was *not* a reasonable inference for a jury to find that "the defendants' statements were infused with a violent meaning, at least in part, because of the action of others. If this were a permissible inference, it could have a highly chilling effect on public debate on any cause where somebody, somewhere has committed a violent act in connection with that cause. A party who does not intend to threaten harm, nor say anything at all suggesting violence, would risk liability by speaking out in the midst of a highly charged environment."

In reaching its conclusion, the Ninth Circuit deemed it "highly significant that all the statements were made in the context of public discourse, not in direct personal communications." Citing its own earlier precedents, the Court stated "public speeches advocating violence are

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given substantially more leeway under the First Amendment than privately communicated threats."

As stated above, the Court also found it pivotal that the speech at issue was in pursuit of a political cause:

> If political discourse is to rally public opinion and challenge conventional thinking, it cannot be subdued. Nor may we saddle political speakers with implications that words do not literally convey but are later 'discovered' by judges and juries with the benefit of hindsight and by reference to facts over which the speaker has no control.

Likening the ACLA's conduct in this matter to that of N. A.A.C.P. leader Charles Evers in the *Claiborne Hardware* case, the Court concluded

> ACLA did not communicate privately with its targets; the statements were made in public fora. And, while ACLA named its targets, it said nothing about planning to harm them; indeed, it did not even call on others to do so. This stands in contrast to the words of Charles Evers, who explicitly warned his targets that they would suffer broken necks and other physical harm. Under the standard of *Claiborne Hardware*, the jury's verdict cannot stand.

Limited Usefulness

Despite its flowery rhetoric and speech-protective outcome, the Ninth Circuit's opinion appears to be of only limited utility to media publishers and producers against whom claims are asserted that publicly disseminated speech "caused" third party readers, listeners or viewers to engage in violent conduct (e.g., the *Hit Man* litigation, "Natural Born Killers," etc.), because the Ninth Circuit's opinion hinges upon the fact that core "political speech" is at issue. However, the opinion does state that "[i]f the First Amendment protects speech advocating violence, then it must also protect speech that does not advocate violence but still makes it more likely."

Furthermore, in a footnote (number 7), it recognizes the danger of subjecting to liability statements which only serve to make violence more likely, but that are not "true threats" - a verbal commitment to engage in violence or other harmful conduct unless the target changes her conduct:

> newspapers might face liability for publishing stories that increased the likelihood that readers would harm particular persons, for example by disclosing the identity of mobsters in hiding or convicted child molesters. This would permit the imposition of liability for the mere publication of news, dramatically undercutting the freedom constitutionally accorded to the press.

(citing and quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

The plaintiffs have filed a petition for rehearing and a suggestion for rehearing by the Ninth Circuit en banc.

Christopher A. Ferrara of the American Catholic Lawyers Association argued the case on behalf of the appellants. Maria Vullo of Paul, Weiss, Rifkind, Wharton & Garrison in New York argued the case for the appellee Planned Parenthood.

Steven Zansberg is an associate with Faegre & Benson L.L.P. in Denver.

New Survey Released on Attitudes of Americans Towards Freedom of Information

Growing Concern for Personal Privacy Outweighs Support of Open Government

According to a new public opinion survey, "Freedom of Information In the Digital Age," released this month by the First Amendment Center and the American Society of Newspaper Editors (ASNE), Americans growing concern for personal privacy outweighs their support of open records and freedom of information, especially when it comes to posting information on the internet. The survey documents people's views on access, records, privacy and technology. The statistics reveal, for the most part, a strong support for an open government and free access to government records. Nine in 10 people support open records and six in 10 see public access as "crucial" to good government. People also generally support open meetings, court access and other basic tenants of open government.

Americans Concerned About Privacy on the Internet

But the support for freedom of information wanes when access involves modern technology. Only 22 percent support making records available on the internet. In general, people mistrust both the government and private industry to use these personal records appropriately. And 56 percent say they would support stricter privacy laws, even if such laws would hinder journalists. In fact, there is not much evidence that people make distinctions among the growing number of department stores, insurance companies, database firms, government agencies and newspapers that make use of personal information.

Editors' Views Compared to Public's

A second part of the survey was conducted among a group of editors across the country. The study attempted to show how individual newspapers are approaching these challenges while comparing editors' views with the public's views.

As expected, the editors strongly support open records and freedom of information. 96 percent believe the government conducts too much business in secret and 82 percent say public access laws should be strengthened. However, there are points of contention, even among the editors. For example, they are divided about whether or not drivers license information should be public domain and are split over how well current law protects privacy.

But most acknowledge the important role modern technology will play in accessing and storing information. Many newspapers make public databases available to readers and almost all use the internet to access information and link to government databases in their reporting. In general, editors agree that freedom of information is vitally important but differ on the extent of access and how to put it into practice.

Commercialization of Records

The final section includes an analysis by Sue Hale, executive editor of *The Daily Oklahoman* in Oklahoma City, on the advantages and drawbacks of commercializing records. She contends that the commercialization of information has become an important force that shapes public opinion and will have an impact on the future legislation of access. Digital information and new technology make it easy to sell products and track consumers creating a growing industry. Government agencies have become involved; selling information, accessing digital records or partnering with private companies. Hale considers anything done by the government to make more information available is a positive step, but raises questions about the effects of commercialization on the availability of records, the cost of raw information and the distinction between what is a private and public record.

The survey is available at <www.freedomforum.org>.

CD-Rom Archive of National Geographic Magazine Violates Freelancer Copyrights

By Robert G. Sugarman and Naomi Jane Gray

On March 22, 2001, the United States Court of Appeals for the Eleventh Circuit, in *Greenberg v. National Geographic Society,* 2001 U.S. App. LEXIS 4270, 14 Fla. L. Weekly Fed. C491 (March 22, 2001), held that § 201(c) of the Copyright Act of 1976 did not permit the National Geographic Society (the "Society") to publish "The Complete National Geographic: 108 Years of National Geographic Magazine on CD-ROM" ("CD-ROM 108"), an electronic archive reproducing every issue of National Geographic Magazine (the "Magazine") exactly as it appeared in print.

The panel opinion was written by Judge Birch, joined by Chief Judge Anderson and Judge Tjoflat. The plaintiff is a freelance photographer who did four photographic assignments for the Society and whose photographs appeared in various issues of the magazine. In addition to appearing in "CD-ROM 108," one of the pictures taken by the plaintiff also appears in a brief animated sequence which appears when each disc is inserted into a user's computer.

Publisher's Privilege

Section 201(c) provides that, absent an express transfer of the copyright or any of the rights under it, the publisher of a collective work is presumed to obtain the following privileges: to reproduce an author's or photographer's contribution

(1) as part of that particular collective work;

(2) any revision of that collective work and

(3) any later collective work in the same series.

The Panel rejected the Society's arguments that, since all it had done was to reproduce the Magazine in a different medium, CD-ROM 108 contained mere reproductions of "that particular collective work," or, at most, was a revision of those collective works. It held instead that the CD-ROM 108 "constitutes a new collective work that lies beyond the scope of Section 201(c)." Op. at 1.

Panel Opinion Runs Contrary to Congress' Objectives

The Panel Opinion upsets the objectives that Congress so carefully sought to achieve in drafting the 1976 Act in general and § 201(c) in particular. First, in "narrowly construing the publisher's privilege," (Op. at 11) the Panel upsets the careful equilibrium between publishers and contributors established by Congress in enacting § 201(c).

Section 201(c) was a compromise reached after many years of study and debate. It protected authors/contributors by making it clear that the "copyright in each separate contribution to a collective work . . . vests initially in the author of the contribution." It protected publishers by establishing a baseline level of privileges that the publisher acquires by force of law absent express contract language to the contrary. It was thus meant to create a level playing field between authors and publishers and to ensure that each group had an equal opportunity to take advantage of their creations.

In light of Congress' clearly expressed intention, there is no basis for construing the publishers' privilege "narrowly" and in so doing, the Panel Opinion shifts the balance of § 201(c) in favor of contributors. Rather, the publishers' privileges under § 201(c) were "an essential counterpart of the basic presumption" and should have been treated accordingly.

Second, recognizing that technology changes at an infinitely faster rate than the law, the 1976 Act was drafted to be medium neutral. The Panel Opinion eviscerates that core principle of neutrality with respect to § 201(c) by effectively holding that publishers of collective works have no revision privilege if they reproduce those works in electronic media.

Not Part of that Particular Collective Work

Despite finding that the issues of the Magazine are electronically reproduced exactly as they appeared in print, the Panel concluded that CD-ROM 108 is not a reproduction of Greenberg's photographs "as part of that particular collective work" because it was "unable to stretch the phrase . . . to encompass the Sequence and Program elements as well." Op. at 12. The Sequence displays, in rapid succession, ten different covers of issues of the Magazine that digitally "morph" from one into the other. It lasts approximately 25 seconds. One of the Covers includes a photograph taken by the Plaintiff. The "Program" permits

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the user to search, retrieve and view issues of the Magazine.

To the contrary, the panel found that CD-ROM 108 is "a new product ('an original work of authorship')." (Op. at 16) That conclusion ignored defendant's arguments that a "particular collective work," however, does not cease to be a "particular collective work" just because it is reproduced alongside other collective works or introductory material is added.

Moreover, in so doing, the Panel misread and misapplied a key piece of legislative history. Congress wrote in the concluding paragraph of its discussion of Section 201 (c):

> Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it, the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work." (Op. at 15)(Emphasis in panel's opinion)

To this panel's mind, the "common-sense copyright analysis" (Op. at 15) compelled the conclusion that this was a new product, "in a new medium, for a new market that far transcends any privilege of revision or other mere reproduction envisioned in Section 201(c)." Op. at 16.

Computer Program Key

Most worrisome is the Panel's conclusion that the presence of a computer program was a critical factor in depriving the Society of its § 201(c) privilege. Every publication that is stored in electronic format will, by necessity, include a computer program that itself may constitute an original work of authorship. The Panel effectively eliminates that privilege for any electronic reproduction that requires the use of software to search or retrieve the text or images – *i. e.*, virtually any CD-ROM or computer database, although the panel, in a footnote, states that because the CD-ROM 108 includes the Sequence and replicas of the magazines in digital fashion, it need not decide if the addition of only the Program would result in the creation of a new product. Op. at n.12.

Since the 1976 Act was intended to be a medium neutral, a publisher should be entitled to reproduce and distribute an individual contribution as a part of a "particular collective work" *regardless* of the medium in which that collective work originally appeared. The privilege is not limited to "that particular collective work in the particular medium originally published."[1] The legislative history of § 201(c) itself confirms that future technology, like CD-ROM, was intended to be encompassed by § 201(c). In the hearings, George D. Cary of the Copyright Office stated, "We have tried to phrase the broad rights granted in such a way that they can be adapted as time goes on to each of the now advancing media."[2]

The Panel tried to distinguish the reproduction of the Magazines in CD-ROM from the reproduction in microfilm/ microfiche, which the Society has published for decades and which has never been challenged, by stating that CD-ROM 108 "requires the interaction of a computer program in order to accomplish the useful reproduction involved with the new medium. These computer programs are themselves the subject matter of copyright, and may constitute original works of authorship, and thus present an additional dimension in the copyright analysis."[3]

Yet, the microfilm reader requires interaction between the reading machine's patentable or copyrightable elements, its light and the film images of the Magazine to create viewable images for the user. This is no different than the computer's interaction with copyrightable software to view the exact same image in "The Complete National Geographic."[4] Like the microfilm reader and its light, the software that permits the display is a functional aspect of the medium in which the work is stored. As such, is has no impact on the § 201(c) analysis.

The Society has filed a Petition for Rehearing En Banc.

Robert G. Sugarman and Naomi Jane Gray are with Weil, Gotschal & Manges, LLP., New York, NY, and represent the National Geographic Society in this matter. The plaintiff is represented by Norman Davis of Steel, Hector & Davis, L.L.P., Miami, Florida.

[1] See 17 U.S.C. § 102(a) ("Copyright protection subsists … in original works of authorship fixed in *any* tangible medium of expression, *now known or later developed*, from which they can be perceived, reproduced, or other-

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wise communicated, either directly or with the aid of a machine or device."); 1976 U.S.C.C.A.N. 5659, 5665 ("it makes no difference what the form, manner, or medium [in which a work is fixed]…whether embodied in a physical object in written, printed…magnetic…form… and whether it is capable of perception directly or by means of any machine or device 'now known or later developed.'").

[2] Hearing on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the House Committee on the Judiciary, Copyright Law Revision, 89th Cong. at 57 (U.S. Gov't Prtg. Office 1966).

[3] Op. at 13 n. 12.

[4] Nor does the Sequence distinguish CD-ROM 108 from microfilm. Microfilm rolls of the Magazine contain a title page that is not part of the original collective work and are distributed in new and different packaging. Many rolls also include, at the end, a six-month index published separately from the collective work. No one contends that these added elements invalidate the privilege to reproduce the collective work on microfilm or microfiche.

FCC Dismisses Claims Against Broadcasters for Erroneous Elections' Projections in Florida

On April 3, 2001, the Enforcement Bureau of the Federal Communications Commission adopted an Order denying a request for an investigation under Section 403 of the Telecommunications Act (47 U.S.C. § 605) of the erroneous projections for Florida at the presidential elections last November. *In the Matter of Complaint Request for Section 403 Investigation*, EB-00-IH-0438 (2001). The complaint and request was filed by law firm Smithwick and Belendiuk, P.C. and concerned the reports that were broadcast on ABC, CBS, NBC and Fox giving the state's electoral votes to Al Gore while polls were still open in parts of Florida and elsewhere in the country. The FCC was asked to investigate whether network reports intentionally distorted exit poll data collected by the Voter News Service or whether they showed a reckless disregard for the accuracy of the data. In addition, the complaint suggested that the Commission should determine whether the networks knowingly or recklessly broadcast inaccurate statements in order to generate ratings or to influence the outcome of the election.

The FCC noted that Section 403 investigations are discretionary and rejected the request by stating that "the mere fact that the Networks incorrectly projected that Al Gore would receive Florida's electoral votes is not a sufficient basis to institute such an investigation."

Mixed Rulings in Telemarketing Class Action Against Atlanta Radio Station

By Sean R. Smith and Scott Dailard

Rulings last month against Susquehanna Radio Corporation in a Georgia class action lawsuit brought under the federal Telephone Consumer Protection Act ("TCPA") could have significant implications for future class action suits against broadcasters. *Garver v. Susquehanna Radio Corp.*, No. 00VS002168E (Ga. State Ct., Fulton Co. 2001).

On March 22, a Georgia State Court in Fulton County ruled that prerecorded message calls inviting consumers to listen to a free radio broadcast constitute unlawful telemarketing solicitations under the TCPA. 47 U.S.C. § 227(b)(1)(B). Judge Susan Forsling held that recorded messages encouraging some Atlanta residents to listen to an FM radio station broadcast were prohibited by the TCPA, and were not exempted by applicable FCC rules, because the messages included "unsolicited advertisements" within the meaning of the statute.

The TCPA's implementing regulations permit prerecorded message calls that are made for a commercial purpose but that do not include the transmission of any "unsolicited advertisement." The term "unsolicited advertisement" means "any material advertising the commercial availability or quality of any property, goods or services."

Judge Forsling held that radio broadcasts are "services" under the TCPA and found that the prerecorded messages delivered on behalf of Susquehanna's Atlanta radio station WNNX-FM advertised the "availability" of the station's broadcast service to potential listeners. Dismissing arguments that radio broadcasts are not "*commercially* available" to potential listeners, she focused instead on the overall "commercial" character of the station's business, collapsing the distinction between sales of commercial airtime to advertisers and the broadcast service that the station makes available to the public free of charge.

Judge Forsling also held that the messages deliv-

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Mixed Rulings in Telemarketing Class Action Against Atlanta Radio Station

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ered on behalf of the Susquehanna station were "advertisements" within the meaning of the TCPA because they promoted the availability of airline frequent flyer miles offered as a prize in the station's promotional contest offer. She reasoned that "even if the message is not deemed to advertise the availability of a service, i.e., the radio broadcast, there is no question that Defendant's telemarketing calls promoted the commercial availability of goods and/or property by advertising the availability of Delta SkyMiles."

Judge Forsling refrained from ruling on any of Susquehanna's arguments that the TCPA and its implementing regulations impose unconstitutional restrictions on commercial speech. She also declined to rule on arguments that enforcement of the statute against Susquehanna would violate due process guarantees.

Judge Forsling did, however, rule in Susquehanna's favor on one statutory defense. Specifically, she dismissed the claim advanced by one of the two named plaintiffs pursuant to a regulatory exemption for calls to parties with whom the caller has formed an "established business relationship." She found that one of the plaintiffs had formed an "established business relationship" with WNNX-FM through his voluntary membership in the "Freeloaders" program — a station-sponsored discount club for loyal listeners. Given the station's extensive enrollment of Freeloaders club members in Atlanta (approximately 263,000 members), this ruling could significantly impact plaintiffs' efforts to certify a class.

The underlying complaint seeks certification of a class composed of all Georgia residents who allegedly received the same prerecorded message calls from WNNX. For themselves and for each member of this proposed class, the named plaintiffs seek an award of statutory damages in the amount of $1,500 per call, plus exemplary damages and attorney's fees. The same lawyer has threatened to file additional TCPA class action lawsuits against broadcasters on a nationwide basis.

Sean R. Smith, a member in the Atlanta office of Dow, Lohnes & Albertson PLLC and Scott Dailard, of DL&A's Washington office, represent Susquehanna Radio Corporation in this TCPA lawsuit.

Jury Verdict in *Nicholson v. Hooters* TCPA Litigation

Two days after Judge Forsling entered her summary judgment order, in the case against WNNX-FM, a jury in Richmond County, Georgia returned a multi-million dollar verdict against the defendant in another, unrelated TCPA class action lawsuit, *Nicholson v. Hooters of Augusta.* No. 1995-RCCV-616 (Ga. Super. Ct., Mar 24, 2001).

The *Hooters* case involves a different section of the TCPA that prohibits the transmission of unsolicited advertisements to facsimile machines. This case predated the filing of either the *Susquehanna* or *Cox* suits and involves different counsel. The jurors found that the Hooters restaurant franchise in Augusta willfully violated the TCPA by sending multiple unsolicited fax advertisements to approximately 1,300 members of the plaintiff class. Because the jury found that Hooters committed "willful" violations, the court has discretion to treble the amount of statutory damages available under the TCPA. Accordingly, the trial judge is expected to enter a judgment against Hooters and award the plaintiff class between $4 million and $12 million in aggregated statutory damages. According to Hooters' appellate counsel, the trial judge refused to admit testimony from members of the plaintiff class who affirmatively consented to receive facsimile advertisements from the defendant. This ruling should figure prominently into Hooters' appeal.

D.C. Circuit Overturns FCC Rules Limiting Cable Operators' Size and Carriage of Their Own Programming

Rules Stuck on First Amendment Challenge

By Marc Apfelbaum

In *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (*Time Warner II*), the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Williams, struck down on First Amendment grounds rules adopted by the FCC to implement two provisions of the 1992 Cable Act. The first set of rules implemented provisions of the Act that directed the FCC to prescribe limits on how many subscribers any one cable operator could reach (the "ownership limits"). The second set of rules implemented provisions in the Act directing the FCC to limit the number of channels cable operators could use on their systems to carry their own programming services (the "channel limits"). The D.C. Circuit had earlier upheld against First Amendment challenges the statutory provisions themselves. *Time Warner Entertainment Co. v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000) (*Time Warner I*).

In striking down the rules, the court made clear that agencies, in implementing statutory restrictions on speech that are themselves constitutional, are still constrained by the First Amendment.

First Amendment Limits

In striking down the rules, the court (Judges Williams, Randolph & Totel) made clear that agencies, in implementing statutory restrictions on speech that are themselves constitutional, are still constrained by the First Amendment in deciding the actual contours of the regulations they adopt. In rendering its decision, the D.C. Circuit also questioned without resolving the issue of the extent to which Congress as well as agencies may restrict the speech of some in the name of promoting the diversity of the sources of speech. The case was brought by Time Warner Cable ("Time Warner") and later joined by AT&T, which are two of the nation's largest cable operators.

In defending the FCC's rules, the government argued that the First Amendment issues were largely, if not entirely, answered by the decision of the earlier D.C. Circuit panel that found that the statutory provisions were themselves constitutional. The government argued that the implementing rules should be subject to no more than traditional review under the Administrative Procedure Act.

The earlier panel, citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*), determined that the statutory provisions should be subjected to intermediate, not strict scrutiny, and that they passed muster under that standard. (Time Warner had unsuccessfully argued that, under *Turner I*, the statutory provisions should be subject to strict scrutiny, since their purpose was directly to override cable operators' editorial choices.) In *Turner I*, the Supreme Court held that to withstand intermediate scrutiny, the government must show that a challenged law supports an important interest unrelated to suppression of speech, that the harms it means to address are "real, not merely conjectural,"and that it burdens no more speech than necessary.

In reviewing the actual rules, the D.C. Circuit rejected the government's contention that the constitutional issues were largely settled by the earlier decision. The court instead made clear that in enacting implementing rules of statutes that are themselves constitutional, agencies have an independent obligation to comply with constitutional limitations. The court stated: "Constitutional authority to impose some limit is not authority to impose any limit imaginable." *Time Warner II*, 240 F.3d at 1129-30.

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Rules Must Be Justified

The court also emphasized that the agency must independently meet the *Turner* test: "[I]n 'demonstrating that the recited harms are real, not merely conjectural,' [quoting *Turner I*] the FCC must show a record that validates the regulations, not just the abstract statutory authority." *Id.* at 1130. The panel found that the FCC failed in this burden as to both the ownership and channel limits.

Congress had identified two interests in enacting the statutory ownership and channel provisions, (i) "the preservation of statutory competition," and (ii) "the promotion of diversity in ideas and speech." *Time Warner I*, 211 F.3d at 1319. To carry out these interests with regard to the ownership restrictions, Congress directed the FCC come up with a limit that would ensure that no single "cable operator or group of cable operators can unfairly impede the flow of video programming from the video programmer to the consumer." 47 U.S.C. § 533 (f)(2)(A).

In the rules at issue, the FCC had determined that it was necessary to restrict any individual cable operator from reaching more than 30 percent of all subscribers to multichannel video programming distributors

30 Percent Limit

In the rules at issue, the FCC had determined that it was necessary to restrict any individual cable operator from reaching more than 30 percent of all subscribers to multichannel video programming distributors ("MVPDs,"a term that includes cable operators as well as other retail suppliers of video programming, such as DBS operators). In arriving at the 30 percent limit, the FCC first found that its rules should prevent any one cable operator from having enough subscribers to unilaterally prevent a new programming service from becoming viable if it decided not to carry that service. Through a series of steps, the FCC concluded that the average programmer needs to be able to reach 40 percent of all MVPD customers for viability.

The court noted that, assuming that all those steps were valid, the FCC could have imposed a 60 percent limit, because this would leave a rejected unaffiliated programmer with a chance to reach the 40 percent of all other possible viewers the FCC thought were needed for survival. The court then rejected, however, the steps the FCC used to reduce the 60 percent figure to 30 percent. In particular, the FCC had concluded that if there were only two cable operators nationwide (which a 60 percent limit would allow), there would be too much chance that the two companies would collude on their programming carriage decisions, leaving a rejected independent programmer without a chance of getting the 40 percent of viewers needed for survival. The FCC also concluded that, even without collusion or any other "unfair" acts, Congress's diversity goal would be better served by a limit that would ensure the existence of at least four cable operators, because four or more cable operators would more likely choose a broader mix of programming services than would two. Factoring in these additional concerns, the FCC concluded that a limit of 30 percent would be appropriate.

The D.C. Circuit found that the FCC under intermediate scrutiny might be justified in setting a limit that would prevent a single cable operator from having the ability to prevent the viability of an independent cable operator. The court determined, however, that that method would justify a cap no lower than 60 percent. Lowering the number to 30 percent would entail acceptance of the FCC's collusion theory, or its other theory — that the statutory goal of promoting a diversity of voices authorized it to set a limit that would ensure a larger number of cable operators regardless of whether there was any basis to believe those operators would act unfairly. The court concluded that neither of these theories was supportable under intermediate scrutiny.

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Government Must Show Collusion Potential

As to the collusion theory, relying on *Turner I*, the court found that the government had the burden of showing that there was a nonconjectural risk that collusion would occur. The court found that the record could come from either Congress or the FCC, but that without any showing of such a threat in the record, the collusion theory was not available to defend the 30 percent limit. In examining the record, the court found that neither Congress nor the FCC had developed any factual support for the notion that cable operators would make decisions about what programming to carry based on collusion rather than independent editorial decisions. The court also found that the FCC had paid insufficient attention to evidence in its record that DBS was becoming increasingly effective as competition to cable. The court reasoned that with increasing competition, cable operators would be even less likely to make carriage decisions based on collusion instead of their own editorial judgments and the need to please their customers.

Diversity Rationale Rejected

As to the FCC's diversity rationale, the court first expressed skepticism as to whether, under the First Amendment, a government interest in promoting a greater diversity of voices alone could ever be a sufficient to justify overriding the editorial decisions of private entities:

> We have some concern how far such a theory may be pressed against First Amendment norms. Everything else being equal, each additional "voice" may be said to enhance diversity. And in this special context, every additional splintering of the cable industry increases the number of combinations of companies whose acceptance would in the aggregate lay the foundations for a programmer's viability. But at some point, surely, the marginal value of such an increment in "diversity" would not qualify as an "important" governmental interest. Is moving from 100 possible combinations to 101 "important"? It is not clear to us how a court could determine the point where gaining such an increment is no longer important. And it would be odd to discover that although a newspaper that is the only general daily in a metropolitan area cannot be subjected to a right of reply, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), it could in the name of diversity be forced to self-divide. Certainly the Supreme Court has not gone so far. 240 F.3d at 1135.

The court determined, however, that it need not reach the question of Congress's authority to override private speech rights in the name of promoting diversity, because it found that the statutory ownership provision did not give the FCC authority to act in the name of diversity alone. Parsing the statute's directive that the FCC "ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions of operators of sufficient size, the flow of programming from the video programmer to the consumer," the court concluded that the FCC lacked statutory authority to limit the size of cable operators based on diversity concerns alone:

> The language addresses only "unfair[ ]" impediments to the flow of programming. The word "unfair" is of course extremely vague. Certainly, the action of several firms that is "joint," in the sense of collusive, may often entail unfairness of a conventional sort. . .. But we cannot see how the word unfair could plausibly apply to the legitimate, independent editorial choices of multiple MSOs. A broad interpretation is plausible only for actions that impinge at least to some degree on the interest in competition that lay at the heart of Congress's concern. The Commission's reading of the clause effectively deletes the word "joint" and opens the door to illimitable restrictions in

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the name of diversity. 240 F.3d at 1135.

Having rejected the FCC's ownership rules, the court then made quick work of the FCC's channel rules, which limit to 40 percent the amount of its own programming a cable operator may carry on the first 75 channels of its cable systems:

> The FCC presents its 40% vertical limit as advancing the same interests invoked in support of its statutory authority to adopt the rule: diversity in programming and fair competition. As with the horizontal rules the FCC must defend the rules themselves under intermediate scrutiny and justify its chosen limit as not burdening substantially more speech than necessary. Far from satisfying this test, the FCC seems to have plucked the 40% limit out of thin air. 240 F.3d at 1137.

As with the ownership limits, the court also criticized the FCC for failing to take adequately into account the record evidence that competition from DBS was becoming increasingly effective. The court reasoned that any favoritism for the cable operator's own programming could threaten a cable operator's "very survival" when it faced sufficient competition.

The D.C. Circuit therefore remanded the ownership and channel limits rules to the FCC for further consideration in light of its decision. It is not yet clear whether the FCC will seek further judicial review of the order.

This decision will have a significant impact going forward. In an era when government agencies like the FCC have growing authority to regulate media entities, the court's holding that such agencies must independently comply with the structures of the First Amendment in enacting rules that limit speech rights will often come into play and will serve as an important check on that authority. In addition, there are sure to be many more cases that follow up on the court's questions about the extent to which the First Amendment bars government from restricting the speech rights of private actors in the name of promoting diversity.

David Carpenter of Sidley & Austin argued the case on behalf of AT&T and Time-Warner Entertainment. James M. Carr of the FCC argued for the government.

Marc Apfelbaum is Senior Vice President & General Counsel of Time Warner Cable.