

# MILRC

Media  
Law  
Resource  
Center

## MEDIA LAW LETTER

Reporting Developments Through April 28, 2004

<b>MLRC</b>		
<b>LDRC Inst.</b>	<b>First Amendment Seminars at High School Journalism Conventions</b> <i>Seminars explore how reporters balance public safety and fair trial concerns</i>	<b>51</b>
<b>Legislative</b>	<b>Broadcast Decency Continued; OFAC Regulations</b>	<b>53</b>
<b>Ethics</b>	<b>Attorneys Risk Disclosure of Their Communications with Expert Witnesses</b> <i>Under Federal Rule 26, attorneys should be wary of information they provide to experts</i>	<b>57</b>
<b>SUPREME COURT</b>		
<b>U.S.</b>	<b>Privacy Interests Bar Release of Vince Foster Photos</b> <i>Shift in Burden May Hamper Media</i> National Archives and Records Administration v. Favish	<b>4</b>
<b>LIBEL &amp; PRIVACY</b>		
<b>S.C. C. P.</b>	<b>Directed Verdict for Newspaper after Mid-Trial Ruling on Public Figure Status</b> <i>Court ruled guardian ad litem was public figure who did not prove actual malice</i> Erickson v. Jones Street Publishers, L.L.C.	<b>7</b>
<b>Mass. Super. Ct.</b>	<b>The Right to Reveal Intimate Details: A Protected Right</b> <i>Court dismisses private facts case, recognizes author's right to tell personal story</i> Bonome v. Kaysen & Random House	<b>9</b>
<b>Ill.App., N.D.Ill</b>	<b>Chicago Sun-Times Wins Two Cases on Innocent Construction Rule</b> <i>Illinois courts dismiss libel cases over articles implying mafia ties and prostitution</i> Salamone v. Hollinger International, Inc.; Knafel v. Chicago Sun-Times	<b>11</b>
<b>Ill.App.</b>	<b>Being Turned Away from Memorial Service Not Defamatory</b> <i>Appellate court affirmed dismissal of sports agent's claim against newspaper</i> Zucker v. Chicago Tribune Company	<b>13</b>
<b>S. Ct.</b>	<b>Petition for Cert. Filed in Ross v. Santa Barbara News-Press</b> <i>Seeking to appeal \$2.25 million jury award</i>	
<b>N.Y.A.D. 2d Dep't</b>	<b>NY Court Affirms Dismissal of Media Ride-along Claims</b> <i>Plaintiff's failure to allege property related damage from trespass fatal to claim</i> Every Drop Equal Nutrition, L.L.C. v. ABC, Inc.	<b>15</b>
<b>R.I.</b>	<b>Court Affirms Summary Judgment for News Station, Condemns "Ambush Interview"</b> <i>Court upholds investigative journalists' rights while disagreeing with methods</i> Leddy v. Narragansett Television, L.P.	<b>17</b>
<b>M.D.Pa.</b>	<b>Court Dismisses Pro Se Prisoner's Case Holding Plaintiff Libel Proof</b> <i>Plaintiff incarcerated for drug trafficking incapable of proving damages for defamation</i> Istrefi v. Pocono Record Newspaper	<b>19</b>
<b>N.Y.A.D. 4th Dep't</b>	<b>Old Public Figures Still Never Die, Nor Do They Fade Away</b> <i>Court rules that public figures, once established, retain status for later commentary</i> White v. Berkshire Hathaway, Inc.	<b>21</b>
<b>Penn. C. P.</b>	<b>Claim that Pennsylvania Judge Used Handicapped Parking Spot Is Not Defamatory</b> <i>Reports about parking violations deemed embarrassing, but not highly offensive</i> Joyce v. NextMedia Group, Inc.	<b>23</b>

(Continued on page 2)

<b>Utah Dist. Ct.</b>	<b>Utah Anti-SLAPP Statute Applied to Dismiss Defamation Claim Against Newspaper</b> <i>In first application of statute in media context, court awards attorney fees to newspaper</i> Jacob et al. v. Bezzant et al.	<b>25</b>
<b>Georgia</b>	<b>Legislature Acts to Protect Amber Alert Broadcasters</b> <i>Senate Bill creates broad civil immunity for media outlets that broadcast Amber Alerts</i>	<b>27</b>
<b>S.C.App.</b>	<b>South Carolina Asserts Jurisdiction over Book Publisher</b> <i>Court ruled publisher that sold only 30 copies of book in state had targeted market</i> Moosally v. W.W. Norton & Company, Inc.	<b>28</b>
<b>D.S.D.</b>	<b>Ex-Senator's Libel Suit Against Website Survives Motion to Dismiss</b> <i>Court ignores defendant's rhetorical hyperbole and opinion argument</i> Abourezk v. ProBush.com	<b>38</b>
<b>4th Cir.</b>	<b>Court Affirms Summary Judgment for Religious Rights Legal Group</b> <i>Court rules press release accusing school officials is a matter of public concern</i> Hugger v. Rutherford Institute	<b>44</b>
<b>ACCESS</b>		
<b>S.D.N.Y.</b>	<b>Judge Prohibits Publication of Juror Names in Quattrone Retrial</b> <i>Judge cites recent Tyco mistrial as basis for bench order</i>	<b>29</b>
<b>N.Y. Sup.</b>	<b>Transcripts of Chambers Meeting with Hold-out Juror in Tyco Trial Unsealed</b> <i>No choice but to declare mistrial</i>	<b>29</b>
<b>PRIOR RESTRAINT</b>		
<b>Mass. App.</b>	<b>Court Vacates Order Prohibiting Identification of Witness</b> <i>Judge finds state interest not sufficient to support injunction</i> Commonwealth v. Porter	<b>30</b>
<b>6th Cir.</b>	<b>Court Stays Prior Restraint of "Naked Newscaster" Video</b> <i>Defendant demonstrated strong likelihood of showing injunction violated 1st Amend.</i> Bosley v. WildWetT.com	<b>34</b>
<b>REPORTERS' PRIVILEGE</b>		
<b>N.D.Ill.</b>	<b>Reporter Ordered to Testify About Defendant's Demeanor During Interview</b> <i>Reporter's impressions relevant to obstruction charge</i> U.S. v. Hale	<b>33</b>
<b>Ill. Cir. Ct.</b>	<b>Sun-Times Columnist Defeats Subpoena for Deposition</b> <i>Underlying case lacked merit under innocent construction rule</i> Michael Breen MD v. WBBM-TV et al.	<b>35</b>
<b>CYBERSPACE</b>		
<b>ABA</b>	<b>Survey Confirms Internet Jurisdiction Concerns</b> <i>ABA/ICC survey finds majority of media companies fear being sued in foreign courts</i>	<b>36</b>
<b>4th Cir.</b>	<b>Fourth Circuit Affirms Chat Room Liability Decision</b> <i>Court upholds ruling that 47 U.S.C. §230 immunity applies to federal claims</i> Noah v. AOL Time Warner Inc.	<b>37</b>
<b>Cal.</b>	<b>Cal.S.Ct. to Review Barrett v. Rosenthal</b> <i>Decision Held "User" Not Entitled to Immunity</i>	<b>37</b>

(Continued on page 3)

(Continued from page 2)

**COPYRIGHT & TRADEMARK**

<b>S.D.N.Y.</b>	<b>Court Awards Attorney Fees in Copyright Suit over Robert Mitchum Obituaries</b> <i>Judge awards three television networks total of \$300,000 for successful fair use defense</i> Video-Cinema Films v. CNN, Inc. and ABC, Inc., Video-Cinema Films v. CBS Corp.	<b>39</b>
<b>6<sup>th</sup> Cir.</b>	<b>Court Reverses Jury Verdict in Movie Infringement Case</b> <i>Holds reasonable jury could not find substantial similarity after filtering elements</i> Murray Hill Publications, Inc. V. Twentieth Century Fox Film Corp.	<b>41</b>

**INTERNATIONAL**

<b>Australia</b>	<b>Australian Attorney General Pushes for Uniform Libel Law or National Legislation</b> <i>Proposals for national law even more favorable toward plaintiffs</i>	<b>45</b>
<b>Canada</b>	<b>Canadian Court Denies Compelled Disclosure of P2P File Swappers Identities</b> <i>Court held music companies failed to make prima facie case of copyright infringement</i> BMG Canada v. John Doe	<b>47</b>
<b>Japan</b>	<b>Toyko Court Overturns Restraint on Magazine</b> <i>Injunction not warranted for alleged invasion of privacy</i>	<b>50</b>

**NEWS & UPDATES**

<b>11<sup>th</sup> Cir.</b>	<b>PGA Tour is Entitled to Restrict Real Time Golf Scores</b> <i>Rejecting antitrust claim, court holds PGA has business justification to control scores</i> Morris Communications Corp. v. PGA Tour	<b>31</b>
<b>FCC</b>	<b>FCC Announces \$495,000 Fine Against Clear Channel for Howard Stern Broadcast; Miami Station Fined for Crank Call to Castro</b>	<b>52</b>
	<b>Media Groups Protest Seizure of Reporters' Tapes at Scalia Speech</b> <i>In response, Scalia apologizes for incident, promises more access for print reporters</i>	<b>55</b>

**Correction:** The article "Flynn on The Hot Seat In 'Mulberry Street,'" on *164 Mulberry St. Corp. v. Columbia University*, was written by Susan Stevens, not Susan Davis as incorrectly noted in the February 2004 *MediaLawLetter*.

**2004 NAA/NAB/MLRC  
MEDIA LAW CONFERENCE**

Forty years after New York Times v. Sullivan:  
PROBLEMS, POSSIBILITIES, AND ANSWERS

Alexandria, Virginia  
September 29, 30 and October 1, 2004

***You should have already received your registration materials by mail.  
If you do not have the materials, there are forms available on our web site, [www.lsrc.com](http://www.lsrc.com).***

## Supreme Court Holds Privacy Interests Bar Release of Vince Foster Photos

### *Shift in Burden of Proof May Hamper Media*

By David Bralow

On March 30th, the Supreme Court, in a unanimous opinion written by Justice Anthony Kennedy, held that FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death scene photographs. *National Archives and Records Administration v. Favish*, 124 S. Ct. 1570 (2004).

Plaintiff, a lawyer and former counsel to Accuracy in Media, the conservative media watchdog group, sought to compel production of certain death scene photographs of former White House Counsel Vincent Foster to conduct his own investigation into the death. In July 1993, Foster was found dead in Fort Marcy Park in Washington, D.C. Several investigations, including one by the Office of Independent Counsel, concluded that Foster committed suicide, but several groups continue to dispute this finding.

The Court found that here the family's privacy interest outweighed any public interest in disclosure of the photographs. While acknowledging that as a general rule, citizens seeking documents subject to FOIA disclosure are not required to explain why they seek the information, the Court held that where privacy concerns are present, the requester must show a significant public interest.

#### ***New Burden of Proof on FOIA Requests***

While the United States Supreme Court decision in the Vincent Foster autopsy photograph case solidified the notion that family members have privacy rights to prevent the release of death images of relatives, the lasting mischief of the decision in *Favish* arises from the Court's imposition of heretofore unknown burdens of proof on those who seek Freedom of Information Act (FOIA) records. See 124 S. Ct. 1579-80.

For the media, the question posed is whether this burden shifting becomes a permanent hurdle for the FOIA requester or whether this decision represents an anomaly arising from

a strongly worded adverse judicial reaction to the dissemination of disturbing pictures of deceased family members. Considered from another vantage point, can *Favish* be explained as another case, similar to the case involving the Dale Earnhardt autopsy photographs, in which a court is concerned with the problem of Internet distribution of disturbing photographs.

In short, can *Favish* be limited to its facts?

#### ***Public Interest Requirement***

In *Favish*, Justice Kennedy for a unanimous Court held that when a person requests FOIA records that implicate privacy interests protected by 5 U.S.C. Section 552(b)(7)(C), (that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy") the person has two specific burdens to satisfy before the government may release those records.

First, the person must demonstrate a "significant public interest" in obtaining the records that is different from and greater than some general FOIA interest in understanding government's doings.

Second, if that public interest is based on government impropriety or negligence, "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred."

The second burden seems similar to a "newly discovered" evidence rule. Indeed, the Court presumes the correctness of a government investigation, asserts that bare suspicion is not sufficient to meet this new burden and suggests that meaningful evidence must be something not previously known to the government. The Court observes:

It would be quite extraordinary to say we must ignore the fact that five different inquiries into the Foster matter reached the same conclusion (of the suicide of Vincent Foster).

124 S. Ct. at 1582.

---

***The lasting mischief of the decision in Favish arises from the Court's imposition of heretofore unknown burdens of proof on those who seek Freedom of Information Act (FOIA) records.***

---

(Continued on page 5)

**Supreme Court Holds Privacy Interests Bar Release of Vince Foster Photos**

(Continued from page 4)

**Burden Is Inconsistent with FOIA Policy**

These new burdens are inconsistent with previously recognized policy that access to government information, without any reason, is a core democratic value because it “would she[d] light on an agency’s performance of its statutory duties and would otherwise let citizens know what their government is up to.” *United States Dep’t of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 497 (1994).

As stated in *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976), the core value of FOIA was the presumption in favor of access to government information. Or as the Ninth Circuit Court of Appeals held in the *Favish* case “nothing in the statutory command conditions [disclosure] on the requesting party showing that he has knowledge of misfeasance by the agency.” 217 F.3d 1168, 1172-73 (9<sup>th</sup> Cir. 2000).

More important, this burden shifting also ignores the media’s and public’s pragmatic skepticism about the way gov-

ernment conducts investigations, especially about itself. As pointed out in the Reporters Committee Amicus Brief to the Court:

The government seeks a decision from this Court that allows an agency to choose who, if anyone, shines the light. But the FOIA rejects that scenario. Congress was well aware of the ‘innumerable times’ that agencies had withheld information under prior law ‘only to cover up embarrassing mistakes or irregularities,’ and chose to write a statute that opened government files to the public at large and made ‘disclosure, not secrecy ...the dominant object.’

Brief of Amici Curiae Reporters Committee for Freedom of the Press, et al. at p. 15, *citing Rose*, 425 U.S. at 361 (other citations omitted).

Instead of giving weight to the core values of openness in a democratic society, the Supreme Court determined that

(Continued on page 6)

---

***If there is one certain conclusion, autopsy photographs and other images of the deceased must be treated as a special category after Favish.***

---

MEDIA LAW RESOURCE CENTER  
TWENTY-FOURTH ANNUAL DINNER

WEDNESDAY, NOVEMBER 17, 2004

WITH PRESENTATION OF THE

**WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD**

TO

**TED TURNER**

WHO WILL BE INTERVIEWED ON THE OCCASION OF THE AWARD BY

**Tom Brokaw**  
**NBC News**

6:00 p.m. Reception  
Sponsored by Media/Professional Insurance

7:30 p.m. Dinner

## Supreme Court Holds Privacy Interests Bar Release of Vince Foster Photos

(Continued from page 5)

Congress intended the personal privacy exemption under 7 (C) of the FOIA to be construed to avoid some “limited or cramped notion” of the idea of privacy. Citing, *Reporters Committee for Freedom of the Press v. United States Dep’t of Justice*, 489 U.S. 749, 763 (1989).

It found support for this proposition because the language of 7(C), itself, is broadly written to include “any disclosure that ‘could reasonably be expected to constitute’ such an invasion” *Id.* The Court contrasted this generous language with that found in Exemption 6(C), pertaining to “personnel and medical files,” where withholding is required only if disclosure “would constitute a clearly unwarranted invasion of personal privacy.” *Id.* It is the difference between “clearly unwarranted” and “reasonably expected” that gives the Court the confidence to find that “7 (C)’s comparative breadth is no mere accident in drafting.”

The result of this comparison could be considered inconsistent with previously defined notions of privacy. For instance, medical records comprehended under Exemption 6(C) in the possession of state and federal agencies have always been treated as worthy of special privacy protection against dissemination. But here the Court recognizes a broader privacy protection to areas in which the recognition of a privacy interest is far less defined.

Perhaps, an explanation for this broad construction is found in the force of Justice Kennedy’s language relating to family members’ rights to prevent the dissemination of images of their recently deceased. The Court relies on a breadth of sources from Sophocles’ *Antigone* to the burial rituals discussed in the *Encyclopedia Britannica* to reach the conclusion:

We have little difficulty, however, in finding in our case law and traditions the right of family members to direct and control dispositions of the body of the deceased and to limit attempts to exploit pictures of the deceased family member’s remains for public purposes.

124 S. Ct. at 1578.

### ***Emotive Aspects to Court’s Ruling***

This reference to case law and tradition sounds as if the Court recognized a new privacy cause of action. Such a

broad enunciation was unnecessary because federal courts have previously recognized a privacy right of family members in the images or voices of their loved ones under the FOIA. See, e.g., *New York Times Co. v. National Aeronautics and Space Admin.*, 782 F. Supp. 628, 631 (D.D.C. 1991) (sustaining use of Exemption 6(C) because “exposure of the voice of a beloved family member ...would cause the Challenger families pain”); *Katz v. National Archives and Records Admin.*, and 862 F. Supp. 476, 485 (D.D.C. 1994) (release of Kennedy photographs would create additional anguish to the Kennedy family).

It is the emotive aspect to Justice Kennedy’s opinion that explains the ruling. For instance, there is the reference to the declaration of Foster’s sister, Sheila Foster Anthony, of possible injuries from the disclosure of the photographs, including “nightmares,” “heart-pounding insomnia,” fear of another round of “intense scrutiny by the media,” and being the “focus of conceivably unsavory and distasteful media coverage.”

There is the Court’s observation that “undoubtedly” the photographs will be placed on the Internet. And there is the Court’s almost goblins-in-the-woodshed list of horrible people who might get these photographs: “We are advised by the Government that child molesters, rapists, murderers, and other violent criminals make FOIA requests for autopsy photographs and records of their deceased victims.” 124 S. Ct. at 1579.

In this respect, the Court’s concern mirror those of the appellate court in Florida that the dissemination of photographs, especially on the Internet, would cause significant pain to Teresa Earnhardt, Dale’s widow, and her family. *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. 5th DCA 2002).

Indeed, the *Earnhardt* decision has the same type of list of horrors, including real and hypothetical cases of Internet publication of graphic and disturbing images.

Whether these burdens will be strenuously enforced for all cases in which Exemption 7(C) is invoked shall have to wait for future applications. If there is one certain conclusion, autopsy photographs and other images of the deceased must be treated as a special category after *Favish*.

*David S. Bralow is Senior Counsel at Tribune Company.*



## Directed Verdict for Newspaper After Mid-trial Ruling on Plaintiff's Public Figure Status

By John J. Kerr

After seven days of trial, a common pleas judge of the Ninth Judicial Circuit sitting in Charleston, South Carolina, directed a verdict for the *Charleston City Paper*, ruling that the plaintiff guardian *ad litem* was a public figure who failed to present clear and convincing evidence of actual malice. *Erickson v. Jones Street Publishers, L.L.C., d/b/a Charleston City Paper* (directed verdict March 30, 2004).

### ***Newspaper Article Explored Guardianship System***

The libel lawsuit arose out of an article published by the newspaper that explored the South Carolina private guardian *ad litem* system in general, and specifically how that system was practiced in custody actions in the family court system in Dorchester County, South Carolina. The lengthy article cited several sources for the proposition that the system was corrupt and needed overhauling.

The article focused on two custody cases tried in the Dorchester County family court. In one of the cases, the guardian *ad litem* appointed for the minor child admitted to having an affair with the child's father. The guardian said it was after her duties were over, but that was disputed by others connected with the case.

Plaintiff Erickson was the guardian *ad litem* in the other custody action reviewed in the January 2000 article. She was not named, but she was identifiable. The single source for the portion of the article about plaintiff was the maternal grandmother of the minor children at the center of a custody battle.

The grandmother and plaintiff were in conflict from the outset. Evidence presented during the trial backed up the grandmother's claims that plaintiff was biased against her, her husband and her daughter. The article contained the grandmother's claims that plaintiff "did not do a thorough job" in carrying out her guardian *ad litem* duties; that she "manipulated the judge" in a preliminary custody hearing; and that plaintiff "had it written that [the grandmother] could have no contact with either of her minor grandchildren" following the divorce and custody action.

The grandmother, grandfather and the daughter were so upset over their experience with plaintiff and the Dorchester County family court system that they formed a group called the Domestic Court Reform Movement. They advertised in their local newspaper and found others who had equally distressing experiences and began protesting on the courthouse grounds.

### ***Judge Refused to Rule on Status Before Trial***

Plaintiff sued the newspaper days before the expiration of the two-year statute of limitations for libel actions in South Carolina. At a summary judgment hearing, the court refused to rule on plaintiff's status as a private or public figure.

After a futile search, the newspaper's attorney could not find a case where a guardian *ad litem* was a libel plaintiff. However, he found several analogous lawsuits brought by social workers whose duties and responsibilities are similar to those of a guardian *ad litem*. Social worker plaintiffs in libel actions had been ruled public figures/officials by courts in California, Tennessee, and Colorado. The judge hearing the summary judgment motion decided the public or private status of the plaintiff guardian *ad litem* was a novel issue that needed to be decided by the trial judge after reviewing evidence and testimony.

### ***Private Figure Ruling Reversed During Trial***

At the close of the plaintiff's case, late on the afternoon of the fifth day of trial, Judge Roger Young denied the newspaper's motion for a directed verdict, ruling that the plaintiff was a private figure.

On Monday, March 29th, the newspaper began presenting its defense. On the second day and during the plaintiff's cross-examination of the newspaper's second witness, the judge called for a break. In chambers, Judge Young told the attorneys he had heard enough testimony to change his mind completely on the status of plaintiff for purposes of her libel action.

Additional testimony presented during the defense showed that plaintiff gave misleading and false statements about the mother and grandmother to the psychologist ap-

(Continued on page 8)

### **Directed Verdict for Newspaper After Mid-trial Ruling on Plaintiff's Public Figure Status**

*(Continued from page 7)*

pointed to conduct a custody evaluation. Those statements wound up in the psychologist's custody evaluation report entered into evidence during the divorce/custody action. (Private guardian *ad litem*s have only qualified immunity from lawsuits arising out of the performance of their duties.)

Plaintiff also voluntarily interjected herself into what had become a public controversy by sending an agent or agents to surreptitiously tape record meetings of the Domestic Court Reform Movement where she was being discussed. Another agent recorded a telephone conversation with the grandfather. After the agent gave a fake account of plaintiff being the guardian *ad litem* in his daughter's custody battle, the agent then tried to lure the grandfather into slandering plaintiff.

Following the chambers meeting, the newspaper rested its case without calling the mother, grandmother and grandfather to testify. Judge Young then granted the newspaper's directed verdict motion. Judge Young refused to rule the plaintiff guardian *ad litem* was a public official as the newspaper's attorney also contended.

### ***The Jury***

In what was an extremely rare occurrence, the parties drew an all male jury of twelve with one male alternate. Out of a jury pool of approximately eighty, equally divided between men and women, the clerk drew twenty three names. Only two women were drawn. The plaintiff and defendant's attorneys each used one of their five strikes to remove the two women. The defendant's attorney wanted all females on the jury if possible. However, he struck the wife of an attorney.

The grandmother's former son-in-law also brought a lawsuit containing several causes of action, including libel against the newspaper on account of the article, and slander against the grandmother and grandfather because of statements made during the course of the litigation. That lawsuit is scheduled to commence on June 14, 2004.

*John J. Kerr of Buist Moore Smythe McGee P.A. in Charleston, SC represented the media defendant.*

### ***Order Now!***

## **50 State Survey 2003-2004: MEDIA PRIVACY AND RELATED LAW**

*With a special report on privacy and related law in the Federal Courts of Appeals.*

**TOPICS INCLUDE:** *False Light • Private Facts • Intrusion • Eavesdropping • Hidden Camera • Misappropriation • Right of Publicity • Infliction of Emotional Distress • Prima Facie Tort • Injurious Falsehood • Unfair Competition • Conspiracy • Tortious Interference with Contract • Negligent Media Publication • Damages and Remedies • Relevant Statutes*

**\$175**

**For ordering information go to [www.medialaw.org](http://www.medialaw.org)**



## The Right to Reveal Intimate Details: A Protected Right

By Elizabeth McNamara and Linda Steinman

Breaking up is, as the song goes, hard to do. Chronicling the break-up in a memoir adds to the burden. In a significant boost to the right of autobiographers and memoirists to explore and record their lives, the Massachusetts Superior Court last month issued a significant opinion dismissing an intimate private facts claim on a motion to dismiss and recognizing an author's right to tell her own personal story – even if it implicates highly personal facts concerning others in her life. *Bonome v. Kaysen & Random House*, MICV2003-02767-H (Mass. Super. Ct. March 9, 2004).

### ***Memoir Recounted Relationship***

The action, arose out of Susanna Kaysen's memoir *The Camera My Mother Gave Me*. Ms. Kaysen is perhaps best known as the author of her previously highly acclaimed memoir, *Girl Interrupted*, which explored her year in a mental institution at the age of 18.

*Camera* chronicles another year in Kaysen's life, this one documenting the effects of Kaysen's seemingly undiagnosable vaginal pain on many aspects of her life, including her overall physical and emotional state, her friendships, and her relationship with her unnamed boyfriend (Mr. Bonome).

It is fair to say that her boyfriend did not react well to her condition and struggled with its necessary consequences, particularly with the significant reduction in sexual relations. Thus, the boyfriend is depicted as always "pestering" or "whining and pleading" for sex. To that end, the book details, graphically on a few occasions, several sexual encounters between Kaysen and her boyfriend as he becomes increasingly impatient with her condition, culminating in a scene where her boyfriend is physically forceful in an attempt to engage her in sex.

### ***Private Facts Explored Significant Themes***

Random House and Kaysen moved to dismiss the complaint, arguing that this was Kaysen's own story to tell. The memoir unquestionably addressed a series of issues of public concern, from the medical community's ability to treat and diagnose debilitating pain to when is the delicate line crossed distinguishing consensual from coercive sex. While indisputably intimate, private facts concerning the couple's sexual relationship were included in the memoir, the defendants argued that such facts were inextricably entwined in the memoir's exploration of its significant themes.

Remarkably few cases have addressed the boundaries for revealing private facts in the context of autobiographies or memoirs, particularly facts of a highly personal nature that do not have a public records component. *Anonsen v. Donahue*, 157 S.W.2d 700 (Tex. App.

1993) is perhaps the best previous decision that recognized the key distinction between intimate disclosures by a person telling his or her own story versus reporting by an unconnected third party.

In the context of the Phil Donahue Show, *Anonsen* addressed a wife's disclosure that her husband raped their then 11-year old daughter and that the family raised the resulting child as a sibling of the daughter. There, the Texas court found that the impact of this tragedy on the wife's life was an issue of significant public concern and it was *her* right to reveal it, even if it necessarily implicated the privacy of others in her family.

### ***Court Analyzed Privacy Interests***

Superior Court Justice Christopher Muse, in *Bonome*, builds on this important distinction between arguable prying by an uninvolved third party and the critical right of authors to explore and relay their own

(Continued on page 10)

---

**Remarkably few cases have addressed the boundaries for revealing private facts in the context of autobiographies or memoirs, particularly facts of a highly personal nature that do not have a public records component.**

---

## The Right to Reveal Intimate Details: A Protected Right

*(Continued from page 9)*

stories. The decision carefully analyzes both the privacy interests at stake as well as the First Amendment interests implicated. The Court noted that the general public has an interest not only in liberty of speech and press, which has been widely recognized, but also has “an equally important interest in safeguarding the individual’s right to keep private aspects of his life private.”

As to the privacy interests at stake, the court took into account not only the traditional notion of keeping private matters private but also “a more basic right to control the flow of information about oneself.” The Court noted that this case “presents an additional challenge in that it pits Kaysen’s right of publicity – her own right to disclose intimate facts about herself – directly in conflict with Bonome’s right to control the dissemination of private information about himself.”

### *Author’s Interest in Telling Her Story*

As to the First Amendment interests, the Court emphasized the wide-ranging scope of interests of legitimate concern to the public and the broad deference properly given to publishers in making this judgment.

Quoting the *Restatement (Second) of Torts* §652D, the Court stated that,

“In this case, a critical issue is whether the personal information concerning Bonome is in the book for its relevance to issues of legitimate public concern or is merely ‘morbid and sensational prying into [Bonome’s] private life for its own sake.’”

Ultimately the Court concluded that, “it is clear that the details are included to develop and explore” the themes of the book, which were unquestionably matters of legitimate public concern – namely the

“impact of [Kaysen’s] medical condition on her physical and emotional relationship with her boyfriend and the issue of when undesired physical intimacy crosses the line into non-consensual sexual relations.”

In reaching its conclusion, the Massachusetts Court wrote eloquently of the broad interests of an author in telling his or her own story.

“In this case, it is critical that Kaysen was not a disinterested third party telling Bonome’s personal story in order to develop the themes of her book. Rather, she is telling her *own* personal story – which inextricably involves Bonome in an intimate way. . . . Where one’s own personal story involves issues of public concern, it is often difficult, if not impossible, to separate one’s intimate and personal experiences from the people with whom those experiences are shared . . . . Because the First Amendment protects Kaysen’s ability to contribute *her own* personal experiences to the public discourse on important and legitimate issues of public concern, disclosing Bonome’s involvements in those experiences is a necessary incident thereto.”

### *Sensitivity to the Impact of Disclosure*

It is also noteworthy that the Court recognized that the nexus between the disclosure of private facts and the issue of legitimate public concern should be both logical and proportional. On the latter point, even though he was plainly identifiable to those who knew the couple, the Court found it to be of some import that Kaysen did not use Bonome’s name in the book and thus shielded him from unnecessary publicity and attention.

“This is not to overlook or discount the impact this disclosure may have had on Bonome, or his substantial claim that Kaysen may have breached a fundamental trust of their relationship. However arguably odious, the defendants did not exercise the right of disclosure in a manner offensive to the balance of those interests.”

In short, sensitivity to the impact and implications of one’s revelations is warranted.

*Elizabeth McNamara and James Rosenfeld of Davis Wright Tremaine, and Linda Steinman and Jon Fine of Random House, Inc. represented Susanna Kaysen and Random House.*

## Chicago Sun-Times Wins Two Cases on Innocent Construction Rule

By Damon E. Dunn

Illinois adheres to a modified innocent construction rule, under which an Illinois court must dismiss a defamation complaint as a matter of law when the offending statement is reasonably capable of an innocent construction. Two decisions rendered last March in Illinois involved high profile news stories in which an Illinois court of appeals and a federal district court both applied the innocent construction rule to defeat defamation complaints against the *Chicago Sun-Times*.

In *Salamone v. Hollinger International, Inc., et al* No.1-02-2492, 2004 Ill. App. LEXIS 314 (Ill. App. March 30, 2004), the court affirmed the dismissal of a defamation lawsuit filed by a casino investor, who had been referred to as a "reputed organized crime figure."

In *Knafel v. Chicago Sun-Times*, 03C6434, 2004 U.S. Dist. LEXIS 5117 (N.D.Ill., March 24, 2004), the court dismissed a complaint by a female friend of basketball icon Michael Jordan who had alleged that a *Sun-Times* column described her as a prostitute.

### "Reputed Organized Crime Figure"

In *Salamone*, the *Sun-Times* published a story headlined "Mob links hurt Rosemont casino bid." During a heated dispute over Illinois' last available casino license, the State's gaming board effectively barred Emerald Casino from relocating its gambling operations to Rosemont, Illinois.

Among other reasons, the board cited Emerald's agreements "to sell shares in Emerald to the Sherry Boscarino Trust and Joseph Salamone, who are associated with persons who have been identified as members and associates of organized crime." The resulting *Sun-Times* story referred to Salamone as a "reputed organized crime figure," prompting Salamone to allege defamation *per se* and false light invasion of privacy against the newspaper's corporate parent, the newspaper and its reporter.

The *Sun-Times* moved to dismiss the complaint. Judge Kathy M. Flanagan of the Illinois Circuit Court granted the motion in a written opinion, finding that the phrase was both overly vague and capable of an innocent construction. Salamone then filed an amended complaint, adding a count for defamation *per quod*, which Judge Flanagan also dismissed with a second memorandum order.

On appeal, Salamone argued that "if any one of the justices of this court were referred to as a 'reputed organized crime figure' counsel confidently maintains that the justice would understand the term and not find it innocent in the slightest." The *Sun-Times* reasserted all of its original grounds for dismissal, including that the phrase did not convey a verifiable fact and was subject to an innocent construction, as well as lack of actual malice and fair report.

### Use of "Reputed" Provided Safe Harbor

The appeals court published a unanimous opinion written by Justice Robert Cahill affirming the dismissal. In reading the story, the court found that it characterized Salamone "not as a mobster, but as a person who is believed to be, possibly erroneously, an organized crime figure." Reading the phrase in context with the entire story, the court further held: "There is nothing in the remainder of the article that would support an opposite conclusion." The court added that the term "reputed" was a "slippery word to handle" but concluded:

For better or worse, the use of "reputed" in front of derisive characterizations of people appears to be a safe harbor for the media. The obvious question: "Reputed by whom?" is easily deflected by the statutory privilege that protects a journalist from revealing his sources.

### No Special Damages

Turning to the *per quod* count, the appeals court upheld dismissal for failure to plead special damages. Recognizing that there is no precise definition for special damages, the court nevertheless found Salamone's allegations insufficient. Salamone not only alleged humiliation and distress but also that "repeat customers of his independent grocery store ceased patronizing his store after the publication of the article."

Noting that allegations of noneconomic injury do not plead special damages in Illinois, the court also rejected the allegations of economic loss because the complaint failed to allege with particularity which customers ceased patronizing Salamone's business or "actual monetary loss from a lack of business."

(Continued on page 12)

***Sun-Times Wins Two Cases on Innocent Construction Rule***

*(Continued from page 11)*

Interestingly, the appeals court took a slightly different tack with respect to the false light count. The court found that Salamone failed to allege “the most basic element” of this tort: that the statement was false. Applying an analysis more akin to protected opinion than innocent construction, the court observed that: “While the statement may be construed as a strong criticism of plaintiff, it is not a statement that is capable of being verified as true or false.”

The *Salamone* opinion should provide valuable precedent supporting the freedom to report substantive allegations. Yet, it remains to be seen how courts will deal with perceived abuses of this “safe harbor,” particularly where, as in Illinois, a statutory reporter’s privilege provides qualified protection for a journalist’s source material.

In *Knafel v Chicago Sun-Times*, the plaintiff’s claims arose from a column entitled *Is Karla Knafel’s affection really worth \$ 5 million?*, which appeared in both the print and online versions of the *Sun-Times*. Knafel claimed that the column was defamatory *per se* because it falsely stated that she had committed the criminal offense of prostitution.

***Plaintiff Sought Money from Michael Jordan***

The column, written by columnist (and television film critic) Richard Roeper, opined on an Illinois state court lawsuit between NBA star Michael Jordan and Knafel. Jordan admitted to a relationship with Knafel but claimed that she later had attempted to extort him. Knafel countersued, claiming that Jordan agreed to pay her five million dollars when he retired from playing basketball in return for her promise not to file a paternity suit or publicly reveal their relationship.

The column opened with a wry observation on the pursuit of male celebrities by their female admirers before asking (emphasis added):

What do female groupies expect to get from these encounters? Well, sex. Some want to be able to say they bedded a celebrity. Others are hoping against

hope for true love, or at least an affair that will make them semi-famous. *And, of course, there are some women who see a famous horny guy, blink their eyes and hear the ka-ching of a cash register. Women like Karla Knafel.*

Roeper then discussed Knafel’s claim that “Michael Jordan promised to pay her \$5 million not to discuss their affair.” In closing, the column noted that Knafel described herself as “saddened and shocked” that Jordan would not honor their contract and concluded:

In other words, you had sex with a famous, wealthy man, and you claim he promised to pay you \$ 5 million to keep quiet about it, and now you want your money. That just exudes class, doesn’t it? When Knafel’s children are older, they’ll be so proud to read the news clippings about mom. Knafel was once

an aspiring singer. She’s now reportedly a hair designer. *But, based on the money she’s been paid already and the additional funds she’s seeking in exchange for her affair with Jordan, she’s making herself sound like someone who once worked in a profession that’s a lot older than singing or hair designing.* (emphasis added)

Knafel claimed that, when read in conjunction, the italicized sentences falsely imputed to her the commission of prostitution because they stated that “Knafel intended to and did trade sex for money with Jordan.”

***Innocent Construction Rule Applied***

The *Sun-Times* moved to dismiss for failure to state a claim, primarily arguing that the column conveyed subjective judgments and/or opinions based on truthful disclosed facts. In addition, the newspaper argued that the column, at worst, implied the offense of intimidation rather than prostitution (which was a substantially true description of Knafel’s admitted counterclaim for “hush money”) and that the column could be innocently construed.

*(Continued on page 13)*

---

***The Salamone opinion should provide valuable precedent supporting the freedom to report substantive allegations. Yet, it remains to be seen how courts will deal with perceived abuses of this “safe harbor.”***

---



## Sun-Times Wins Two Cases on Innocent Construction Rule

(Continued from page 12)

District Judge Amy St. Eve elected to decide the case on innocent construction grounds, finding that the “chief deficiency” in Knafel’s claim was that the column did not impute commission of the actual crime of prostitution. The offense of prostitution in Illinois requires the bargained-for exchange of discrete sexual favors for money.

The court agreed with the *Sun-Times* that the column instead suggested a more indefinite transaction with Jordan and was therefore “reasonably construed as imputing to Knafel mercenary actions that do not amount to the commission of prostitution.” Consequently, the court concluded that: “While Roeper’s column may cast a moral judgment on Knafel, it is, as a matter of law, reasonably susceptible to the interpretation that it goes no further.”

While Illinois treats innocent construction as a question of law, the district court thought it necessary to distinguish *Muzikowski v. Paramount Pictures*, 322 F.3d 918 (7th Cir. 2003), which qualified a federal court’s ability to dismiss under Rule 12(b)(6). The district court, however, found

*Muzikowski* inapposite because “no further evidence is necessary to show that, in their ‘natural sense,’ the statements may be reasonably read to impute to Knafel avarice rather than the commission of prostitution.” Furthermore, the district court expressed doubts that any amendment could salvage the claim and Knafel eventually declined to amend.

Interestingly, in both the *Salamone* and *Knafel* opinions, the defendants’ initial argument was that the offending phrases were not actionable because they did not convey a verifiable fact. Both courts instead opted instead for the

secondary innocent construction argument as the grounds for their decision and did not address the constitutional argument directly.

Plaintiff in *Salamone* was represented by David A. Novoselsky; the plaintiff in *Knafel* was represented by Michael T. Hannafan & Associates, Ltd.

***The court agreed with the Sun-Times that the column instead suggested a more indefinite transaction with Jordan and was therefore “reasonably construed as imputing to Knafel mercenary actions that do not amount to the commission of prostitution.”***

*Damon E. Dunn, a member of Funkhouser, Vegosen, Liebman & Dunn Ltd. in Chicago, represented the Chicago Sun-Times and other defendants in the Salamone and Knafel cases.*

## Being Turned Away from Memorial Service Not Defamatory

By Jamie L. Secord

An item in a *Chicago Tribune* column reporting that a sports agent tried to attend the memorial service of a former client but was turned away three times was deemed non-defamatory by the Illinois Appellate Court. The court also dismissed plaintiff’s claim for false light invasion of privacy based upon the same statements. *Zucker v. Chicago Tribune Company*, Nos. 1-02-2394, 1-02-3406 (Ill. App. March 12, 2004).

### ***Sports Agent Sued Over Report***

The plaintiff, Stephen Zucker, is a sports and entertainment agent. He sued the Chicago Tribune Company and a reporter, alleging that the story “trashed” his business reputation and “attempted to make him the pariah of Chicago.” Zucker had had a publicly acrimonious relation-

ship with his former client, Chicago sportscaster Tim Weigel, whose memorial service Zucker reportedly had attempted, unsuccessfully, to attend.

Defendants moved to dismiss Zucker’s claims because the statements did not harm his professional reputation and were capable of an innocent construction – namely, that despite a previous falling out, Zucker had decided to put aside past disagreements and attend Weigel’s memorial service. Defendants also argued that the statements were not sufficiently outrageous to sustain a false light claim and that Zucker had failed to identify the special damages required to support a false light claim.

The Circuit Court of Cook County agreed with defendants that the statements were not defamatory *per se*, but allowed the false light claim to proceed.

On appeal, defendants argued that the Circuit Court’s

(Continued on page 14)

**Being Turned Away from Memorial Service Not Defamatory**

*(Continued from page 13)*

reasoning on the defamation claim – that the statements “at most” amounted to accusations that Zucker was “rude and grossly insensitive” – precluded a finding that the statements were “highly offensive” and therefore could not be actionable as an invasion of privacy.

Defendants also argued that in light of the Colorado Supreme Court’s recent refusal to recognize the false light tort altogether, Illinois courts should similarly abolish such claims in defamation cases. *See Denver Publishing Co. v. Bueno*, 54 P.3d 893, 894 (Colo. 2002) (false light is “highly duplicative of defamation both in interests protected and conduct averted”).

**Claims Nonactionable As a Matter of Law**

The appellate court, in an opinion written by Judge David Donnersburger, affirmed the dismissal of the defamation claim because the statements did not prejudice Zucker in his profession or business and were reasonably capable of an innocent construction. The court also held that dismissal of the false light claim was warranted because Zucker failed to plead special damages. Because of the special damages ruling, the court did not address defendants’ additional argument that the statements were not offensive enough to support a false light claim. The court also did not address defendants’ request to abolish false light claims in defamation cases.

Zucker has filed an affidavit of intent to appeal the appellate court’s decision, although that affidavit was filed one day after the deadline. The Illinois Supreme Court has not yet ruled on Zucker’s motion for an extension.

Paul Vickrey of Niro, Scavone, Haller & Niro represented plaintiff.

*Richard O’Brien and Jamie Secord of Sidley Austin Brown & Wood LLP represented the defendants.*

**TO ORDER**

**2004:1 MLRC BULLETIN  
ANNUAL REPORT ON TRIALS & DAMAGES**

**PLEASE CONTACT US AT 212-337-0200**

**Petition for Cert. Filed in Ross v. Santa Barbara News-Press**

The Santa Barbara News-Press filed a petition for certiorari in *Ross v. Santa Barbara News-Press*, 2003 WL 22220512, 32 Media L. Rep. 1025 (Cal. App. 2 Dist. Sep 26, 2003) (unpublished).

In *Ross*, a California appellate court affirmed a \$2.25 million dollar jury libel award. The court held that plaintiff’s status as a private figure was law of the case on a retrial and not subject to reexamination on appeal of the second trial. At issue were two lengthy articles that profiled plaintiff, a prominent real estate investor, and his attempt to increase his ownership of a California savings and loan. Plaintiff alleged the articles implied he had been investigated for the same investor fraud that his former business partner had been jailed for. The court affirmed the award on the ground that newspaper articles were not fair summaries of prior investigations of plaintiff.

The petition for certiorari raises two questions: 1) Does the First Amendment require appellate courts in libel cases to independently review a jury’s finding that an allegedly defamatory statement was not substantially true? 2) Is a person who has or seeks control over a business in a pervasively regulated industry a “public figure” under the First Amendment for the limited purpose of media coverage about his business dealings?

The newspaper is represented by Kelli Sager, Jeffrey Blum, Jeffrey Fisher and Susan Seager of Davis Wright Tremaine LLP in Los Angeles and George Freeman of the New York Times.

**TO RECEIVE THE  
MEDIALAWLETTER BY E-MAIL**

**(Or Add Others From  
Your Organization to Our List)**

**Please Contact  
Kelly Chew  
kchew@ldrc.com**



## NY Court Affirms Dismissal of Media Ride-along Claims

By Nathan Siegel

In a typically terse opinion, New York's Appellate Division, Second Department affirmed the dismissal of a libel and trespass suit arising out of a "ride-along" report by New York's WABC-TV. *Every Drop Equal Nutrition, L.C. v. ABC, Inc.*, 772 N.Y.S.2d 865 (2d Dep't 2004).

Though it was not the principal focus of the litigation, the dismissal of the trespass claim will likely prove to be the more important precedent for the media, particularly for media advocates seeking dismissal of similar claims at the pleadings stage.

The case arose out of a report on WABC-TV's local evening news about a raid by inspectors from two different New York City agencies on the plaintiff's business, accompanied by a reporter and videographer. The business was located in a cordoned-off area of the parking garage of a residential public housing project. The principal issue in dispute was WABC's reporting that city inspectors said the plaintiff was operating an illegal water-bottling business on the premises – taking water from some unknown source, bottling it, and selling it as spring water.

The report also showed excerpts of an on-camera interview with a New York City Council staffer who accompanied the inspectors and alleged that the water was really tap water that was a health hazard. The report also contained a brief excerpt of a man-in-the-street interview with an area resident who said that he wouldn't "trust" any water coming from the garage. Finally, the report noted that the Health Department had shut the business down while it investigated, but very preliminary testing indicated that the water was safe to drink.

### ***Plaintiff Sued for Libel & Trespass***

The plaintiff business alleged claims of defamation and trespass against WABC, its reporter and a host of New York City agencies and individuals who participated in the raid and investigation. The gravamen of the defamation

claim was the allegation that the business was legal and was not bottling any water, but merely used the premises as a storage area for previously-bottled water awaiting shipment to retailers.

The trespass claim alleged that both the inspectors and the WABC cameraman entered the plaintiff's business premises without consent (no one from the business was present at the time of the raid). WABC denied that its cameraman had entered the premises – saying he shot the visible interior standing outside with a zoom lens – but recognized that for purposes of its motion the Court had to assume the plaintiff's allegation was true.

Only the media defendants filed a motion to dismiss, prior to discovery. The trial court, in a more extensive opinion, granted the motion based on a virtual *potpourri* of defamation defenses – New York's statutory version of the fair report privilege, the absence of any apparent "gross irresponsibility"

(New York's fault standard for private figures) as a matter of law, and a finding that the man-in-the-street comment was non-actionable opinion.

### ***Dismissal on Fair Report Ground***

The Appellate Division affirmed based only on the fair report privilege, *N.Y. Civil Rights Law § 74*, and did not address the other defenses. The decision joins a number of others in which New York courts have proved willing to dismiss libel cases based on the fair report privilege without discovery.

On the trespass claim, both the trial and appellate courts followed *Costlow v. Cusimano*, 311 N.Y.2d 92 (4th Department 1970) to dismiss the claim. To this author's knowledge, *Costlow* was the first media "ride-along" case to result in a published opinion, long before more recent developments in this area of the law spurred by Judge Jack Weinstein's now-infamous opinion in *United States v. Sarnusi*, 813 F.Supp. 149 (E.D.N.Y. 1992).

(Continued on page 16)

---

***Though it was not the principal focus of the litigation, the dismissal of the trespass claim will likely prove to be the more important precedent for the media, particularly for media advocates seeking dismissal of similar claims at the pleadings stage.***

---

**NY Court Affirms Dismissal of Media Ride-along Claims**

*(Continued from page 15)*

Following *Costlow*, the Second Department held that because the plaintiff did not allege any property-related damage caused by the alleged trespass, but rather only sought the same publication damages alleged in the defamation claim, the Complaint failed to state a claim for trespass as a matter of law.

***Trespass Claims and Publication Damages***

*Every Drop Equal Nutrition* adds to some ambiguity among New York's intermediate appellate courts concerning the viability of trespass claims against the media that seek exclusively publication damages. Both *Costlow* and *Every Drop* simply dismissed such claims outright.

However, in the context of a trespass-by-misrepresentation claim more typically arising out of undercover reporting, the First Department has held while publication damages will not lie, such claims may go forward as claims for nominal damages. *Shiffman v. Empire Blue Cross and Blue Shield, et. al.*, 681 N.Y.S.2d 511 (1st Dep't 1998).

This distinction is mirrored by cases in other jurisdictions that have produced the same ambiguity. *Compare*

*Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) and *La Luna Enterprises, Inc. v. CBS Corp.*, 74 F.Supp. 2d 384 (S.D.N.Y. 1999) (both permitting trespass claims for nominal damages) with *Medical Lab. Mngt. Consultants v. American Broadcasting Companies, Inc.*, 306 F.3d 806 (9<sup>th</sup> Cir. 2002) and *Robinson v. City of Philadelphia*, 2001 U.S. Dist. LEXIS 23128 (E.D. Pa.), *aff'd* 2003 U.S. App. LEXIS 16223 (3<sup>rd</sup> Cir. 2003) (dismissing trespass claims alleging only publication damages).

The distinction is significant both because of the symbolic importance of whether such alleged media actions constitute a tort, and because in many jurisdictions claims for nominal damages may support larger awards of punitive damages. Most jurisdictions, including some within New York,

have not addressed the issue, so *Every Drop* should assist media advocates faced with cases of first impression raising this important issue.

Craig D. Holland of Agoglia, Fassberg, Holland & Crowe, P.C., Melville, NY represented plaintiff.

*Nathan Siegel is an in-house counsel at ABC and represented ABC in both the trial and appellate proceedings.*

***Because the plaintiff ... only sought the same publication damages alleged in the defamation claim, the Complaint failed to state a claim for trespass as a matter of law.***

*Order now!*

**MLRC 50-STATE SURVEY 2003-04:  
MEDIA LIBEL LAW**

*With updated reports on libel law in the Federal Circuits and an outline of English libel*

**MEDIA LIBEL LAW TOPICS INCLUDE:** *Defamatory Meaning • Opinion • Truth/Falsity • Fault • Republication • Privileges • Damages • Motions to Dismiss • Discovery Issues • Trial Issues • Appellate Review • Remedies for Abusive Suits • Retraction • Constitutional/Statutory Provisions*

**\$175**

**For ordering information on the most current editions, including the 2002-2003 edition currently in stock, go to [www.medialaw.org](http://www.medialaw.org)**

## Rhode Island Supreme Court Affirms Summary Judgement for News Station, But Condemns “Ambush Interview” Tactic

By William P. Robinson

The rights of investigative journalists were upheld in the recent unanimous decision of the Supreme Court of Rhode Island in *Leddy v. Narragansett Television, L.P.*, 843 A.2d 481 (R.I. 2004), although in dicta the court did not conceal its unhappiness with the “ambush interview” tactic.

### *Investigative Report on Disability Pensions*

The case arose from a three part series of investigative reports on Channel 12 in Providence concerning the Rhode Island municipal disability pension system. The plaintiff, a deputy state fire marshal at the time of the broadcasts, had previously been a Providence firefighter before leaving with a disability pension. During the broadcast interview with plaintiff, Channel 12’s reporter asked plaintiff: “Do you feel like you’re ripping off the system in some way, because you really, pardon, no offense, but you don’t look that handicapped.”

Plaintiff alleged that the investigative reports and subsequent promotional advertisements that used excerpts from the reports, defamed him and used his likeness for commercial purposes in violation of a state privacy statute. The defendants took the position that the words used in the broadcasts were too vague and general to be defamatory and that, in any event, the plaintiff was a public official and that there was no evidence of actual malice.

Throughout the litigation, the defendants placed much emphasis on the importance of the media’s role in scrutinizing government and on the broad protection that the First Amendment provides to that scrutinizing process. After a substantial amount of discovery, defendants obtained summary judgment on all counts from the Superior Court.

### *Plaintiff’s Status*

The Supreme Court unanimously affirmed that grant of summary judgment, but its grounds differed significantly from the grounds relied on by the Superior Court.

The Superior Court had held that the plaintiff (who was one of only four deputy state fire marshals at the time of

the broadcast and who had statutory arrest powers, which he had exercised on numerous occasions) was a public official. Among the authorities cited by the Superior Court in support of that ruling was the earlier Rhode Island case of *Hall v. Rogers*, 490 A.2d 502 (1985), which defined the public official category in a notably broad manner.

The Supreme Court discussed the considerations that would be pertinent to deciding whether the plaintiff was a public official, but then declined to rule on the issue, choosing to “assume, without deciding, that the public-official designation would not apply to plaintiff in this case.”

### *Protected Opinion*

Instead, the Supreme Court chose to rule that the investigative reports were not defamatory because the station had “disclosed during the broadcast the nondefamatory factual basis for the derogatory words used.” For that reason, the Supreme Court held that the broadcasts consisted of protected “derogatory opinion about a subject of legitimate public interest.”

### *Promotional Advertisements*

The subsequent promotional spots contained a brief soundless clip showing, among other images, the reporter questioning plaintiff. A background voice stated, “Hey. It’s simple. If you don’t want these guys in your face, don’t do anything wrong.” The Court held that the use of the phrase “don’t do anything wrong” as plaintiff’s image appeared was not actionable since, in the Court’s words, that statement “was too imprecise and vague to support plaintiff’s defamation claim because such as statement cannot be proven true or false.”

The Court also rejected plaintiff’s Privacy Act claim based on the use of plaintiff’s image in these advertisements for the station’s newsgathering prowess. Construing for the first time the state statute governing the use of a person’s likeness and image for advertising and trade purposes (R.I. Gen. Laws § 9-1-28), the Court held that the statute was not violated.

(Continued on page 18)

## Rhode Island Supreme Court Affirms Summary Judgement for News Station, But Condemns “Ambush Interview” Tactic

(Continued from page 17)

The Rhode Island court reached the same conclusion as that reached by courts in other states (notably New York and California) relative to such promotional advertising by the media. Noting the pertinence of “free-speech considerations,” the Court stated:

Although the promotional spot in this case undoubtedly included a commercial aspect in attempting to attract viewers to Channel 12’s future news broadcasts, courts have ruled that free-speech considerations protect brief rebroadcasts of previously televised investigative reports or other newsworthy events to promote a news medium from such invasion-of-privacy or wrongful-use claims – so long as the original broadcast itself was not false or defamatory.

The Supreme Court then proceeded to hold as follows:

---

***The Court clearly is not fond of certain journalistic practices, but it nevertheless did not hesitate to put to one side its own views as to how newsgathering should be conducted; and it proceeded to uphold the First Amendment rights of the defendant television station and its reporter.***

---

Applying this reasoning, a news medium such as Channel 12 has a constitutional privilege to tout itself in promotional spots or advertisements by showing brief rebroadcasts or televised snippets from its past nondefamatory reports or from its coverage of news stories.

### ***Court Condemns Ambush Interviews***

Although the result in this case is undoubtedly favorable to the media in general and to investigative reporters in particular, the court did not conceal its unhappiness with the “ambush journalism” technique. For example, the Court’s opinion begins as follows:

As the television cameras roll, an investigative reporter, inquiring about an issue of potential public interest, thrusts a microphone into the startled, hapless face of some speedwalking employee, who is vainly attempting to short circuit the interview. How often has this all too familiar scene of

“ambush journalism” played itself out on television news shows and on other similar programs?

And, while ruling in defendants’ favor on constitutional grounds, the opinion concludes with the following similar observations about “ambush journalism.”

[E]ven though we carry no brief for the disreputable aspects of “ambush journalism” – especially when the media focus their attention on relatively low-level government employees and others who do not deserve to bear the brunt of such base antics – it is not our place to serve as the censors of journalistic discretion, so long as the media do not overstep those broad constitutional lines between which they are allowed considerable room to maneuver. (Footnote and citation omitted.)

The opinion does not define which particular aspects of “ambush journalism” are disreputable, nor

does it explain why “relatively low-level government employees” should not have to “bear the brunt” of scrutiny by the media if the focus of that scrutiny is a subject of legitimate public interest.

When all is said and done, the Rhode Island Supreme Court’s decision in *Leddy v. Narragansett Television* represents a pretty good day for media rights in Rhode Island. The Court clearly is not fond of certain journalistic practices, but it nevertheless did not hesitate to put to one side its own views as to how newsgathering should be conducted; and it proceeded to uphold the First Amendment rights of the defendant television station and its reporter.

Plaintiff was represented by Charles Nystedt of Providence, RI.

*William Robinson is a partner in Edwards & Angell, LLP in Providence, Rhode Island. He represented Narragansett Television in this case.*

## Pennsylvania Court Dismisses Pro Se Prisoner's Case Holding Plaintiff Libel Proof

By Amy B. Ginensky, Michael E. Baughman,  
Kirstin J. Miller

The United States District Court for the Middle District of Pennsylvania dismissed a case against *The Pocono Record Newspaper Company*, its editor, its publisher, and one of its reporters, finding that the plaintiff was libel proof as a matter of law. *Istrefi v. Pocono Record Newspaper*, No. 3:02cv0987 (M.D. Pa. Feb. 26, 2004).

The court found that Mr. Faik Istrefi, a pro se plaintiff incarcerated for drug trafficking, damaged his own reputation and was incapable of proving damages in a claim for defamation. The court also dismissed claims for defamation brought by Mr. Istrefi's family members for defamation.

### ***Plaintiff Was Suspected of Links to Terror Groups***

The suit arose out of a series of articles printed by *The Pocono Record* regarding plaintiff Faik Istrefi's 2001 arrest. The articles, which were published shortly after the Septem-

ber 11, 2001 terrorist attacks, describe how Mr. Istrefi, along with several others, was arrested in October 2001 in connection with an international crime ring involving stolen motor vehicles and the "skimming" of credit card information.

On October 5, 2001 the defendants reported that "according to several sources, federal investigators came upon additional evidence and information that provided possible links to terrorist groups." On October 6, 2001 the

Pocono Record published another article entitled "Evidence links Pocono Suspects with New York Attacks."

An article published on October 17, 2001 stated that plaintiff was "among 700 people arrested nationwide following the attacks on the World Trade Center." On October 26

and October 27 defendants published articles discussing plaintiff's possible links to terrorism. On February 27, 2002 defendants reported that terrorism charges were *not* filed against plaintiff, despite the fact that law enforcement officials had said that they suspected some of the men might have ties to terrorist groups.

(Continued on page 20)

---

***The court concluded that even if the media defendants' articles were somehow deemed defamatory, Mr. Istrefi "could not recover anything more than nominal damages" for any further damage to his already severely fractured reputation.***

---

## 2004 NAA/NAB/MLRC MEDIA LAW CONFERENCE

Forty years after New York Times v. Sullivan:  
PROBLEMS, POSSIBILITIES, AND ANSWERS

Alexandria, Virginia  
September 29, 30 and October 1, 2004

***You should have already received your registration materials by mail. If you do not have the materials, there are forms available on our web site, [www.lsrc.com](http://www.lsrc.com).***



## **Pennsylvania Court Dismisses Pro Se Prisoner's Case Holding Plaintiff Libel Proof**

*(Continued from page 19)*

### ***Plaintiff Pled Guilty to Drug Trafficking***

Following his arrest, on February 5, 2003, Faik Istrefi pled guilty to a fifty-five count indictment after testimony showed that he did, in fact, spearhead a multi-million dollar international drug, money-laundering and car theft ring. Specifically, Mr. Istrefi plead guilty to charges of distributing "multiple kilogram quantities of cocaine" between the United States, Switzerland and Columbia, heading an organization that acquired stolen motor vehicles, "retagged" the stolen vehicles, and sold them in interstate commerce, and organizing a group of individuals who skimmed credit card information to manufacture counterfeit credit cards used to purchase "hundreds of thousands of dollars worth of merchandise and/or services."

According to court records, a search warrant executed in October, 2001 revealed approximately five tractor trailer loads of appliances and other goods purchased with counterfeit credit cards.

### ***Trial Court Finds Plaintiff Libel Proof***

Judge James M. Munley — who was also the Judge who heard Istrefi's criminal case — granted defendants' motion to dismiss on the grounds that plaintiff is "libel proof." Pennsylvania courts previously have not had the opportunity to address directly the viability of the "libel proof" defense in Pennsylvania.

Nevertheless, the court agreed with defendants' assertion of the doctrine and held that "plaintiff's reputation was already so tarnished by his own behavior, he could not recover anything more than nominal damages." The court applied the "libel proof" doctrine to Mr. Istrefi because he sued the media defendants for defamation and the tort of defamation provides a remedy for damage to one's reputation.

Relying on Mr. Istrefi's Sentencing Memorandum the court noted that Mr. Istrefi "was charged with and pled guilty to running an international drug distribution network, directing the "re-tagging" and sale of stolen luxury motor vehicles both nationally and internationally, and being the leader of a multi-state credit card "skimming" operation where credit card account numbers were stolen and used to manufacture counterfeit credit cards."

With this background, the court concluded that even if the media defendants' articles were somehow deemed de-

famatory, Mr. Istrefi "could not recover anything more than nominal damages" for any further damage to his already severely fractured reputation. Therefore, the court concluded that the "libel proof" doctrine applied and dismissed Mr. Istrefi's case against the media defendants.

The court also dismissed claims brought by Istrefi's family members for defamation. The court, following well established precedent, concluded that the cause of action for defamation is personal in nature, and, therefore, family members have no cause of action for defamation of someone other than themselves.

The plaintiff proceeded pro se.

*Amy B. Ginensky, Michael E. Baughman, and Kirstin J. Miller of Dechert LLP in Philadelphia represented the defendants in this case.*

## **MLRC MediaLawLetter Committee**

David Bralow (Co-Chair)  
 Bruce Rosen (Co-Chair)  
 Robert Balin  
 Jim Borelli  
 Jay Ward Brown  
 Peter Canfield  
 Thomas Clyde  
 Robert Dreps  
 Judy Endejan  
 Jon Epstein  
 Charles Glasser, Jr.  
 Richard M. Goehler  
 Karlene Goller  
 Steven D. Hardin  
 S. Russell Headrick  
 Russell Hickey  
 David Hooper  
 Jonathan Katz  
 Debora Kristensen  
 Eric Lieberman  
 Daniel Mach  
 John Paterson  
 Deborah H. Patterson  
 Mark J. Prak  
 William Robinson  
 Laurence B. Sutter  
 Charles D. Tobin  
 Paul Watler



## Old Public Figures *Still* Never Die, Nor Do They Fade Away

By Karim A. Abdulla

On March 19, 2004, a New York appellate court affirmed a March 2003 media-favorable decision on public figure status. *White v. Berkshire Hathaway, Inc., et al.*, 773 N.Y.S.2d 664 (4<sup>th</sup> Dept. 2004), *affirming*, 759 N.Y.S.2d 638 (Sup. Ct. Erie Co. 2003).

The significance of the Appellate Division's decision lies not so much in the text itself – it is, after all, only a brief slip opinion – but rather in its rationale: in affirming the trial court's 2003 decision, the Appellate Division expressly based its ruling on the reasons set forth by the lower court which engaged in a full discussion of the multiple elements to be properly considered in a public figure analysis. This was a contrast to prior decisions in which New York courts (both at the trial and appellate levels) tended to focus on a single element of the public figure analysis. *See also Media-LawLetter* April 2003 at 23.

In addition to providing New York practitioners with a more broadly-based and well-reasoned public figure analysis, the trial court's opinion was quite helpful on the issue of what effect a temporal lapse of publicity would have on a plaintiff's public-figure status. Now, with the Appellate Division's affirmance, New York practitioners have for the first time at their disposal an appellate level decision that embraces in a media-friendly manner national jurisprudence on this issue.

### Background Facts

The plaintiff is a real estate developer who during the late 1970s and early 1980s had been the subject of, and a participant in, dozens of news reports concerning his business practices and real estate ventures in Buffalo, including a nursing home.

The initial period of publicity was followed by an approximately twelve-year span in which plaintiff received virtually no media coverage. In 1994 however, following

an investigation by the United States Department of Housing and Urban Development ("HUD"), *The Buffalo News* published a lengthy article and editorial about the HUD proceedings and plaintiff's alleged involvement in improprieties at the nursing home. The plaintiff brought an action for defamation. After initial discovery, *The Buffalo News* asked the court to declare plaintiff a public figure.

### New York Public Figure Caselaw

In 1976, following the U.S. Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), New York's Court of Appeals decided *James v. Gannett*, 386 N.

Y.S.2d 871, stating "[t]he essential element underlying the category of public figures is that the publicized person *has taken an affirmative step to attract public attention.*" 386 N.Y.S.2d at 876 (emphasis added).

Since *Gertz* and *James*, public figure caselaw in other jurisdictions evolved to include in the analysis a number

of factors above and beyond this "affirmative thrust" element. However, in New York, post-*James* decisions on the issue have tended simply to repeat the language of *James*, emphasizing this single element to the virtual exclusion of other factors.

### The Decision

At both the trial and appellate court, *The Buffalo News* successfully argued that the *James* single-factor "thrust" test merely reflected public figure jurisprudence in its infancy and was improperly narrow. The plaintiff, by contrast, argued that the *James* single-element analysis was controlling and limiting.

The plaintiff also tried to circumscribe the "controversy" to encompass only the 1990s HUD investigation of the nursing home. Indeed, because this HUD/nursing home matter had received no media attention prior to the *The Buffalo News'* article and editorial, plaintiff ar-

---

***In addition to providing New York practitioners with a more broadly-based and well-reasoned public figure analysis, the trial court's opinion was quite helpful on the issue of what effect a temporal lapse of publicity would have on a plaintiff's public-figure status.***

---

(Continued on page 22)

### Old Public Figures *Still* Never Die, Nor Do They Fade Away

(Continued from page 21)

gued that it was not a “public” controversy at all. *The News* argued that the public controversy at issue was plaintiff’s business practices in general (which had been widely reported in the past) *including* his involvement in the nursing home and that plaintiff was a public figure for this purpose in the earlier period and remained so for these 1994 reports.

The trial court agreed with *The News*, holding that a limited purpose public figure determination is a multi-step inquiry, involving analysis of: (a) “whether there was a particular public controversy that gave rise to the alleged defamation;” (b) “the nature and extent of the plaintiff’s participation in that controversy;” and (c) “whether the alleged defamation was related to that controversy.”

The trial court also broadly defined the public controversy to include not only plaintiff’s involvement in the nursing home in particular, but also his development efforts in general, noting that it was the plaintiff’s own business practices that had led to investigations and public interest. Looking at “the totality of his past conduct and business practices,” the trial court held that defendants had “aptly demonstrated” that the plaintiff is a limited purpose public figure.

#### *Passage of Time*

As to the lapse of time between the earlier articles and the publications at issue, *The News* argued that all of the Federal Courts of Appeal that have addressed this issue have ruled that individuals who are limited purpose public figures with respect to a particular controversy or controversies remain limited purpose public figures for later comment on those controversies.

*The News* cited, among other cases, *Contemporary Mission, Inc. v. New York Times Co.*, 665 F.Supp. 248, 263 (S.D.N.Y. 1987), *aff’d*, 842 F.2d 612 (2d Cir. 1988), *cert. denied*, 488 U.S. 856 (1988)(9 year lapse of time); *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265 (7th Cir. 1996) (25 year lapse of time); *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir. 1981), *cert. dismissed*, 454 U.S. 1095 (1981)(40 year lapse of time); *Brewer v. Memphis Publishing Company, Inc.*, 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981) (8

year lapse of time); *Time, Inc. v. Neil Johnston*, 448 F.2d 378 (4th Cir. 1971) (9-12 year lapse of time).

The trial court agreed with the *The News*, holding that “[i]t matters not that many of the articles temporally preceded the complained of writings for a public figure, once established, remains a public figure for later comment on that controversy or subject matter.”

With the recent affirmance of the trial court’s decision, New York practitioners now have, for the first time, an appellate level decision correctly applying this federal constitutional principle to a state defamation case.

Plaintiff was represented by Richard T. Sullivan of Sullivan Oliverio & Gioia.

*Joseph M. Finnerty and Karim Abdulla of Stenger & Finnerty represented The Buffalo News.*

### ***Order Now!***

## **50 State Survey 2003-2004: Media Privacy & Related Law**

*With a special report on privacy and related law in the Federal Courts of Appeals.*

**TOPICS INCLUDE:** *False Light • Private Facts • Intrusion • Eavesdropping • Hidden Camera • Misappropriation • Right of Publicity • Infliction of Emotional Distress • Prima Facie Tort • Injurious Falsehood • Unfair Competition • Conspiracy • Tortious Interference with Contract • Negligent Media Publication • Damages and Remedies • Relevant Statutes*

**\$175**

**For ordering information go to  
[www.medialaw.org](http://www.medialaw.org)**

## Claim That Pennsylvania Judge Used Handicapped Parking Spot Is Not Defamatory or Highly Offensive

By Gayle C. Sproul

Broadcast remarks stating that a judge of the Superior Court of Pennsylvania had illegally parked in a spot reserved for the handicapped do not rise to the level of defamation or false light invasion of privacy. *Joyce v. NextMedia Group, Inc., et al.*, Nos. 12617-2003, 13133-2003, Memorandum Opinion (Mar. 9, 2004 Court of Common Pleas of Pennsylvania, Erie County).

Dismissing the complaint, the court found that the remarks were incapable of defamatory meaning and would not be deemed highly offensive to a reasonable person.

### ***Parked in Handicapped Spot***

Plaintiff, Judge Michael T. Joyce, claimed that he was defamed by defendants' radio broadcast of a contest during a morning "drive-time" talk show, which asked listeners to identify the public official, who was not handicapped, but who nevertheless drove his late model Mercedes to a scenic park on a particular date, parked in a space reserved for the handicapped, displayed a handicapped parking placard, and then rollerbladed through the park.

On the day the contest was announced, no one identified the rollerblading public official. The next day, a caller identified Judge Joyce and was rewarded with a free dinner for two at a local restaurant.

Judge Joyce claimed in his complaint that he did not park in a handicapped spot on the date stated in the broadcast, a day on which he apparently went rollerblading with friends in the park. He brought claims for "intentional defamation," "negligent defamation" (this claim was later abandoned) and false light invasion of privacy.

Judge Joyce claimed that the remarks concerning his parking were false and that they were tantamount to accusations of criminal conduct and implied that he "had engaged in unethical, immoral and reprehensible conduct, and had abused his official office." In later briefing sup-

porting his complaint, Judge Joyce claimed that the remarks further implied that he had obtained the parking placard through corrupt means and that he had committed one or more felonies.

All judges of the Erie Court of Common Pleas recused themselves based at least in part on the fact that Judge Joyce had served on that Court for many years before being elected to the Superior Court. Senior Judge Martin J. O'Brien of Butler County was then specially appointed to hear the case.

After a procedural wrangle regarding whether the case would be heard in state or federal court, the case landed in state court (*see MediaLawLetter* Feb. 2004 at 21), and

Judge O'Brien decided defendants' Preliminary Objections, which included arguments that plaintiff could not credibly allege either defamatory meaning or that the remarks would be highly offensive to a reasonable person.

---

***The accusation of a single parking violation – whether true or false – simply could not "grievously fracture" anyone's reputation, even that of a judge.***

---

### ***No Defamatory Meaning***

Defendants first argued that the alleged remarks (there is no tape of the broadcasts at issue), heard in the context of a light-hearted radio talk show, were incapable of defamatory meaning. *Baker v. Lafayette College*, 516 Pa. 291, 296, 532 A.2d 399, 402 (1987).

Defendants maintained that, viewed as a matter of law and common sense, the accusation of a single parking violation – whether true or false – simply could not "grievously fracture" anyone's reputation, even that of a judge. First, under Pennsylvania law, a parking violation involving handicapped parking does not meet the criteria for a "crime," as defined by the Crimes Code; rather, it is a summary offense.

Second, defendants could not find a single case – nor could Judge Joyce – supporting the view that an allegation of a parking violation is defamatory. In fact, all of the reported cases involving alleged injury to reputation from such allegations, and there were very few, held that these allegations posed no threat to reputation. *See Fitzgerald v.*

(Continued on page 24)

### **Claim That Pennsylvania Judge Used Handicapped Parking Spot Is Not Defamatory or Highly Offensive**

*(Continued from page 23)*

*Town of Kingston*, 13 F. Supp. 2d 119, 126 (D. Mass. 1998); *Vickey v. Nessler*, 230 N.J. Super. 141, 147-48, 553 A.2d 34, 37 (1989).

Finally, defendants cited the questionnaires filled out by applicants for judicial office, retention on the bench, and for the Pennsylvania bar, all of which expressly direct applicants *not* to include, in response to questions about whether the applicant has been “arrested, charged with or convicted of violating” any law or regulation, any “summary traffic offenses.”

#### ***Parking Violation Like Corruption***

Plaintiff contended in response that the broadcast remarks were far more than allegations of inconsequential misbehavior. He argued that he was charged with a “heinous” act and felonies such as bribery and official corruption. He likened his case to those involving allegations of malfeasance in office by judges and district attorneys, in which the Pennsylvania appellate courts have repeatedly found defamatory meaning. In effect, he argued that because he is a judge, the remarks were more defamatory than they would be if made about a lay person.

The court, however, accepted defendants’ argument that parking violations are the stuff of ordinary life. While allegations of such violations certainly are not complimentary, they are not defamatory:

Plaintiff is a sitting judge on the Superior Court of Pennsylvania and committing a summary offense parking violation does not render him unfit for judicial office. If this were the case, this Court imagines that it would be extremely difficult to find and retain suitable candidates for the Commonwealth’s judiciary. In the instant case, Plaintiff is embarrassed and annoyed by Defendants’ statements. However, words that are merely embarrassing or annoying to an individual do not have defamatory meaning.

Memorandum Opinion at 9.

#### ***False Light Claim Dismissed***

On the false light claim, defendants argued, among other things, that the broadcast remarks were not highly offensive to a reasonable person, which under Pennsylvania law, re-

quires a “major misrepresentation” of the plaintiff’s “character, history, activities or beliefs.” *Rush v. Philadelphia Newspapers, Inc.*, 732 A.2d 648, 654 (Pa. Super. 1999).

In particular, defendants noted that the complaint did not state that the judge had never committed a parking infraction, but only that he had not done so on a particular date. Again, the plaintiff claimed that the remarks went far beyond allegations of a parking violation.

Once again, however, the court resisted plaintiff’s expansive interpretation of the broadcast remarks, noting that

“[a]lthough unflattering, Defendants’ statement regarding Plaintiff’s parking violations are not a ‘major misrepresentation’ of Plaintiff’s character and would not be ‘highly offensive’ to a reasonable person. Parking violations are an everyday occurrence with which every driver must contend.”

Memorandum Opinion at 11.

Plaintiff is represented by Richard Sprague and colleagues from Sprague & Sprague in Philadelphia.

*Gayle C. Sproul is of counsel to Levine Sullivan Koch & Schulz, L.L.P. in the firm’s Yardley, PA office. She represented the defendants in this case together with Jay Ward Brown in the firm’s Washington, D.C. office and Alia L. Smith in the firm’s New York office.*

*Order now!*

**MLRC 50-STATE SURVEY 2003-04:**

**MEDIA LIBEL LAW**

*With updated reports on libel law in the Federal Circuits and an outline of English libel*

**\$175**

**For ordering information on the most current editions, including the 2002-2003 edition currently in stock, go to [www.medialaw.org](http://www.medialaw.org)**



## Utah Anti-SLAPP Statute Applied to Dismiss Defamation Claim Against Newspaper

### *Court's Application of Statute is First of its Kind in State*

By Jeffrey J. Hunt and David C. Reymann

On April 2, 2004, a district court in Utah issued a ruling in what appears to be the first test of Utah's recently enacted anti-SLAPP statute. *William T. Jacob, et al., v. Brett Bezzant, et al.*, No. 000403530 (Utah 4<sup>th</sup> Dist. Ct. 2004).

The lawsuit involved claims of defamation brought by a wealthy businessman in American Fork, Utah, against a small-town newspaper and its publisher based on the publication of a political editorial. In its recently-issued ruling, the court dismissed all of the plaintiff's claims with prejudice, finding that their primary purpose was to interfere with the defendant newspaper's legitimate participation in the process of government.

The court further awarded the newspaper its reasonable attorneys fees incurred in connection with the plaintiff's failed civil rights claims. The case appears to be the first application of Utah's anti-SLAPP statute, at least in the context of the news media.

#### ***Lawsuit Based on Newspaper Editorial***

The lawsuit arose from a heated political exchange in the course of a campaign for the American Fork City Council. In 1999, the plaintiff, William T. Jacob, paid for and produced an anonymous flyer which questioned the candidacies of two individuals running for seats on the City Council. Jacob, a prominent businessman, is well known in American Fork for his political involvement and his various lawsuits against the City. In the flyer, which purported to come from a "Nonpartisan Citizens Group," allegations were made that the two individuals were legally prohibited from seeking public office because each had prior relationships with the city – one was a volunteer paramedic, and another was an insurance broker who had provided health insurance for various city officials. Jacob arranged for this flyer to be distributed as an insert in the last edition of the *American Fork Citizen New Utah*, the local weekly paper, published prior to the election.

The issue raised by Jacob's flyer was not a new one; it had been publicly debated throughout the course of the 1999 campaign. Both candidates had sought and received the assurance of the City that they were not prohibited from running for office. When the *Citizen* and its publisher, Brett Bezzant, discovered that Jacob's flyer had been disseminated

without providing the opportunity for anyone else to respond, Bezzant personally paid for the publication of a special editorial prior to the election disagreeing with Jacob's accusations.

In the editorial, the *Citizen* apologized to the two candidates for publishing what it believed to be "false and misleading information" without affording them an opportunity to respond. The editorial identified Jacob as the source of the flyer and stated that the flyer constituted "negative campaigning" that was detrimental to the political process. The two candidates were subsequently elected to office.

Jacob then sued the *Citizen* for defamation, claiming that the editorial accused him of dishonesty. After conducting a series of depositions of city officials, Jacob amended his complaint to add American Fork City and a number of its elected officials as defendants, alleging that the *Citizen* had also conspired with the City to deprive Jacob of various constitutional rights and seeking damages under 42 U.S.C. § 1983.

#### ***Newspaper Moved to Dismiss under New anti-SLAPP Law***

Utah's anti-SLAPP statute, known as the "Citizen Participation in Government Act," Utah Code Ann. §§ 78-58-101, *et seq.*, became effective in April, 2001. Under the Act, a defendant can file a Motion for Judgment on the Pleadings seeking dismissal of claims brought to interfere with or chill a defendant's participation in the process of government. Upon the filing of such a Motion, all discovery is stayed, the Motion is to be heard as expeditiously as possible, and interlocutory appeal is permitted from a denial of the Motion.

Because the *Citizen* believed that Jacob's lawsuit was simply an attempt to retaliate against the *Citizen* for publicly disagreeing with Jacob in a political debate, and because his claims against the *Citizen* were clearly without merit, the *Citizen* filed a Motion under the anti-SLAPP statute in July, 2002. At the same time, the *Citizen* filed a Counterclaim under the statute, which permits a defendant to recover attorneys fees and compensatory damages from a plaintiff who brings a SLAPP suit.

For nearly two years after that date, the *Citizen* fought to obtain a hearing on its Motion. Jacob, however, engaged in a number of steps that served to delay the case. He immediately attempted to remove the case to federal court, requiring

*(Continued on page 26)*

**UT Anti-SLAPP Statute Applied to Dismiss Defamation Claim**

(Continued from page 25)

the *Citizen* to seek remand because plaintiffs have no statutory right of removal.

While the case was pending in federal court, Jacob filed his own Motion to Dismiss the *Citizen's* Counterclaim; became a named plaintiff in a separate federal "class action" asserting constitutional violations against American Fork City, and then moved to consolidate the *Citizen's* case with that class action; took the deposition of a named defendant in violation of the automatic discovery stay; moved to stay the proceedings for several years; and ultimately opposed his own counsel's Motion to Withdraw from the case based on manifest conflicts of interest.

As a result of these numerous delays, it was not until February, 2004 that Jacob filed a response to the *Citizen's* anti-SLAPP Motion, a year and a half after the Motion had been filed. The Court heard arguments on the Motion a month later, and granted the Motion shortly thereafter.

***Court Applied Utah anti-SLAPP Law***

In its Ruling, the Court applied Utah's anti-SLAPP statute to Jacob's claims, finding that the *Citizen's* publication of a political editorial in the midst of a campaign constitutes the core of the First Amendment's protections for freedom of speech. Quoting the United States Supreme Court's opinion in *Buckley v. Valeo*, 424 U.S. 1, 15 (1976), the Court stated that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Given the wide berth afforded to political speech, and the substantial delays and expense caused by Jacob, the Court found that "Jacob filed the litigation at issue for the purpose of chilling [the *Citizen's*] proper participation in the process of government." The Court therefore dismissed Jacob's claims under the anti-SLAPP statute.

The Court's decision was also grounded in an extensive analysis of the legal defects in Jacob's claims. Given the political nature of the *Citizen's* editorial, the Court found that the editorial was incapable of a defamatory meaning as a matter of law, was privileged under Utah's "public interest privilege," Utah Code Ann. § 45-2-3(5), and was a non-actionable statement of editorial opinion. These legal defects, which were apparent on the face of Jacob's complaint, provided further support for the Court's conclusion that the claims had no real purpose other than to harass the *Citizen*.

The Court also dismissed Jacob's claims against the *Citizen* under 42 U.S.C. § 1983, finding that Jacob had failed to satisfy the "color of law" state action requirement of his claims. The Court specifically noted that attempts to group the news media with the government for purposes of Section 1983 pose a dangerous risk of chilling protected speech and should be viewed with extreme skepticism.

In this case, Jacob had alleged nothing more than the fact that the *Citizen* had agreed with the official position of American Fork City, which was insufficient to establish a constitutional conspiracy. Significantly, the Court exercised its discretion and awarded the *Citizen* its reasonable costs and attorneys fees incurred in connection with the Section 1983 claims, as permitted under 42 U.S.C. § 1988.

Finally, the Court denied Jacob's Motion to Dismiss the *Citizen's* anti-SLAPP Counterclaim, since that Motion was primarily based upon the argument that Jacob's claims had legal merit. That Counterclaim is still pending before the Court, and the *Citizen* intends to seek the remainder of its attorneys fees, together with compensatory damages from Jacob.

***Significant Protection for News Media***

The Court's ruling is significant for the news media as the contours of Utah's anti-SLAPP statute continue to be defined. Journalists are an easy target for SLAPP suits, particularly from wealthy political activists who seek to use the press to influence public opinion.

Defamation lawsuits filed against small town publishers can have devastating financial consequences and significantly chill the ability of the press to challenge wealthy opponents in public discourse. The Court's decision in this case provides hope that the anti-SLAPP statute can become an effective tool for disposing of these frivolous and abusive lawsuits at an early stage, or, hopefully, deterring them altogether.

Plaintiff was represented by Randall K. Spencer of Fillmore Spencer, LLC, Provo, Utah.

*Jeffrey J. Hunt and David C. Reymann are shareholders in the law firm of Parr Waddoups Brown Gee & Loveless in Salt Lake City, Utah. They have represented the Citizen throughout this litigation.*



## Georgia Legislature Acts to Protect Amber Alert Broadcasters Joins Growing List of States That Provide Media Immunity

By Matthew Crawford

In its recently-completed 2004 session, the Georgia legislature passed Senate Bill 400, which creates broad civil immunity for media outlets that broadcast alerts under “Levi’s Call,” Georgia’s version of the “Amber Alert” system. Levi’s Call utilizes the Emergency Alert System to notify the public of child abductions. The bill provides, in relevant part:

Any broadcaster participating in Levi’s Call: Georgia’s Amber Alert Program shall not be liable for any civil damages arising from the broadcast or dissemination of information that is substantially consistent with the information transmitted by the Georgia Emergency Management Agency and that takes place during an alert requested by the Georgia Emergency Management Agency and for a period of two hours after such alert has ended or the Georgia Emergency Management Agency informs the participating broadcasters that the alert has changed in content.<sup>1</sup>

The bill also provides that “[n]othing in this Code section shall be construed to limit or restrict in any way any

legal protection a broadcaster may have under and other law for broadcasting or otherwise disseminating any information.”<sup>2</sup> The bill was signed by Governor Sonny Perdue on April 9, 2004 and is now in effect. It is codified at O.C.G.A. § 51-1-50.

In enacting Senate Bill 400, Georgia joins a growing list of states that have recognized the importance of protecting broadcasters who participate in statewide Amber Alert programs. To date, at least 7 states have enacted legislation providing such protection: Connecticut,<sup>3</sup> Idaho,<sup>4</sup> Indiana,<sup>5</sup> Louisiana,<sup>6</sup> Michigan,<sup>7</sup> Minnesota,<sup>8</sup> and Nevada.<sup>9</sup>

*Matthew Crawford is an associate at Dow Lohnes & Albertson in Atlanta.*

<sup>1</sup> S.B. 400, 2003-2004 Term, 2d Sess. (Ga. 2004).

<sup>2</sup> Id.

<sup>3</sup> 2003 Conn. Acts 03-111 (Reg. Sess.)

<sup>4</sup> Idaho Code § 3-540 (2003)

<sup>5</sup> Indiana Code § 10-13-5-8.5 (2003)

<sup>6</sup> La. Rev. Stat. § 37-1737 (2003)

<sup>7</sup> Mich. Comp. Laws § 28-761, *et seq.* (2002)

<sup>8</sup> Minn. Stat. § 604A.35 (2003)

<sup>9</sup> Nev. Rev. Stat. § 432.380

**Order Now!**

### **MLRC 50 State Survey: EMPLOYMENT LIBEL AND PRIVACY LAW 2004**

**TOPICS INCLUDE:** *Publication • Compelled Self-Publication • Fault Standards Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction Emotional Distress • Interference with Economic Advantage • Prima Facie Tort*

**\$175**

**For ordering information on the most current editions,  
go to [www.medialaw.org](http://www.medialaw.org).**

## South Carolina Court Asserts Jurisdiction over Book Publisher

The South Carolina Court of Appeals reinstated libel, false light and conspiracy claims against book publisher W.W. Norton & Company, holding that the publisher had sufficient contacts with the state to be subject to personal jurisdiction in a suit over a book it published about a naval accident. *Moosally v. W.W. Norton & Company, Inc.*, 2004 WL 726848 (S.C. App. April 5, 2004). The court, however, affirmed dismissal of the same claims against the book's author and a source on jurisdictional grounds.

At issue in the case is the 1999 book *A Glimpse of Hell*, which chronicles a 1989 explosion onboard the battleship Iowa that killed 47 sailors. The ship was on a training exercise in the Caribbean. The book, written by Charles C. Thompson, a Virginia resident, alleged that the investigation into the accident was botched. Thompson had previously produced a *60 Minutes* segment on the accident. Also named as a defendant was Daniel Meyer, a Maryland resident, who was a source for the book.

Plaintiffs, including the captain of the Iowa at the time of the accident and the head of the accident investigation, sued in 2001. Plaintiffs are all non-residents and presumably sued in South Carolina to take advantage of the state's 2 year statute of limitations for libel.

### **No Jurisdiction over Author and Source**

The court first affirmed that there was no personal jurisdiction over the non-resident source who had simply volunteered information to the author about events that occurred outside the state and also contributed to a movie version of the book. The court noted that "[t]o hold otherwise would be to extend jurisdiction over anyone interviewed by any publication about any event, no matter where it occurred."

Similarly, there was no jurisdiction over the non-resident author. The *60 Minutes* segment on the accident, the book, and a movie version of the book were insufficient to establish jurisdiction. The court noted that because all these involved "an event of national interest that oc-

curred outside of South Carolina, it does not follow that his activity of pressing pen to paper was directed to the residents of South Carolina."

### **Publisher Subject to General Jurisdiction**

In contrast, the court held that W.W. Norton was subject to jurisdiction in the state based on the totality of its publishing activities, citing to *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

Although only 30 copies of *A Glimpse of Hell* were sold in South Carolina, the court found that as a national publisher "W.W. Norton has continually endeavored to exploit the South Carolina market," noting, among other things, W.W. Norton's overall book sales and marketing in the state.

---

**Although only 30 copies of *A Glimpse of Hell* were sold in South Carolina, the court found that as a national publisher "W.W. Norton has continually endeavored to exploit the South Carolina market."**

---

### **Door Closing Statute**

Additionally, the court held that the lower court erred in holding that plaintiffs were barred from suing W.W. Norton under the state's so-called Door Closing statute, S.C.

Code Ann. § 15-5-150.

The statute provides in relevant portion that a suit against a foreign corporation can be brought in state circuit courts by a non-resident plaintiff "when the cause of action shall have arisen or the subject of the action shall be situated within this state."

The court concluded that the Door Closing statute does not bar the suit against W.W. Norton because, at least for purposes of the statute, "the tort of libel occurs wherever the offending material is circulated."

Plaintiffs were represented by Stephen F. DeAntonio, of Charleston, SC. W.W. Norton and Charles C. Thompson were represented by John J. Kerr and David B. McCormack of Buist Moore Smythe McGee P.A. in Charleston, SC. Daniel P. Meyer appeared pro se.

**MLRC 2003 Annual Dinner Transcript Available**

**"In the Trenches Revisited"**

*To view, please visit our web site  
www.ldrc.com*

## In Wake of Tyco Mistrial, Judge Prohibits Publication of Juror Names in Quattrone Retrial

By Alia Smith

On April 13, 2004, during jury selection in the retrial of Frank Quattrone in the Southern District of New York, U.S. District Court Judge Richard Owen issued an oral order from the bench, prohibiting publication of the name or address of any juror or prospective juror called in the criminal prosecution.

A group of media organizations including the New York Times Co., The Associated Press, Bloomberg L.P., the Daily News, Inc., Dow Jones & Co., Inc., NBC, Inc., Newsday, Inc., Reuters, the San Jose Mercury News,

---

***“A six-month trial was absolutely blown to smithereens because reporters put the names out,” Judge Owen stated, in reference to Tyco.***

---

Inc., and the Washington Post, Inc. wrote to Judge Owen the following day, requesting that he reconsider his order imposing a prior restraint on the press.

Judge Owen heard argument on the prior restraint in his robing room later that day, despite the media’s repeated requests to hold the argument in open court. Judge Owen seemed satisfied that the media’s lawyers would be able to adequately recount the closed hearing to members of the press.

Turning to the prior restraint, Judge Owen stressed that he believed his order was a proper method by which to protect jurors and protect the viability of the retrial, especially in the aftermath of the Tyco mistrial.

“A six-month trial was absolutely blown to smithereens because reporters put the names out,” Judge Owen stated, in reference to Tyco. Because he apparently believed that this case presented a similar risk of mistrial, and a risk that, because of the Tyco situation, jurors likely would be very worried about publicity, he refused to vacate the prior restraint.

Judge Owen did confirm, however, that the prohibition on publication did not apply once a juror or potential juror’s service was complete. He also said that he would allow pool reporters into the robing room for those portions of *voir dire* conducted outside open court.

The media organizations which challenged the judge’s orders will appeal.

*Alia Smith is an associate in the New York office of Levine, Sullivan, Koch & Schulz LPP, which represented the media coalition in this matter.*

### Transcripts of Chambers Meeting with Hold-out Juror in Tyco Trial Unsealed

Responding to a media motion following the mistrial in the grand larceny trial of former Tyco executives Dennis Kozlowski and Mark H. Swartz, presiding Judge Michael Obus unsealed transcripts of chambers conferences with hold out juror Ruth Gordon.

Gordon received substantial media attention, and was named by several newspapers, after she appeared to make a favorable hand gesture to the defendants during deliberations.

The transcripts shed light on the court’s decision to declare a mistrial. Among other things, Gordon, a 79 year old retired teacher and lawyer, said she was “very, very scared” after receiving an anonymous phone call and an insulting letter after her identity was revealed during deliberations. The letter remains under seal pending an investigation into whether it constituted jury tampering.

Following the chambers conferences, Judge Obus declared he had “no choice but to declare a mistrial.”

The media’s access motion was filed by Victor Kovner and Carolyn Foley of Davis Wright Tremaine in New York.

## Massachusetts Appeals Court Vacates Order Prohibiting Identification of Witness

By Howard A. Merten

Ottaway Newspapers Inc. and The Providence Journal Company convinced a Massachusetts Appellate Court to overturn a prior restraint order preventing the publication of the identity of a witness expected to testify in open court. *Commonwealth v. Porter*, No. 04-J-157 and 04-J-158, Massachusetts Appeals Court, April 13, 2004.

While the facts of the case were somewhat unique, the appellate court's close scrutiny of the state's evidence in support of the order offers an excellent precedent for media outlets combating such requests on vague and general records.

### *Abuse by Ex-Priest*

The issue arose in a preliminary civil hearing to determine if ex-priest James Porter was a "Sexually Dangerous Person" requiring further incarceration. The Commonwealth planned to present several adult witnesses at the hearing who had been victimized by James Porter as children in the 1960's. One of the witnesses, referred to as "Witness X," asked that his identity be protected. The Commonwealth sought an order preventing the media from identifying the witness, who intended to testify voluntarily in open court.

### *Newspapers Intervened to Oppose Restraint*

Ottaway Newspapers, Inc. and The Providence Journal Company intervened to contest the Commonwealth's request. The Superior Court (McLaughlin, J.) conducted an expedited summary hearing. The Commonwealth presented two witnesses – Witness X and a long-time child abuse investigator for the Commonwealth. Witness X testified he was named by the Commonwealth in its original indictment of Porter in the 1990's and that he had participated actively in efforts to publicize Porter's criminal acts at that time.

He said that he had since moved and did not wish to go through the intensive media scrutiny a second time. He further testified the renewed disclosure "could impact my health, family, my attitude, my job." The Commonwealth's child abuse investigator testified that child victims of sexual abuse were extremely concerned about their privacy and safety and did not want their names made public.

### *Press Ordered Not to Identify Witness X*

The Superior Court issued a written decision. It stated that, after observing Witness X testify, it was apparent to the Court that he suffered significant stress and that further publicity would place his health at risk. Over the objections of Ottaway Newspapers and The Providence Journal, the Superior Court entered an order prohibiting the press or public from identifying Witness X as a witness in the upcoming hearing.

The Superior Court did not prohibit publication of already public information, including Witness X's identity as a prior victim of sexual abuse.

### *Restraint Dissolved on Appeal*

Ottaway Newspapers and The Providence Journal sought immediate appellate review. Justice Cynthia Cohen granted that request and heard arguments on the motion by telephone. After argument, the judge dissolved the prior restraint.

Justice Cohen's opinion, noted that "only in the most extreme situations, if at all, may a state court constitutionally forbid a newspaper to report or comment on happenings in and about proceedings which have been held in open court." The Court found that no such compelling state interest supported the order in this case, particularly as the identity of Witness X as the victim of abuse was already public. The Superior Court's order did nothing more than prevent the identification of Witness X as a "witness" in the upcoming proceeding, something that is deserving of little legitimate privacy protection

---

***Justice Cohen's opinion, noted that "only in the most extreme situations, if at all, may a state court constitutionally forbid a newspaper to report or comment on happenings in and about proceedings which have been held in open court."***

---

### Massachusetts Appeals Court Vacates Order Prohibiting Identification of Witness

(Continued from page 30)

#### ***Strict Standards Applied***

Of particular import to the press is the appellate court's discussion of the standard to be applied to such orders and the Court's rigorous review of the evidence needed to support such an order. The Court set a high standard for orders of this kind, noting there was nothing in the record that showed identification would "subject the prospective witness to emotional distress, much less the significant risk of psychological harm that is a necessary precondition to placing restrictions upon the public's right to know of events that transpire in the courtroom."

The appellate court rejected as insufficient justification for a prior restraint the trial court's determination that pub-

licity would cause Witness X significant stress even though the trial court sought to buttress that finding by reference to the witness's demeanor. Justice Cohen noted that the witness testified only that such publicity "could" cause him problems, but did not elaborate. The court also commented that "there was no medical evidence indicating that the psychological well-being of the prospective witness would be affected by renewed disclosure of his identity."

*Howard Merten and Eric Sommers of Vetter & White, Inc., Providence, Rhode Island represented Ottaway Newspapers, Inc. Joseph V. Cavanagh and Mary Dunn of Blish & Cavanagh, Providence, Rhode Island represented The Providence Journal Company.*

## 11th Circuit Rules PGA Tour Is Entitled to Restrict Real Time Golf Scores

On March 24, only ten weeks after oral argument, a unanimous 11<sup>th</sup> Circuit panel affirmed summary judgment in favor of PGA Tour, Inc. ("PGA"), rejecting the novel claim by Morris Communications that the PGA was violating antitrust law by restricting news organizations from reporting and syndicating realtime golf scores. *Morris Communications Corp. v. PGA Tour, Inc.*, 2004 WL 627723 (11th Cir. 2004), *affirming*, 235 F. Supp. 2d 1269 (M.D. Fla. 2002). *See also MediaLawLetter* February 2004 at 27; January 2003 at 7.

The court held that the PGA had a "proprietary interest" in the golf scores and a valid business justification to control the market for these scores, concluding that Morris Communications was essentially seeking to "free ride" on scores collected at the PGA's expense. The court, however, never discussed the legal basis of the PGA's "proprietary interest" beyond emphasizing that it *was not* based on copyright or any other intellectual property law. Nor did the court adequately explain how a news organization can "free ride" by disseminating or selling newsworthy facts from a sporting event.

#### ***PGA Credentials Restrict Reporting of Scores***

The restrictions on reporting and syndicating golf scores are contained in the PGA's media credentials. Starting in 1999, the PGA credentials required on-line news organizations to delay their reporting of scoring information until at least "thirty minutes after the actual occurrence of the shots." The credentials also provide that news organizations may not sell scoring information to third parties.

The PGA obtains its realtime scoring information of competitors in its golf events from volunteers and staffers who tabulate players' scores and transmit their tallies to a centralized computer system, the PGA's Real-time Scoring System ("RTSS"). PGA regulations prohibit other organizations from gathering scores from the course. The compiled scores are available in a press media center. Because PGA events are played over a large geographic area (*i.e.*, an 18-hole golf course) by numerous players, complete scores for all competitors are available only in the media center.

(Continued on page 32)

---

***The court held that the PGA had a "proprietary interest" in the golf scores and a valid business justification to control the market for these scores, concluding that Morris Communications was essentially seeking to "free ride" on scores collected at the PGA's expense.***

---



### **11th Circuit Rules PGA Tour Is Entitled to Restrict Real Time Golf Scores**

*(Continued from page 31)*

Morris Communications alleged that the PGA's restrictions allowed it to monopolize the publication and syndication of real-time golf scores on its own Internet website. In other words, the restriction eliminates competition from other online news organizations for the timely reporting of these facts.

The district court granted summary judgment to PGA, holding that the media restrictions were reasonably necessary to protect a property right and, thus, justified by a legitimate business reasons. The district court cited two U. S. Supreme Court cases which recognized the right of commodity exchange members to control the dissemination of ticker tape information to non-members. In *Board of Trade of the City of Chicago v. Christie Grain and Stock Company*, 198 U.S. 236 (1905) and *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926), the Supreme Court held that the information was "akin to trade secrets" and gave rise to a property right that the exchanges could enforce against third parties.

On appeal, Morris argued that the realtime golf scores were not trade secrets or any other type of intellectual property. Rather they are facts in the public domain and it is impossible to "free ride" on such information.

#### ***Proprietary Interest in Scores***

The 11<sup>th</sup> Circuit's decision, written by Judge Joel F. Dubina and joined by Chief Judge J. L. Edmondson and Judge Emmett Ripley Cox, began by describing the case as a "straight-forward antitrust case involving a product," emphasizing that it was not about copyright law or the First Amendment.

Noting in a footnote that the PGA at the preliminary injunction stage said it would allow Morris to publish the scores on its own website and newspaper, apparently without regard to the restrictions in the credentials, the court addressed only the restriction on selling the scoring information to third parties.

Without analysis, the court simply concluded that real-time golf scores are a "product" derived from the PGA's scoring system and that PGA has the right to exclusively sell this product the same way it sells rights to television coverage of its events. Morris agreed that the PGA had a

legitimate business interest in exclusive television broadcasts because the broadcasts enjoy copyright protection – in contrast to scores which are public domain facts.

Without exploring to what extent a sports organization can control the media's use of such facts, the court concluded that the PGA acted "appropriately to protect its economic interests."

#### ***Conclusion***

The 11<sup>th</sup> Circuit's decision is disappointing. The court did not persuasively resolve why news organizations can be accused of "free-riding" by using facts gathered at sports events. Thus the decision may strengthen the hand of sports organizations in the ongoing controversy with the media over ownership of the content of sporting events — specifically in using press credentials to impose unilateral contractual limitations.

Morris Communications is considering appealing the decision to the Supreme Court.

Morris Communications was represented by George Gabel Jr., Holland & Knight in Jacksonville, Florida., together with Jerome W. Hoffman, Tallahassee, Florida; Steven L. Brannock and David C. Borucke, Tampa, Florida. Jon Hart of Dow Lohnes & Albertson in Washington, D.C. filed the brief for the media amicus curiae. The PGA was represented by Jeffrey A. Mishkin of Skadden, Arps, Slate, Meagher & Flom, LLP, New York; and James M. Riley of Rogers, Towers, Bailey, Jones & Gay, Jacksonville, Florida.

## **Contribute to the Brief Bank**

***MLRC is Now Accepting  
Briefs Electronically***

***Just e-mail to [ldrc@ldrc.com](mailto:ldrc@ldrc.com)***

## Reporter Ordered to Testify About Defendant's Demeanor During Interview

By Charles D. Tobin

A former network television correspondent was ordered to testify in a high-profile criminal prosecution in Chicago, following a federal magistrate's ruling that the reporters' privilege did not protect testimony about a defendant's demeanor during an interview. *U.S. v. Hale*, slip op., Cause No. 03 CR 11 (N.D. Ill. April 6, 2004).

While ordering the journalist to testify, the magistrate judge narrowly interpreted last summer's opinion by influential Seventh Circuit Judge Richard Posner, which held that journalists have very little room, if any, to argue privilege under the First Amendment. See *McKevitt v. Pallasch*, 339 F.2d 530 (7th Cir. 2003).

In *Hale*, prosecutors subpoenaed former CNN bureau chief Jeff Flock to testify about the demeanor of defendant Matthew Hale, the leader of the white supremacist Church of the Creator in suburban Chicago, during a 1999 interview.

### Reporter Interviewed White Supremacist

Flock had interviewed Hale in the wake of a shooting spree in which one of Hale's followers killed a number of Asians, African Americans, and Jews. Flock asked Hale a series of questions about whether he felt remorse for his followers' actions.

Hale is now on trial on charges unrelated to the 1999 shooting spree, including four counts of conspiring to murder a federal judge. An additional obstruction of justice count charges Hale with encouraging his father to lie to a grand jury. According to the indictment, Hale told his father to tell jurors that the son "had to cut off" the CNN interview about the shootings "because [he] started crying."

Prosecutors subpoenaed the interview tape last year. As this month's trial date approached, they also subpoenaed Flock shortly after he retired from the network.

Another former CNN employee, the producer on the Hale interview story, also was subpoenaed after she left the network. She chose to be interviewed by the FBI and will likely be called as a witness at trial.

Flock filed a motion to quash the subpoena based on Federal Rule of Criminal Procedure 17(c) and reporter's privilege. He argued that the subpoena was unreasonable and oppressive under the rule, and that prosecutors had ample alternative sources under the privilege, because:

- The interview tape furnished to prosecutors was the best evidence of Hale's demeanor at the interview.
- The journalist was not a witness to the alleged criminal act, the conversation

where Hale allegedly told his father to lie.

- Hale's father will either testify at trial that he did not observe Hale at the interview, which would expose the statement Hale told his father to make as a lie, or he will provide the jury with the

same type of information about Hale's demeanor as the journalist.

- The producer who consented to the FBI interview also is available to testify about Hale's demeanor.

---

***Strongly suggesting that confidential-source protections survive McKevitt, Judge Rodovich held that in the Hale case, "it appears the government is seeking only Flock's impressions of Hale's demeanor and not any information concerning what Hale may have told Flock in confidence while the camera was not recording."***

---

### Reporter's Observations Important

Magistrate Judge Andrew P. Rodovich denied the motion. Finding that testimony about Hale's emotional state "obviously is important to this charge," he held that Flock "was in unique position, as the interviewer, to observe Hale's demeanor during the interview."

The magistrate observed that the tape prosecutors subpoenaed did not capture all of the discussion Hale and Flock had that day. Finally, as to alternative sources, he held: "The government is under no obligation to forego some evidence from a credible source merely because other sources also may testify to the same matters."

The magistrate reviewed both *Branzburg v. Hayes*, 408 U.S. 665 (1972) and Judge Posner's decision in

(Continued on page 34)

### Reporter Ordered to Testify About Defendant's Demeanor During Interview

(Continued from page 33)

*McKevitt v. Pallasch*, 339 F.2d 530 (7th Cir. 2003). He noted that “both the plurality and Justice Louis [sic] Powell’s concurrence” in *Branzburg* “recognized that when a subpoena is used for an improper purpose, to harass or otherwise interfere with a reporter’s confidential relationships or to use the media as an investigative tool,” courts may quash subpoenas. He also noted Judge Posner in *McKevitt* held that when a subpoena does not implicate a confidential source, “it is difficult to see what possible bearing the First Amendment could have.”

Strongly suggesting that confidential-source protections survive *McKevitt*, Judge Rodovich held that in the Hale case, “it appears the government is seeking only Flock’s impressions of Hale’s demeanor and not any information concerning what Hale may have told Flock in confidence while the camera was not recording.” He therefore ordered Flock to testify. Flock declined to appeal the decision.

*Postscript:* On April 20, prosecutors released Flock from the subpoena after determining during trial that his testimony would be duplicative and was therefore no longer necessary.

*Charles D. Tobin and Ethan Arenson, with Holland & Knight LLP in Washington, D.C., represented journalist Jeff Flock in this matter.*

## Contribute to The Newsroom Seminar Bank

*Submit your Outlines and  
Videotapes to MLRC*

### 6th Circuit Stays Prior Restraint of “Naked Newscaster” Video

On April 21, the Sixth Circuit stayed a preliminary injunction that had blocked several websites from publishing or selling videos and photographs of Catherine Bosley, an Ohio television news anchor, who was caught on camera participating in a wet t-shirt contest in a Florida bar. *Bosley v. WildWetT.com*, No. 4:04-cv-393 (6<sup>th</sup> Cir. 2004), *staying*, No. 4:04-cv-393 (N.D. Ohio March 31, 2004) (Gwin, J.)

Bosley participated in the contest while on vacation in Key West, Florida in March 2003. She was aware that some people were taking still photographs of her, but was not aware that her performance was also being videotaped by someone in the audience. Bosley resigned from WKBN-TV in Youngstown, Ohio after videos and pictures surfaced on the Internet.

She sued several website operators for violating her statutory and common law right of publicity by publishing and selling copies of the video. On March 31, 2004 Judge James Gwin of the U.S. District Court for the Northern District of Ohio issued a preliminary injunction against the websites, finding that Bosley had a likelihood of success on the merits.

Citing, among other cases, the California Supreme Court’s decision in *Comedy III, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001), Judge Gwin held that the images of Bosley did not contain any “transformative elements” and were being used “solely for the purpose of commercially exploiting her fame.” Having found that the videos and images were “commercial speech,” the district court concluded that an injunction would not be an improper prior restraint on speech.

The Sixth Circuit stayed the injunction in a short three paragraph order from Judges James Ryan, Martha Daughtrey and Eric Clay. “We are not persuaded, at this stage of the proceedings, that the defendant’s speech is outside the protection of the First Amendment,” the court noted, concluding “defendant has shown a strong likelihood of success in demonstrating that the district court’s preliminary injunction is a prior restraint on speech in violation of the First Amendment.”

## Sun-Times Columnist Defeats Subpoena For Deposition By Arguing Underlying Case Lacked Merit Under Innocent Construction Rule

By Damon Dunn

In an unpublished decision, an Illinois Circuit Court rejected a libel plaintiff's attempt to depose a third party reporter after finding that the underlying claim was subject to an innocent construction. *Michael Breen MD v. WBBM-TV et al.*, No. 02 L 014908 (Cir Ct. Cook Co. February 24, 2004) (Disko, J.) Interestingly, the underlying defamation lawsuit was filed against the reporter's presumed sources rather than against the journalist himself, *Sun-Times* columnist Robert Feder.

Feder covers the local broadcast media and is no stranger to such controversies, having prevailed in a defamation action brought against him by a former station manager over remarks that the manager had "screwed up" WLIT-FM. See *Cahill v. Feder, et al.* No. 1-01 3855 (Ill. App. 1st Dist. Sept. 30, 2002).

### Commentator Sued His Former Employer

The decision arose from a defamation and breach of contract suit brought by medical news commentator Michael Breen against his former employer, WBBM-TV. Dr. Breen alleged that his managers defamed him as part of a cost cutting campaign by acting as confidential sources for several Feder columns, culminating in a column reporting that the station discharged Breen for having recycled news stories in violation of journalistic ethics. When deposed, however, a series of WBBM-TV witnesses denied they had spoken to Feder.

Dr. Breen subpoenaed Feder for a second opinion, and also issued document subpoenas for *Sun-Times* telephone records. Feder and the *Sun-Times* objected, interposing the Illinois Reporter's Privilege statute (735 ILCS 5/8-904 *et seq.*). The *Sun-Times* also moved for a protective order barring SBC from complying with separate subpoenas for telephone records.

Breen's prescription was a petition to divest the reporters' privilege, arguing that divestiture was necessary to prove the publication element of his defamation claim against WBBM-TV. Feder responded by arguing, among other things, that Breen's allegations were too speculative and his claim too insubstantial to warrant overriding the privilege.

Judge Disko's diagnosis relied on the Illinois innocent construction rule to find that Breen's case against WBBM-TV was too frail to justify divesting the reporter's privilege. The court reasoned that the columns reported two instances of a career journalist recycling news stories but such discrete performance problems could be innocently construed so as not to impugn Dr. Breen's general skills and abilities or his suitability for a future position.

Although the opinion was silent with respect to how the ruling might affect WBBM-TV's own defense, it concluded that Breen lacked compelling grounds to override Feder's privilege. Accordingly, the court quashed the deposition subpoena and the subpoenas for telephone records, including a subpoena seeking WBBM-TV's outgoing calls to the *Sun-Times*.

*Damon E. Dunn, a member of Funkhouser, Vegosen, Liebman & Dunn Ltd. in Chicago, represented Robert Feder and the Sun-Times.*

**JUST PUBLISHED**

**2004 MLRC BULLETIN**

**MLRC'S ANNUAL REPORT ON  
TRIALS AND DAMAGES  
2004**

**To order contact us or visit our website  
[www.medialaw.org](http://www.medialaw.org)**

## Survey Confirms Internet Jurisdiction Concerns

By Jon Hart and Steve Blumenthal

On April 3, 2004, at the spring meeting of The American Bar Association Business Section in Seattle, the ABA Cyberspace Law Committee presented the results of an international Internet jurisdiction survey. The survey examined the practical effects on businesses throughout the world of uncertainty relating to the appropriate jurisdiction in which to resolve disputes arising out of Internet-related activity.

The ABA, the International Chamber of Commerce, an international business organization based in Paris (CC), and the Internet Law and Policy Forum, a global consortium of technology companies, jointly conducted the survey. A copy of the ABA/ICC report on the survey can be found at: <http://www.abanet.org/buslaw/committees/CL320060/projects/jurisdiction/20040406000000.pdf>.

The survey found that North American companies especially media companies are concerned about being sued in foreign courts and/or subjected to foreign laws as a result of their Internet activities. According to the survey, three-quarters of North American respondents indicated concern about Internet jurisdiction issues. Fewer than half of European respondents expressed similar concerns.

The survey respondents included media companies, information technology firms, financial institutions, retailers, professional service firms and industrial companies. The survey results are sorted by geographic region and by business sector. However, business sectors are not further sorted by geographic region, and, therefore, the survey results for each business sector include worldwide responses.

Of the various business sectors polled, media company respondents voiced the strongest concerns about Internet jurisdiction risks. Nearly 60% of media company respondents worldwide indicated that they are concerned about being sued in foreign courts and/or being subjected to foreign laws as a result of their Internet activities. Worldwide, 50% of all respondents expressed this concern.

Among North American respondents, the principal areas of jurisdiction-related concern are litigation, privacy and regulation of e-commerce and industry, with litigation being the chief concern. Media company respondents worldwide identified consumer protection laws as their chief source of concern. Other concerns identified by media companies include e-commerce regulation, taxation, litigation and defamation claims.

Consistent with their heightened concerns, media companies were the most active of the respondents in adjusting their businesses to address Internet jurisdiction concerns. Over half of media company respondents worldwide said they had made changes to their businesses to alleviate Internet jurisdiction concerns, as

opposed to only 36% of all respondents.

According to the survey, media companies have attempted to reduce exposure by targeting their websites to particular jurisdictions that are perceived to be low-risk. A

popular technique for targeting websites, according to the survey, involves identifying, and providing website access only to users in particular jurisdictions, often through user registration or self-identification. More than any other business sector, media companies have implemented procedures on their websites to identify the physical locations of their website users.

The survey identified other techniques used to target websites to particular jurisdictions, including identifying location by country-code top-level domains. Respondents also indicated that they tailor the content of their websites, including the language in which text appears, to particular jurisdictions.

Another tactic that survey respondents employ to address their Internet jurisdiction concerns involves eliminating or reducing business activity in jurisdictions where they perceived the risk of liability to be higher. Technical access blocking, user registration requirements, self-identification, and password protection were identified as common techniques to limit exposure in higher risk jurisdictions. North Africa, the Middle East, and Asia were identified as the most frequently avoided regions.

---

***The survey found that North American companies especially media companies are concerned about being sued in foreign courts and/or subjected to foreign laws as a result of their Internet activities.***

---

(Continued on page 37)



### Survey Confirms Internet Jurisdiction Concerns

(Continued from page 36)

The respondents, particularly North American businesses, also indicated that they use legal tools to address Internet jurisdiction issues. Nearly 70% of North American respondents (and nearly three-quarters of media company respondents worldwide) include user agreements on their websites. Media companies, along with retailers, most frequently included choice of forum and choice of law provisions in their website user agreements.

The survey results are expected to help facilitate the consideration by the European Commission and the Hague Conference on Private International Law (the Hague Conference of international jurisdictional rules for non-contractual claims

---

**According to the survey, media companies have attempted to reduce exposure by targeting their websites to particular jurisdictions that are perceived to be low-risk.**

---

that are based on the country-of-origin jurisdictional principle. In 2003, the EC approved the so-called Rome II regulation, which provides that, in general, the law applicable to a non-contractual obligation arising out of a tort is the law of the country in which the loss is sustained. Since 1997, the Hague Conference has been negotiating a

multilateral treaty that would enable a plaintiff to bring a tort claim in the jurisdiction in which the alleged injury occurred. The ICC, which seeks to have the EC re-evaluate the Rome II regulation, intends to present the survey results to the EC.

*Jon Hart is a member in the Washington, D.C. office of Dow, Lohnes & Albertson, PLLC. Steve Blumenthal is an associate in the firm's Atlanta office.*

---

## Fourth Circuit Affirms Chat Room Liability Decision

In a per curiam decision, the Fourth Circuit summarily affirmed *Noah v. AOL Time Warner Inc.*, 2004 WL 602711 (4th Cir. Mar 24, 2004), *affirming*, 261 F. Supp. 2d 532 (E. D. Va. 2003) (Ellis, J.).

Plaintiff sued AOL for allegedly failing to prevent its users from making ethnic and religious slurs in certain chat rooms devoted to Muslim and Arab issues. According to plaintiff, by allowing its users to engage in hate speech in chat rooms, AOL ran afoul the provisions of the Civil Rights Act of 1964 that prohibit discrimination in "places of public accommodation."

At the District Court level, Judge Ellis rejected the plaintiff's novel theory of liability. First, he held that plaintiff's Title II claim was barred by 47 U.S.C. § 230, the federal statute that immunizes interactive computer service providers from claims based on third-party content.

Although nearly all previous Section 230 cases had considered Section 230 in cases involving state law causes of action, this decision confirmed that the immunity applies to federal claims as well. Second, Judge Ellis held that the AOL service was not a "place of public accommodation" within the meaning of Title II, on the grounds that Title II did not reach non-physical spaces such as AOL

chat rooms. The Fourth Circuit's per curiam decision affirmed "for the reasons stated by the district court." See *MediaLawLetter* June 2003 at 67.

### California Supreme Court to Review Barrett v. Rosenthal

The California Supreme Court will review a controversial appeals court decision that held that Section 230 of the Communications Decency Act (47 U.S.C. § 230) does not apply where a libel defendant asserting immunity knew or had reason to know that third party content was defamatory. *Barrett v. Rosenthal*, 9 Cal. Rptr.3d 142 (Cal. App. 2004), *rev. granted*, 2004 WL 840678 (Cal. April 14, 2004). See also *MLRC MediaLawLetter* Nov. 2003 at 57, Feb. 2004 at 34.

The court asked the parties to brief: (1) What is the meaning of the term "user" under section 230 of the Communications Decency Act (47 U.S.C. section 230)? (2) For purposes of the issue presented by this case, does it matter whether a user engaged in active or passive conduct?

## Ex-Senator's Libel Suit Against Website Survives Motion to Dismiss

The South Dakota federal district court declined to dismiss a libel suit filed by ex-South Dakota Senator James Abourezk against a website that included Abourezk and other opponents for the Iraq War on a so-called "Traitor List." *Abourezk v. ProBush.com*, Civ. 03-4146 (D. S.D. March 14, 2004).

Although the "Traitor List" is a clear parody that even includes an explicit disclaimer, Judge Lawrence Piersol denied a 12(b)(6) motion on the confusing grounds that "it is obviously too early to decide whether the speech is of public concern" and "too early to decide whether Abourezk is a public figure."

### *Website Condemns Bush Opponents*

As its name suggests, the website [www.probush.com](http://www.probush.com) expresses support for President Bush. In addition to photographs of the President (and an online petition that President Bush be added to Mt. Rushmore), the site links to political news, and sites selling T-shirts and other memorabilia. It includes a "Patriots List" which praises supporters of the President and the "Traitor List" at issue in this case.

The "Traitor List" contains the photographs of movie stars, politicians and others who do not support President Bush or the war in Iraq, including Barbra Streisand, Whoppi Goldberg, Martin Sheen and the Dixie Chicks. Several of the photographs are accompanied by satiric comments.

Next to Martin Sheen's photograph is the comment "You just play a president on TV so stop acting like one."

### *Site Not Protected as a Matter of Law*

Defendant moved to dismiss the complaint, arguing that the "Traitor List" is rhetorical hyperbole and/or

opinion as a matter of law, citing among other cases, *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970); *Hustler Magazine v. Falwell*, 485 U.S. 46, 54-55 (1988); and *Evel Kneivel* 223 F.Supp.2d 1173 (D. Mont. 2002).

Surprisingly, the federal district court did not address this very persuasive line of cases in its decision. Rather than address defendant's argument that the website is not defamatory, the court instead confusingly ruled that it would have to first determine whether the speech is of public concern and whether plaintiff is a public figure – and that it could determine neither on a motion to dismiss.

### *Plaintiff Opposed Iraq War*

Interestingly, defendant supplied a good deal of information on both these points. James Abourezk was a Democratic Senator from South Dakota from 1972-79, and

previously served one term in the House. He has publicly opposed the Iraq War, signing the "Not in Our Name" petition against the war that was published in major national newspapers in the Fall of 2002 and has written articles against the war.

Although the court acknowledged all these facts it simply noted that plaintiff "does not con-

cede" public figure status.

Plaintiff is represented by his own firm Abourezk Law Offices, P.C in Sioux Falls, SD. Defendant is represented by Ron Parsons of Johnson, Heidepriem, Miner, Marlow & Janklow, LLP in Sioux Falls, SD. UCLA Law Professor Eugene Volokh filed an amicus brief on behalf of defendant.

[www.probush.com](http://www.probush.com)

Traitor List™

**Treason: Violation of allegiance toward one's country or sovereign, especially the betrayal of one's country by waging war against it or by consciously and purposely acting to aid its enemies.**

**Traitor: If you do not support our President's decisions you are a traitor.**

*Get to know your traitor! \*Parody. Not to be taken seriously. These "traitors" are not legal "traitors" of the United States.*

## Court Awards Attorney Fees in Copyright Suit over Robert Mitchum Obituaries

By Nathan Siegel, Robert Balin, Gregory Welch and Naomi Waltman

In an important precedent for news media litigants asserting the fair use defense in a copyright infringement lawsuit, Federal District Court Judge Barbara S. Jones awarded three television networks a total of \$300,000 in attorneys' fees and costs for their successful defense of a suit challenging their use of brief motion picture clips in news obituaries of actor Robert Mitchum. *Video-Cinema Films, Inc. v. CNN, Inc. and ABC, Inc.*, 2004 U.S. Dist. LEXIS 1428 (S.D.N.Y., Feb. 3, 2004) and *Video-Cinema Films, Inc. v. CBS Corp.*, 2004 U.S. Dist. LEXIS 2612 (S.D.N.Y., Feb. 19, 2004).

The decisions, which were not appealed, appear to put an end to one of the most protracted cases, among a recent flurry of cases, addressing the parameters of the fair use doctrine as applied to film clips used in video news and documentaries.

### *Copyright Suit over Film Clips in News Obits*

The case arose out of television news obituaries for Robert Mitchum, all broadcast in July 1997 within twenty-four hours of the actor's death. The obituaries included multiple excerpts of brief clips (twenty seconds or less) from films, including *The Story of G.I. Joe*, a 1946 film that resulted in Mitchum's only nomination for an Oscar.

Plaintiff, the copyright owner of the film at the time of the suit, alleged that ABC, CBS, and CNN's use of clips from the film constituted copyright infringement. Several years ago, Judge Jones granted summary judgment for all defendants on the merits, finding their obituaries to be fair uses under the Copyright Act. *Video-Cinema Films, Inc. v. CNN, Inc.*, 2001 U.S. Dist. LEXIS 15937 (S.D.N.Y. Sept. 28, 2001). See *MediaLawLetter* November 2001 at 3.

Plaintiff's appeal of that decision was dismissed as untimely. Subsequently, all defendants sought their attorneys' fees and costs pursuant to the Copyright Act's fee-shifting provision, which gives trial judges discretion to award fees to prevailing parties. *17 U.S.C. § 505*.

Last year Judge Jones ruled that fees should be awarded, and directed the parties to submit further briefing on the appropriate amount of fees. *Video-Cinema Films, Inc. v. CNN, Inc.*, 2003 U.S. Dist. LEXIS 4887 (S.D.N.Y., March 31, 2003). That decision was itself an important precedent for future cases involving the fair use doctrine.

The Court addressed the factors established by the Supreme Court's decision in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) to guide district courts in exercising their discretion as to whether fees should be awarded in a copyright case.

### *Why Attorneys' Fees Were Assessed*

First, the Court found that plaintiff's claim that the media's use of its clips was not fair was "objectively unreasonable." Judge Jones found that the clips were an obvious fair use – plainly insubstantial, insignificant in relation to the entire film, and without impact on the plaintiff's ability to earn revenue from it.

Second, the Court found that plaintiff's motives for bringing the suit were "improper" and abused the rights granted by the Copyright Act. She noted facts uncovered in discovery demonstrating that the plaintiff was well aware that using clips in obituaries without a license was standard industry practice and sought to take advantage of that reality to threaten expensive copyright litigation to leverage relatively small settlements – a practice discovery suggested plaintiff had employed in the past.

In particular, the Court noted that the plaintiff had not even owned the film when the obituaries at issue were aired. Rather, the plaintiff's sole owner was in the process of trying to purchase the film from a university library. When he heard that Mitchum had died, he spent ten hours watching multiple news broadcasts simultaneously to find uses of the film in obituaries.

He then unilaterally inserted language into his draft purchase contracts to obtain rights to retroactively sue for past infringements. When he purchased the film months later, he immediately sent letters to numerous news organizations threatening suits over the Mitchum obituaries – often without having any idea whether the recipient had even aired an obituary or used *The Story of G.I. Joe*.

(Continued on page 40)

## Court Awards Attorney Fees in Copyright Suit over Robert Mitchum Obituaries

(Continued from page 39)

Judge Jones found that “fees are appropriate in this case to deter future copyright owners from using the threat of litigation to chill other fair uses.” *Id.* at \*15-16.

### *Determining Fees*

Although the litigation throughout involved three different defendants with different newscasts, the Court’s prior decisions granting summary judgment on the merits and awarding fees did not find meaningful distinctions among the three networks and treated the three cases essentially as one.

However, because each defendant had separate counsel with distinct representation and fee arrangements, its decisions regarding the amounts awarded treated the defendants differently and ultimately produced two different decisions and orders. Indeed, the scope of the litigation and number of parties raised a number of distinct and significant questions of law regarding fee awards in copyright cases.

Most importantly, the Court distinguished between the rationale it used to award fees to CNN, which was represented by outside counsel, and ABC and CBS, which were represented exclusively by in-house counsel.

### *CNN*

CNN was represented by Davis Wright Tremaine LLP’s New York office. The Court found that DWT’s billing rates for the case were more than reasonable, noting they were significantly below the median for New York firms of comparable size and copyright litigation experience. The Court further found that the time DWT’s attorneys spent on the matter was reasonable.

However, the Court declined to award CNN fees for all of the time DWT spent on the case, because the amount DWT actually agreed to charge CNN was less than the value of the total amount of time its’ attorneys’ expended.

Although the Second Circuit has arguably permitted district courts to award fees based on a lodestar calculation of time spent by counsel rather than the actual fee paid by the client, *see Crescent Publishing Group v. Playboy Entert.*, 246 F.3d 142 (2d Cir. 2001), Judge Jones declined to do so.

Thus, she awarded CNN one hundred percent of the fees it actually paid to DWT for the litigation through summary judgment, and in addition awarded all of the fees charged for the litigation of the attorneys’ fees issue. The total award came to \$162,345.

### *ABC and CBS*

While there is substantial precedent guiding fee awards based on outside counsel’s work, calculating an award for in-house counsel fees has received little judicial attention. The Court’s award to ABC and CBS in this case represent one of the largest, if not the largest such award ever, so its rationale may serve as a significant precedent for future awards for in-house counsel in any genre of litigation that permits recovery of attorneys’ fees.

First, as other courts have found, Judge Jones held that parties represented by in-house counsel should be able to collect attorneys’ fees to the same extent as parties for outside counsel. However, she found significant differences in the way such fees should be assessed – some arguably favorable to in-house counsel, others not.

On the favorable side, she recognized that in-house counsel do not typically maintain contemporaneous time records – normally a prerequisite for fee awards – and held that the absence of such records should not operate as a complete bar to collecting fees. In this case, ABC and CBS’s in-house counsel had maintained time records for only a portion of the case and also relied on other contemporaneous records demonstrating time expended, such as times recorded in deposition transcripts.

For the portions of the case in which no time records were kept or existed, ABC and CBS requested \$50,000 each. The Court agreed that this amount was reasonable, but imposed a 25% penalty for the absence of time records.

For the portions of the case in which ABC and CBS’s counsel maintained time records, the Court found the time expended was reasonable. However, the Court took an unusual tact in determining a reasonable hourly rate to use as the basis of its award for this time. ABC and CBS requested that the Court use the same rate it used for DWT’s lawyers.

However, the Court declined to do so, finding instead that an award should be limited to the actual out-of-pocket

(Continued on page 41)

## Court Awards Attorney Fees in Copyright Suit over Robert Mitchum Obituaries

(Continued from page 40)

costs expended by ABC and CBS. To arrive at that figure, the Court essentially used an estimate of the hourly value of the total annual compensation the companies' pay their in-house attorneys – a figure considerably lower than outside counsel billing rates.

The result was a total award to ABC of \$85,644 and to CBS of \$51,802. It is noteworthy that while the Court's rationale to arrive at the individual amounts awarded was quite different, the ultimate results were similar in all three cases. In each case, the Court took the parties' initial requests and reduced them by roughly a third, a result not untypical of courts' treatment of requests for fees in substantial cases.

Most importantly, the total sum awarded should provide more breathing space for news organizations contemplating the fair use of copyrighted material in their news reports. A significant disincentive for such uses is the reality that, if challenged, the costs of defensive litigation vastly exceed the license fees typically requested for brief excerpts of copyrighted material. *Video-Cinema* should act as a significant deterrent to anyone contemplating using the threat of litigation to seek such fees for patently fair uses in the future.

Plaintiff was represented by Gregory Sioris of Sioris & Molumby in New York.

*Nathan Siegel is in-house counsel at ABC and represented ABC in the case. Robert Balin and Gregory Welch of Davis Wright Tremaine LLP represented CNN. Naomi Waltman represented CBS.*

## Sixth Circuit Reverses Jury Verdict in Movie Infringement Case

By Louis Petrich

On March 19, a unanimous panel of the Sixth Circuit reversed a jury verdict of copyright infringement against the motion picture *Jingle All The Way* and directed entry of judgment for defendant. *Murray Hill Publications, Inc. v. Twentieth Century Fox Film Corp.*, 361 F. 3d 312 (6<sup>th</sup> Cir. 2004). A petition for rehearing is pending.

### *The Two Screenplays*

At issue were two stories about parents desperate to acquire the latest "hot" toy for their sons at Christmas time. In 1988, an author wrote *Could This Be Christmas* ("CTBC"), a screenplay inspired by his difficulties in obtaining a Golden Batman as a Christmas present for his son. After unsuccessfully attempting to sell the screenplay to various producers, the author sold all his rights to plaintiff corporation.

In 1993, a six-page treatment of *Jingle All The Way* ("JATW") was authored by a Fox script reader (story analyst) and freelance scriptwriter, based on his experience of trying to buy a Mighty Morphin' Power Ranger action fig-

ure as a birthday gift for his son. The district judge in this case determined that the treatment was created (and even registered with the Writers Guild of America) before Fox or any creator of the treatment had access to CTBC. This ruling was not challenged on appeal.

This ruling was significant because 18 of the alleged 24 similarities between plaintiff's script and Fox's movie (asserted by plaintiff's expert) were accounted for by the earlier Fox treatment. But there was evidence that plaintiff's script had been submitted to a division of Fox between the time Fox's treatment was written and the time the treatment's author wrote the first draft screenplay. Even more time elapsed before the movie was completed.

---

***At issue were two stories about parents desperate to acquire the latest "hot" toy for their sons at Christmas time.***

---

### *Legal Standard*

All circuits agree that in order to prove infringement, a plaintiff must show that (1) elements of defendant's work are identical or at least substantially similar to protected expression in plaintiff's copyrighted work ("actionable copying"), and (2) that such similarity resulted from copying plaintiff's work ("actual copying") rather than some other reason.

(Continued on page 42)



**6th Cir. Reverses Jury Verdict in Movie Infringement Case**

(Continued from page 41)

The actionable copying or “substantial similarity” issue requires a comparison at the level of expression, rather than idea. Similarity might be literal (called “fragmented literal similarity”) or more generalized (called “nonliteral comprehensive similarity.”) A case based on the latter type of similarity presents a mixed question of fact and law, because the determination of what constitutes “expression” and what is an unprotected “idea” in plaintiff’s work is a constitutionally directed analysis. See *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 556 (1985).

A prima facie case of actual copying may be shown by direct evidence (e.g., an admission) or circumstantial evidence, i.e., a combination of access (a reasonable opportunity of the creator of defendant’s work to view plaintiff’s work) and similarities that indicate copying (probative similarity).

***The Trial***

Before the trial began, the district court decided that the claim that the creator of the treatment had access to plaintiff’s script before or while writing the treatment was based only on speculation and conjecture. Nevertheless, the court delayed ruling that the treatment was independently created because plaintiff promised to prove at trial that the treatment was so strikingly similar to plaintiff’s script as to preclude even the possibility of independent creation. While the jury deliberated the case, the court concluded no striking similarity was proven, and thus the treatment was independently created.

The court did not tell the jury, however, apparently believing that, to the extent it might be argued that the same elements appeared in the treatment, plaintiff’s script and Fox’s movie, the jury should be permitted to conclude that the writer of JATW copied plaintiff’s script as the source for those elements in the movie rather than relying on his own treatment.

Of course, the court overlooked the reasonable result of the failure to inform the jury of the treatment’s independent creation: that the jury would find infringement on the erroneous belief that the treatment was copied from plaintiff’s script (as plaintiff argued in closing).

The jury found infringement and rendered verdicts for \$19 million, including \$15 million for profits that it speculated Fox might improperly make in the future. The district court granted post-trial motions to cut the judgment to \$1.5 million, but refused to grant Fox’s motion for judgment as a matter of law or the alternative new trial motion.

***Sixth Circuit Decision***

On appeal, Fox argued alternatively that as a matter of law (1) the works were not substantially similar when compared in their entirety, i.e., they told different stories, or (2) if the elements from the independently created treatment were filtered out, the remaining six alleged similarities in the movie were insufficiently similar to create a triable issue.

The Sixth Circuit took the latter tack. It first noted that the trial court had announced that the trial would apply Ninth Circuit standards to determine substantial similarity, including its extrinsic/intrinsic or objective/subjective tests for comparing works.

Since the trial, the Sixth Circuit had determined not to adopt the extrinsic/intrinsic tests but instead a modified version of the Second Circuit’s traditional “ordinary observer” test. See *Kohus v. Mariol*, 328 F.3d 848 (6th Cir. 2003). Importantly, the latter test disapproves of the use of “substantial similarity” expert testimony to dissect works that are directed to general audiences.

The Court noted that all circuits agree that in applying a substantial similarity test, a determination of liability cannot be based on non-protectible ideas, facts and scenes-a-faire (i.e., those matters indispensable or at least standard to the subject matter of the work). These matters must be “filtered out” in making the comparison.

The Court then analyzed the precedents to determine whether “elements already found in a copyright defendant’s earlier, non-infringing work are properly discounted in performing substantial similarity analysis.” To resolve this question of “first impression,” “at least in this court,” it noted that even protectible material licensed from a plaintiff in *Apple Computer v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994) was filtered out during the substantial similarity analysis.

(Continued on page 43)

**6th Cir. Reverses Jury Verdict in Movie Infringement Case***(Continued from page 42)*

It found persuasive that a prior draft had been filtered out in the architectural drawing decision in *Sturdza v. United Arab Emirates*, 281 F. 3d 1287, 1297 (D.C. Cir. 2002). It could also have cited to *Grubb v. KMS Patriots, LP.*, 88 F.3d 1, 4 (1<sup>st</sup> Cir. 1996); *Hofman v. Pressman Toys*, 790 F.Supp. 498, 506 (D.N.J. 1990); *Weygand v. CBS, Inc.*, 43 U.S.P.Q. 2d 1120 (C.D. Cal. 1997). It also concluded that “logic also supports the filtering of independently created elements.” Because the purpose of the substantial similarity analysis is to answer the question whether the defendant copied the work of the plaintiff, ... similar elements between ... work of the plaintiff and the defendant’s work will, depending on the degree of uniqueness and originality of the element, support such an inference. However, where defendant owns a prior work containing the same elements, he has no reason, beyond the illicit thrill of copyright infringement, to copy wrongfully from another what he could legally copy from himself. Therefore, where an element occurs both in the defendant’s prior work and the plaintiff’s prior work, no inference of copying can be drawn.

**Conclusion**

The logic of this ruling is clear where, as in JATW, there is no evidence that the writer of defendant’s script copied his earlier drafts from plaintiff’s work. If the law

were otherwise, plaintiff could argue (1) a defendant might not have relied on its shooting script for a movie when shooting the movie, so a jury could ignore a finding that the shooting script was independently created and conclude the defendant’s movie was copied from a screenplay that was submitted days before principal photography began; or (2) in a publishing setting, that a defendant may not have relied on an independently created first edition of a book when creating a second edition.

Thus, the Court recognized that the inferences a plaintiff would ask a jury to indulge in these situations are not reasonable. Because “no reasonable jury could have found substantial similarity solely on the basis of the six minor elements not so filtered,” the Court concluded that Fox was entitled to entry of judgment as a matter of law.

Plaintiff was represented by Mayer and Jeffrey Morganroth of Morganroth & Morganroth of Southfield, Michigan.

*Louis P. Petrich of Leopold, Petrich & Smith, P.C. of Los Angeles argued the appeal for Twentieth Century Fox Film Corporation. Also on the Fox briefs were Michael Huget and Laurie Michelson of Butzel Long of Detroit, Michigan, and Gregory Jordan and Maria Bernier of Reed Smith, of Pittsburgh, Pennsylvania.*

*Order now!*

**MLRC 50-STATE SURVEY 2003-04:  
MEDIA LIBEL LAW**

*With updated reports on libel law in the Federal Circuits and an outline of English libel*

**MEDIA LIBEL LAW TOPICS INCLUDE:** *Defamatory Meaning • Opinion • Truth/Falsity • Fault • Republication • Privileges • Damages • Motions to Dismiss • Discovery Issues • Trial Issues • Appellate Review • Remedies for Abusive Suits • Retraction • Constitutional/Statutory Provisions*

**\$175**

**For ordering information on the most current editions, including the 2002-2003 edition currently in stock, go to [www.medialaw.org](http://www.medialaw.org)**

## 4th Circuit Affirms Summary Judgment for Religious Rights Legal Group

In a per curiam decision, a Fourth Circuit panel affirmed summary judgment in favor of The Rutherford Institute (“TRI”), religious rights organization, on libel claims over a press release that erroneously accused school officials of anti-religious conduct. *Hugger v. Rutherford Institute*, 2004 WL 765067 (4th Cir. April 12, 2004) (unpublished).

The panel, consisting of Judges Michael Luttig, Karen Williams and Roger Gregory, held that the press release involved a matter of public concern, and that plaintiffs failed to offer sufficient proof of actual malice or actual damages.

### ***Press Release Accused School Officials of Bias Against Religion***

In November 1999, TRI issued a national press release entitled “Sixth Grader Punished for Refusing to Curse in Class,” which reported a 12 year old’s claim that she was made to read the word “damn” aloud in class and told to erase the letters “WWJD,” an acronym for “What Would Jesus Do,” from a school project. The student later admitted she fabricated her claims.

The district court granted summary judgment to TRI, holding that the plaintiffs, a teacher and school principal, were public officials. The Fourth Circuit affirmed, but on different grounds, finding it was not necessary to plaintiffs’ status, because they would not be entitled to recover even if private figures.

### ***Court Affirmed on State Law Grounds***

First, the court found that the press release was a matter of public concern because “the public undoubtedly has a strong interest in the classroom conduct, or misconduct as the case may be, of elementary school teachers and administrators” particularly where the statements accused plaintiffs of “suppressing freedoms of conscience and religion.”

Second, in what might be helpful precedent for media defendants, the court found no evidence that TRI acted with reckless disregard before issuing the press release even though school officials disputed the truth of the accusation prior to publication.

After a school official questioned the student’s version, TRI reconfirmed the story with the student who maintained that she had not lied and gave TRI the names of witnesses.

### ***No Need to Wait to Hear from Witnesses***

TRI attempted to contact the witnesses, but none returned TRI’s telephone calls. As to this fact the court noted that “Although a reasonable person may have waited to hear from one of the corroborating witnesses before issuing the press release, the First and Fourteenth Amendments do not allow states to impose a standard of reasonableness upon defamers who are discussing matters of public concern.” Thus plaintiffs were not entitled to recover presumed damages under North Carolina law.

### ***No Actual Damages***

Finally, the court held that there was insufficient evidence of actual damages where plaintiffs simply alleged that the press release caused them humiliation and damaged their reputation. “Were we to hold that such conclusory allegations were sufficient to avoid summary judgment, we would be, in effect, allowing juries to award damages to defamation plaintiffs on the basis of nothing other than the publication of a defamatory statement.”

Plaintiffs were represented by John Michael Logsdon, of McElwee & McElwee, North Wilkesboro, North Carolina. Defendant was represented by Stephen J. Neuberger, and Thomas S. Neuberger of Wilmington, Delaware.

**Save the Date**

**DCS ANNUAL BREAKFAST**

**Friday, November 19, 2004**

***New York City***

## Australian Attorney General Pushes for Uniform Libel Laws or National Legislation

By Peter Bartlett

Australia presently has eight separate sets of libel laws covering the various states and territories. There are some significant differences between them. Some jurisdictions are largely common law, with relatively minor statutory additions, while others have a completely statutory basis.

The state and territory borders are now largely irrelevant to the media. Thus there has been a realization for some time that Australia should seek more uniform libel laws. Many previous attempts failed because of the difficulty in obtaining the agreement of the eight separate governments, which all tend to favor their existing laws.

The Australian Attorney General Philip Ruddock has recently announced that if the states and territories cannot agree on uniformity, he will introduce legislation in September or October 2004 covering the whole of Australia. This is the first time that an Australian government has seriously contemplated using its limited constitutional powers to introduce national libel laws.

While the move to a national scheme is welcomed, the devil is in the detail. Australia's present libel laws are perceived as pro-plaintiff. The Attorney General's Discussion Paper foreshadows a position even more favorable to plaintiffs.

The law firm Minter Ellison has made a submission to the Attorney General raising concerns about the following proposals.

### DEFAMATION OF THE DEAD

It has always been accepted in Australia that living relatives of the deceased can bring an action for defamation if the living relative can establish that the defamation injures the reputation of the living relative. The Discussion Paper, however, contemplates creating a cause of action for a deceased.

### TRUTH AND THE PUBLIC BENEFIT

Some states and territories presently have truth alone as a defense. That is the preferred position. The Attorney General wants to add an additional requirement that the publication is in the public benefit. This is a vague concept. It seeks to introduce a privacy element to the libel laws.

### FAIR COMMENT

The present common law defense of fair comment provides that if the facts are accurately set out in the publication, the reader has the ability to decide whether they agree or disagree with the comment. This is a fundamental aspect of freedom of speech.

The Attorney General seeks to introduce a defense of honest and reasonable opinion. Thus he says that "prejudiced, biased and grossly exaggerated opinions will receive no protection."

Such a defense would severely inhibit freedom of speech. It seeks to take political correctness too far and would set a precedent forcing publishers into bland reporting of and comment on issues in a manner that may offend no one but will neither inform the reader.

### QUALIFIED PRIVILEGE

The Attorney General seeks to introduce a statutory qualified privilege based on the publication being reasonable in the circumstances. The suggested defense is modeled on Section 22 of the *New South Wales Defamation Act*. That section has been interpreted in such a way that very few media defendants have succeeded under it.

### JURIES

The Attorney General also seeks to abolish all trials by juries.

### *Position of the States and Territories*

The State and Territory Attorneys General have met and decided to seek more uniform laws rather than a national libel law. There is some consensus between them on the following issues:

---

***While the move to a national scheme is welcomed, the devil is in the detail. Australia's present libel laws are perceived as pro-plaintiff. The Attorney General's Discussion Paper foreshadows a position even more favorable to plaintiffs.***

---

(Continued on page 46)

## **Australian Attorney General Pushes for Uniform Libel Laws or National Legislation**

*(Continued from page 45)*

There would be an Objects clause introduced to set out the balance between reputation and freedom of speech. Legislation would seek to limit the damages that would be recovered in a libel action by providing that such damages would be linked in some way to the damages recoverable in a personal injury action. An Offer of Amends process would be introduced to encourage early settlement.

### **CORPORATIONS**

A provision similar to that recently introduced in New South Wales would provide that corporations could not sue for libel.

### **A PUBLIC FIGURE DEFENSE**

The State and Territory Attorneys are against a public figure defense. We have referred them to the Reynolds decision in the United Kingdom.

### **JUDGE / JURIES**

They favor a judge deciding damages.

### **LIMITATION PERIOD**

They favor a one year limitation period.

### **ISSUES IN DISPUTE**

There is still no agreement between the various State and Territory Attorneys on the following: 1) whether truth alone or truth and public benefit would form a defense; 2) whether there should be a definition of "libel" in the legislation; and 3) whether the New South Wales position of imputations forming the cause of action, should remain or whether the common law position of looking at the entire publication should be introduced.

### **CHOICE OF FORUM**

There is also no agreement on whether there should be a provision limiting the right of a plaintiff to choose the forum in which to sue.

### **INJUNCTIONS**

Some attorneys seem to support increasing the right of someone to obtain an injunction against the media, prior to publication. This again is strongly opposed. The courts presently in Australia take the view where monetary damages are an adequate remedy, an injunction, for freedom of speech reasons, should not be granted.

We have spent some considerable time with State and Territory Attorneys stressing the difficulties faced by the media following the *Gutnik v. Dow Jones* decision. The Attorneys are reviewing this position.

### ***What to Expect***

It is difficult to see the State and Territories Attorneys agreeing on uniform legislation. Thus the Australian Attorney General may indeed introduce legislation later this year to create a national libel law.

His Discussion Paper is now open for submissions. He intends to consider those submissions and then release a draft Bill in July. The difficulty he faces is time. The Australian Government must face an election later this year. It is difficult to see that any legislation could be passed before the election.

If the Attorney General is intent on passing new libel laws this year, he will need to delete many of the controversial issues presently raised in his Discussion Paper. As the Government does not have a majority in the Upper House, those controversial issues which impact on freedom of speech are likely to sink or at least delay, passage of the Bill.

That said however, the Australian Attorney General appears intent on this national approach succeeding.

*Peter Bartlett is a partner in Minter Ellison in Melbourne, Australia and head of the firm's Media Group.*

***MLRC would like to thank spring intern David Stein, Benjamin Cardozo School of Law, LLM Class of 2004, for his contributions to this month's MediaLawLetter***



## Canadian Court Denies Motions to Compel ISPs to Disclose Identities of Peer to Peer File Swappers

By Rebecca Brackley

On March 31, 2004, Ontario Federal Court Justice von Finckenstein denied motions to compel Internet service providers (ISPs) to reveal the identities of 29 alleged “uploaders” of copyrighted musical works using popular peer-to-peer (P2P) file-sharing programs, such as KaZaA. *BMG Canada v. John Doe*, No. T-292-04 (Ont. Fed. Ct.).

In addition to finding that the evidence lacked the required reliability to justify invading the privacy of Internet users, the Court held that the applicant music companies had failed to make out a *prima facie* case of copyright infringement under Canadian law.

### *Names of Alleged Infringers Requested*

The Canadian Recording Industry Association (CRIA) – following the lead of its U.S. counterpart, the Recording Industry Association of America (RIAA) – took the first step in its strategy to file suit against individual users of P2P file-sharing programs by attempting to obtain from ISPs the names of alleged infringers.

CRIA invoked the traditional procedure of seeking a court order for disclosure (sometimes called a Norwich order) – not having the benefit of the streamlined subpoena procedure under section 512(h) of the Digital Millennium Copyright Act, 17 U.S.C. (DMCA) (a procedure that was, until the recent decision in *Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir.2003), widely used by the RIAA). The Electronic Frontier Foundation and the Canadian Internet Policy and Public Interest Clinic intervened in the case.

### *Evidence Lacked Reliability*

In denying the applicant’s motion to compel the ISPs to divulge the names of Internet users, the Court called into question the reliability of the applicant’s evidence on several fronts.

First, the Court found that there was insufficient evidence linking the pseudonyms of the P2P users with the Internet protocol addresses that ISPs were in turn asked to link to account holders. The Court also noted that the ISPs were limited in their ability to reliably retrieve older data

from their systems. The Court acknowledged that retrieving data was not easy and that the costs of doing this should be borne by the party making the request.

Similarly, the Court found that while ISPs may be able to generate the names of account holders, this would not necessarily reveal the actual computer users responsible for file sharing. The widespread practice of sharing an Internet connection and the increasing popularity of wireless networks mean that the account holder’s identity may no longer be a reliable indicator of the Internet user.

With respect to the role of the Internet intermediary, the Court held that the person from whom discovery is sought must be the “only practical source of the information” and that the applicants had not provided sufficient evidence to allow the Court to make this determination. It suggested that the operators of the KaZaA and iMesh websites were another possible source.

### *Privacy Outweighs Interest in Disclosure*

With regard to the privacy of Internet users, the Court acknowledged the privacy interest of the individual (particularly in the context of the Internet and in light of Canada’s new federal privacy legislation [the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5]) and found that these concerns outweighed the public interest in favor of disclosure in this case, where the reliability of the evidence and the requested information was in question.

The Court noted that third parties have in the past been compelled to disclose the name of a defendant identified by an Internet protocol address and that “in no [other] case have privacy or other concerns weighing against disclosure outweighed the interest in obtaining documents and information necessary to identify the defendants,” making this case the first to tip the balance in favor of Internet privacy.

### *P2P File Sharing Does Not Violate Copyright Law*

The Court further held that a *prima facie* case of copyright infringement had not been proved. Citing section 80 of the Canadian Copyright Act, R.S.C. 1985, c. C.-42, the Court found that downloading a song for personal use was not an infringement.

(Continued on page 48)

## Canadian Court Denies Motions to Compel ISPs to Disclose Identities of Peer to Peer File Swappers

(Continued from page 47)

Section 80 imposes a levy on the manufacturers and importers of blank recording media (e.g., recordable compact discs) and in exchange exempts from copyright infringement the reproduction of a musical work onto an audio recording medium for private use. The levy, which has been in place since 1999, is collected by the Canadian Private Copying Collective and redistributed to authors, performers and makers of musical works.

This so-called private copying regime was Canada's solution to the difficult enforcement challenge posed by widespread copying of music. Although largely expected, the Court's decision removed any doubt that the exemption applied to digital music copied from the Internet.

The Court went on, however, to consider whether uploading infringed copyright. It found that the "mere fact of placing a copy on a shared directory in a computer where

that copy can be accessed via a P2P service" (so-called uploading) does not amount to reproducing, or authorizing the reproduction, or to distributing unauthorized copies under the Copyright Act.

Citing the recent decision of the Supreme Court of Canada in *CCH Canada Ltd. v. Law Society of Canada* (2004 SCC 13) (holding that a library does not authorize copyright infringement by providing self-service photocopiers for use by its patrons), the Court held that simply setting up facilities that allow copying does not amount to authorizing infringement. The Court held that "distribution" requires some *positive* act by the user (such as sending out copies or advertising that they are available for copying).

Moreover, making copies available was not a right recognized under Canadian copyright law. Finally, the Court rejected the claim of secondary infringement, finding that users lacked the necessary knowledge of infringement. In short, uploading was not an infringement of Canada's distinctive copyright laws.

### Looking Forward

CRIA has filed an appeal. The decision will therefore be considered by the Federal Court of Appeal, and may have important implications for the future of Canadian copyright law in the digital environment.

For the moment, the decision appears to have blocked the Canadian music industry's enforcement efforts through this avenue. It may also force copyright policy-makers to once again rethink the way the Copyright Act balances interests in the digital era.

Indeed, a broader Canadian copyright reform agenda for the digital era is already on the horizon. Proposals for copyright reform that were first introduced in 2001 include

protection for digital rights management technologies and the expansion of copyright holders' rights (including the addition of a "making available" right) to comply with World Intellectual Property Organization treaties (which have been signed by Canada but have yet

to be implemented), as well as establishing safe harbors for ISPs that participate in enforcement efforts.

These proposals largely track reforms that have already been instituted in the United States (e.g., DMCA). However, the process of legislative reform has been slow and appears to be stalled in debate and controversy.

Also eagerly awaited is the Supreme Court of Canada's decision (expected this summer) in the appeal of *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2002] 19 C.P.R. (4th) 289 (F.C.A) (the "Tariff 22" case). Tariff 22 was proposed by the Society of Composers, Authors and Music Publishers of Canada (SOCAN), which is the Canadian copyright collective for the public performance of musical works.

It sought to compensate copyright owners by charging ISPs a royalty for the communication of musical works over the Internet. The Canadian Copyright Board found, however, that ISPs were not liable for royalties (*SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet) (Re)* (1999),

(Continued on page 49)

---

**The Court held that simply setting up facilities that allow copying does not amount to authorizing infringement. The Court held that "distribution" requires some positive act by the user.**

---

### **Canadian Court Denies Motions to Compel ISPs to Disclose Identities of Peer to Peer File Swappers**

*(Continued from page 48)*

1 C.P.R. (4th) 417) and the Federal Court of Appeal largely agreed (except with respect to ISPs' caching activities). Now under appeal to the Supreme Court, the case is expected to clarify the liability of ISPs and further define the roles and responsibilities of Internet intermediaries.

#### **Conclusion**

The Canadian response to the digital music conundrum is unquestionably unique. The focus to date (unlike its American counterparts) has largely been on developing a broad-based tariff and levy structure to compensate rights holders, not on strengthening enforcement tools to prevent online infringements.

In essence a form of compulsory license or tax, the initial Canadian response attempts to balance 1) the concern of the

creative industries that the enforcement challenges and economic realities of P2P file sharing endanger the industry – and with it creative production; 2) the public interest in preserving the openness of the Internet and in safeguarding an Internet user's ability to speak and associate anonymously; and 3) the interests of the Internet intermediaries that are caught in the middle.

As a testing ground for a novel solution, Canada's experience will undoubtedly be closely watched in the United States.

Dimock Stratton Clarizio LLP represents the applicant.

*Rebecca Brackley is an associate at Torys LLP in Toronto, Canada. Torys LLP represents one of the respondents (an ISP).*

## **2004 NAA/NAB/MLRC MEDIA LAW CONFERENCE**

**Forty years after New York Times v. Sullivan:  
PROBLEMS, POSSIBILITIES, AND ANSWERS**

Alexandria, Virginia  
September 29, 30 and October 1, 2004

***You should have already received your registration materials by mail.  
If you do not have the materials, there are forms available on our web site, [www.ldrc.com](http://www.ldrc.com).***

## Tokyo High Court Overturns Restraint on Magazine

The Tokyo High Court this month reversed a lower court injunction against the Japanese weekly magazine *Shukan Bunshun*, published by Bungeishunju Ltd., that barred the magazine from further distributing a story that allegedly violated the privacy of the daughter of former government official.

As reported in last month's *MediaLawLetter*, the plaintiff, who was not specifically named is the daughter of Japan's former Foreign Minister Makiko Tanaka. The magazine reported that the daughter married against her parents' objections, divorced after only one year and is now back in Japan.

Nearly 740,000 copies of the magazine were distributed before the injunction was issued, which apparently only applied to 30,000 copies still held by the publisher.

According to news reports, the Tokyo High Court agreed that the disclosures in the article constituted a violation of plaintiff's privacy, "But we cannot say that the privacy violations were bad enough to seriously damage (the woman's) reputation." It was also reported that plaintiff would not appeal the decision.

The right to privacy in Japanese law is grounded in Article 13 of the Constitution which provides:

All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

***Order Now!***

### **MLRC 50 State Survey: EMPLOYMENT LIBEL AND PRIVACY LAW 2004**

**TOPICS INCLUDE:** *Publication • Compelled Self-Publication • Fault Standards Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction Emotional Distress • Interference with Economic Advantage • Prima Facie Tort*

**\$175**

**For ordering information on the most current editions,  
go to [www.medialaw.org](http://www.medialaw.org).**

## First Amendment Seminars at High School Journalism Conventions

A panel of reporters, a media lawyer and top police official discussed how they interact and handle public safety concerns in the course of gathering and reporting the news, in a program presented last month at the Columbia Scholastic Press Association's Spring Convention in New York.

The program was part of the LDRC Institute's Free Press in a Free Society program designed to teach students about First Amendment values in the context of real life situations faced by the press.

Michael Quinn, in-house counsel at Time Warner Cable, moderated the program with the theme "The Press, the Police and the Public's Right to Know." He led panelists through a hypothetical that explored, among other things, how and in what circumstances public safety concerns should limit reporters' freedom to gather news, particularly in the post 9/11 environment.

The panel featured Paul Browne, the New York Police Department's Commissioner for Public Information; Samuel

Bruchey, Newsday; David Diaz, WCBS-TV; Christopher Nolan, Magazine Publishers of America; Juliet Papa, WINS Radio; and William Rashbaum, the New York Times' Police Bureau Chief.

The hypothetical began with a high school student contacting reporters with his suspicion that a classmate was a member of an Islamic terrorist organization. The hypothetical

required panelists to work through whether and how they would report this, including what steps they would take to investigate the allegation. Panelists were also challenged with scenarios in which their own



safety might be at risk in the course of newsgathering.

The final act of the hypothetical involved terrorists taking high school students hostage — a scenario that had panelists discussing whether they would withhold information on public safety grounds.

## Jackson Walker Presents Seminar at Texas Student Journalism Convention

Laura Stapleton of Jackson Walker LLP organized a First Amendment education seminar for Texas student journalists as part of the University Interscholastic League's annual student journalism convention on April 17 at the University of Texas at Austin.

The seminar program on "Criminal Justice, the Courts and the Public's Right to Know," explored the tensions that arise between the right of the press to attend and report on judicial proceedings and a criminal defendant's fair trial right.

Bob Latham, of Jackson Walker, moderated the seminar. The panelists were:

*Judge:* The Honorable Julie Kocurek, Criminal District Court, Travis County, Texas.

*Reporters:* Tanya Eiserer, Dallas Morning News; Nanci Wilson CBS station KEYE in Austin; Brian Collister, Clear Channel station WOAI in San Antonio; Wayne Dolcefino of ABC station KTRK in Houston.

*Lawyers:* Laura Stapleton, Jackson Walker LLP; Julie Ford, George & Brothers; Bo Blackburn, former state prosecutor; and Bill Allison, criminal defense attorney and head of the Criminal Defense Clinic at University of Texas Law School.



## FCC Announces \$495,000 Fine Against Clear Channel for Howard Stern Broadcast

On April 8, the FCC proposed fining Clear Channel Communications and two of its subsidiaries \$495,000 for broadcasting an allegedly indecent episode of the "Howard Stern Show." *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 04-88 (April 8, 2004) (available at [www.fcc.gov](http://www.fcc.gov)).

Afterwards Clear Channel permanently dropped the "Howard Stern Show" from its six stations that had been broadcasting it in Ft. Lauderdale and Cocoa Beach, Florida, Louisville, Kentucky, Honeoye Falls, New York, San Diego and Pittsburgh. In a press release Clear Channel stated that "The Congress and the FCC are even beginning to look at revoking station licenses. That's a risk we're just not willing to take."

At issue was a discussion among Stern and show members on anal sex and a purported product called "Sphincterine." The FCC found that the discussions were "vulgar and lewd" and "designed to shock and pander."

Rather than counting the entire program as one utterance subject to a single fine, the FCC for the first time

assessed fines against separate utterances in one broadcast. In calculating the fine, the FCC held that Clear Channel was on notice that the Commission could treat separate utterances in one broadcast as separate violations. It calculated three violations: one for the anal sex segment in which only one individual uttered indecent remarks, and two violations for the "Sphincterine" segment in which two individuals uttered indecent remarks.

The Commission calculated a total of 18 violations because the three indecent segments were broadcast on six separate stations. Taking into consideration the "nature, circumstances, extent and gravity" of the broadcasts, the Commission proposed a \$27,500 fine for each of the 18 violations, a total of \$495,000.

### FCC Proposes \$4,000 Fine for Crank Call to Fidel Castro

This month the FCC also proposed fining Miami radio station WXDJ \$4,000 for broadcasting a crank call to Cuban President Fidel Castro. *WXDJ Licensing, Inc.*, Notice of Apparent Liability for Forfeiture, DA 04-1047 (April 23, 2004) (available at [www.fcc.gov/eb/ORDERS](http://www.fcc.gov/eb/ORDERS)).

Two deejays at the Spanish language station succeeded in getting through to Castro by pretending to be Venezuelan President Hugo Chavez. The deejays called Castro an assassin and Castro replied with a string of vulgarities.

The radio station conceded that it did not provide proper notice to Castro and other Cuban officials that the telephone conversation was being recorded for broadcast as required by § 73.1206 of the Commission's rules, but argued that the rule did not apply "to a head of state of a foreign nation whose trade is embargoed and to which travel by U.S. citizens is restricted, and is therefore considered to be 'hostile' to the United States."

The Commission, however, found "nothing in the rule that excuses the prohibited conduct on the basis of the recipients' residence or their political status."

©2004

**MEDIA LAW RESOURCE CENTER, INC.**  
80 Eighth Avenue, Suite 200  
New York, NY 10011

#### BOARD OF DIRECTORS

Harold W. Fuson, Jr. (Chair)  
Dale Cohen  
Stephen Fuzesi, Jr.  
Katherine Hatton  
Henry Hoberman  
Ralph P. Huber  
Kenneth A. Richieri  
Elisa Rivlin  
Susan E. Weiner  
Bruce Johnson (ex officio)

#### STAFF:

Executive Director: Sandra Baron  
Staff Attorney: David Heller  
Staff Attorney: Eric Robinson  
LDRC Fellow: Charles Burger  
Legal Assistant: Kelly Chew  
Staff Coordinator: Debra Danis Seiden

## Legislative Update: Broadcast Decency Continued; OFAC Regulations

By Kevin Goldberg

The two Federal actions discussed below are repeats from the previous edition of the newsletter but there have been some interesting developments with regard to both that justify their update.

The Broadcast Decency Enforcement Act continues to roll through Congress like an 18-wheeler out of control (oh, sure, it's delivering some needed goods but at the same time tends to annoy and even endanger other users of the road). Meanwhile, the Office of Foreign Assets Control ("OFAC") has revised its views on the editing and publishing of works by certain foreign writers in a way that does little to increase the chances that the media will embrace OFAC's interpretation of the United States' trade embargo against Iran, Libya, Syria and Cuba.

### ***Broadcast Decency Enforcement Act of 2004 (HR 3717 and S 2056)***

- Rep. Fred Upton (R-MI) introduced the Broadcast Decency Enforcement Act (HR 3717) on January 21, 2004. The same Telecommunications and Internet subcommittee held a hearing on January 28, 2004. HR 3717 passed that subcommittee on February 11, 2004. Another hearing was held in the Telecommunications and Internet Subcommittee on February 26, 2003.
- The full Energy and Commerce Committee then held a markup session on March 3, 2004 at which the bill was passed by a vote of 49-1 with some significant amendments. As passed by the Energy and Commerce Committee, HR 3717 now allows for a fine of up to \$500,000 per violation. There is no longer a \$3 million ceiling for cumulative violations. Instead, the only "maximum" pertains to the fact that three violations will subject the licensee to a hearing before the FCC as to whether it is operating its license in the public interest.
- Meanwhile, Sen. Sam Brownback (R-KS) has introduced a companion bill in the Senate. S 2056 was introduced on February 9, 2004 and referred to the Committee on Commerce, Science and Transportation. It passed that committee on March 9, 2004.

- There are still some differences which must be worked out between the two bills before either is presented to the President. These include:
  - HR 3717 provides for a maximum penalty of \$500,000 per violation, while S 2056 provides for a maximum penalty of \$ 275,000 for a first violation by a licensee, \$375,000 for a second violation by the same licensee and \$500,000 for a third or any subsequent violation by that licensee, with an overall cap of \$3 million for any one twenty-four hour period or single continuing violation (both specifically authorize the institution of license revocation proceedings after three violations of the indecency rules)
  - S 2056 would allow the industry to begin self-regulation through the institution of a voluntary code of conduct while HR 3717 does not create any form of antitrust or other exemption specifically permitting such action
  - S 2056 requires the FCC to suspend its recently-passed media ownership rules pending a study of the correlation between media ownership and indecency; HR 3717 does not
  - S 2056 incorporates the "Children's Protection from Violent Programming Act", which allows FCC regulation of violent programming; HR 3717 does not

### ***Office of Foreign Asset Control to Enforce Editing of Certain Foreign Writers as "Illegal Services"***

- The Department of Treasury's Office of Foreign Assets Control ("OFAC") sent letters in September 2003 to certain publishers indicating that it will begin prosecuting as violations of federal trade embargo law any attempts to edit and publish works produced by writers living in Iran, Syria, Libya or Cuba. While OFAC allows publication of unedited, "camera-ready" works by these foreign nationals; it considers editing the work to be a "service" offered to these authors in violation of these embargoes. This is despite a legislative amendment introduced by Rep. Howard Berman (D-CA) and passed in 1988, which explicitly states that any informational materials are to be exempted from the items which constitute a violation of these trade embargoes.

(Continued on page 54)

### Legislative Update

*(Continued from page 53)*

- Under the advice of the American Chemical Society, many scientific publishers refused to accept submissions from Iranians for a period of approximately two months. Some publishers have resumed accepting these works, while others continue to play it safe. Presumably, the ban extends to other written and video materials, including news reports or opinion pieces from these countries. Thus, very persuasive op-eds from Cuban dissidents which have run in prominent newspapers across the country would now subject those newspapers to prosecution, even if the paper were to simply correct typographical errors or edit for space – any piece must be run “as-is” or not at all.
- The Institute of Electrical and Electronic Engineers (“IEEE”) sent a letter to OFAC requesting clarification of this policy. OFAC issued its response on April 2, 2004, which offered further insight into the regulations, but little in their way of comfort for news media seeking to utilize the viewpoints of writers or broadcasters residing in the four affected countries
- OFAC addressed two inquiries from the IEEE: (1) whether the “peer review” process is legal under these regulations, and (2) whether style and copy editing is legal under these regulations. It answered that neither runs afoul of the relevant regulations, largely because of the “Berman Amendment.”

The letter first discussed the typical peer review process in which the scientific community engages when deciding whether a particular work is fit for publication in a scholarly journal. The process within IEEE is for the foreign writer to send his or her article to IEEE, which then distributes the article to 3 IEEE volunteers (both in the United States and in a third country).

These peer reviewers use a standard form to provide comments to IEEE including a “yes” or “no” recommendation as to whether the article should be published in an IEEE journal. That form allows for comments and questions by the reviewer that are forwarded to the author, though this form goes to the IEEE editorial board before it is ever sent to the author.

IEEE suggested in a letter to OFAC that this process is geared toward publication under IEEE standards, not to helping the author. OFAC said that this activity does not require a license as long as the peer review does not result in the reviewer’s substantive or artistic alterations or enhancement in the manuscript.

The peer review process is legal until it rises to the level of a collaborative interaction between an author in Iran, Libya, Cuba or Syria and an editor in the US by which a co-authorship exists. In the peer review process as described by IEEE, the editor is simply providing comments and feedback; the foreign author remains free to disregard those comments prior to final publication.

IEEE also inquired as to the proper application of these regulations to style and copy editing. This hits much closer to home for MLRC members. IEEE described style and copy editing as:

- Labeling units of measurement with standard abbreviations
- Correcting grammar and spelling to conform to standard American English
- Changing the size of type or the weight of lines in illustrations so that the diagrams remain legible when reduced in size for publications
- Labeling illustration captions and formatting references to conform to the IEEE style manual
- Sizing and positioning illustrations to fit on the page appropriately and in proper proximity to references in the text
- Formatting mathematical equations to fit on the page appropriately and to avoid breakage between two lines in a way that is unclear
- Ensuring the author has supplied a biography and photo
- Adding page folios with publication titles and page numbers

OFAC said that these activities are legal because they do not “constitute substantive or artistic alteration or enhancement of the informational material and is intrinsically related to and necessary for its dissemination through publication.”

*(Continued on page 55)*

### Legislative Update

(Continued from page 54)

- Thus, at first blush, it appears that OFAC has softened its original stance at least slightly. For instance, correction of simple grammar and spelling errors is allowed. As is some formatting for space – at least if it only applies to changing the size or type of font.

But a closer look reveals that many activities would be prohibited. Members should be very concerned by the description of the peer review process and the fact that is mainly a feedback process for the foreign writer – certainly the editorial process goes beyond just offering feedback, as substantive changes are made which alter the content of an op-ed.

Even though style and copy editing has been given the green light, this editing falls short of the editing process used by many newspapers. It is a very narrow description of “copy editing” that

appears geared only toward scientific writings and the particular content they contain.

Any attempt to edit an op-ed for space by removing words, sentences or paragraphs would run afoul of the law. The same is true for substantive editing where the foreign writer's English requires clarification. For that matter, OFAC does not appear to have given a thumbs up to translation of a work submitted in a foreign language. It appears that many op-eds might be considered a “collaborative work” of the type that OFAC would still consider an infringement; they certainly appear to result in the editor’s “substantive or artistic alterations or enhancement.”

For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Chairman, Kevin M. Goldberg of Cohn and Marks LLP at (202) 452-4840 or [kmg@cohnmarks.com](mailto:kmg@cohnmarks.com)

## Media Groups Protest Seizure of Reporters' Tapes at Scalia Speech

By Kathleen Kirby

On Wednesday, April 7, U.S. Supreme Court Justice Antonin Scalia spoke to students at Presbyterian Christian High School in Hattiesburg, Mississippi about the importance of protecting the rights provided by the Constitution.

Near the end of the assembly, Deputy Marshal Melanie Rube confronted two journalists, one from Gannett's *Hattiesburg American* and the other from The Associated Press, and ordered that they erase the tape

recordings they had made of the justice's remarks. While Justice Scalia's “long-standing policy” is to prohibit electronic recordings of his appearances, no prior announcement of such a prohibition was made at this event.

Reports of the incident drew immediate reaction from journalism organizations. The Reporters Committee for Freedom of the Press (RCFP) sent letters to Scalia, Attorney General John Ashcroft and high-level U.S. Marshals condemning the marshal's actions. The Reporters Committee

argued that seizure of the reporters' work product violated “not only fundamental tenets of press freedom, but directly violate[d] the policy set forth in the Privacy Protection Act” and Justice Department guidelines on requests for information from the news media.

The Radio-Television News Directors Association (RTNDA) wrote to the U.S. Marshals Service underscoring RCFP's concerns and demanding that U.S. marshals be instructed not to confiscate or erase journalists' work product in such instances.

***While Justice Scalia's “long-standing policy” is to prohibit electronic recordings of his appearances, no prior announcement of such a prohibition was made at this***

### ***Privacy Protection Act Violated***

The Privacy Protection Act and the DOJ guidelines concern search warrants for and subpoenas of journalists' work product, respectively. The Privacy Protection Act, 42 U.S.C. § 2000aa(a), states that government officers and employees investigating a criminal offense may not “search for or seize any work product materials possessed by a person reasonably

(Continued on page 56)

## Groups Protest Seizure of Reporters' Tapes at Scalia Speech

(Continued from page 55)

believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public a newspaper, book, broadcast or other similar form of public communication.”

The DOJ guidelines provide, among other things, that “the prosecutorial power of the government should not be used in such a way that it impairs a reporter’s responsibility to cover as broadly as possible controversial public issues,” and set forth specific procedures to be followed during investigations that involve a member of the news media. 28 C.F.R. § 50.10.

### Scalia Apologizes for Incident

In a letter sent to RCFP Executive Director Lucy Dalglish on April 8, Scalia apologized for the incident and stated that the action had not been taken at his direction. Scalia indicated that he would revise his policy “to permit recording for use of the print media so as to “promote accurate reporting.”

He went on to say, “the electronic media have in the past respected my First Amendment right not to speak on radio or television when I do not wish to do so, and I am sure that courtesy will continue.”

In separate letters of apology written to the reporters, Scalia said, “I abhor as much as any American the prospect of a law enforcement seizing a reporter’s notes or recording.” He offered some insight into his long-standing prohibition, explaining that he has refused radio and television coverage of his public appearances because “it has been the tradition of the American judiciary not to thrust themselves into the public eye, where they might come to be regarded as politicians seeking public favor.” Scalia said that he would make it clear in the future that “recording for use of the print media is no problem at all.”

### RTNDA Complaint

Scalia’s disparate treatment of the print and electronic media prompted immediate criticism from RTNDA President Barbara Cochran, who wrote to the Scalia objecting to his treatment of television and radio reporters as *personae non grata*. Cochran’s letter states that Scalia’s policy of excluding electronic media from his public appearances has been extremely troubling to RTNDA members for years. In March

2003, RTNDA protested Scalia’s prohibition on televised coverage of his appearance at The City Club of Cleveland, where he received “The Citadel of Free-Speech Award.”

“You have written that you will allow newspaper reporters to use their recording devices to assure the accuracy of their stories,” Cochran wrote. She continued:

Surely, television and radio reporting should be just as accurate. One of the reasons that the public turns to television and radio for its news is because they can see and hear for themselves exactly what took place. To exclude television cameras and audio recording is the equivalent of taking away pencil and paper from print reporters. Your policy puts television and radio journalists at a distinct disadvantage. . . .we find it very hard to understand how a public official charged with protecting such safeguards of our democracy as freedom of the press would choose to impede effective reporting without sufficient justification. We believe this policy discriminates against television and radio journalists, fosters less accurate reporting, and undermines the principle at the very core of the First Amendment, that people will have the information that enables them to judge government and those in government.

On April 12, Senators Patrick Leahy (D-VT) and Charles Schumer (D-NY) wrote a letter to the Administrative Office of U.S. Courts asking that specific guidelines be established for federal judges, including Justices of the United States Supreme Court, making public remarks either on or off the record.

As of this writing, Justice Scalia has not responded to RTNDA’s letter.

*Kathleen Kirby is of counsel at Wiley, Rein & Fielding in Washington, D.C.*

**TO RECEIVE THE  
MEDIALAWLETTER BY E-MAIL**

**(Or Add Others From  
Your Organization to Our List)**

**Please Contact  
Kelly Chew  
kchew@ldrc.com**



## Ethics Corner: Attorneys Risk Disclosure of Their Communications with Expert Witnesses

By Monica L. Dias and Erin N. Rieger

Attorneys face a potential ethical quandary when deciding whether to provide information to an expert witness. Under the Federal Rules of Civil Procedure, the information will be vulnerable to disclosure if the expert considered the information in forming his or her opinion. But under ethical obligations, an attorney may not be zealously and competently representing the client if the attorney declines to provide information that an expert witness needs to form an opinion.

Given the wording of Federal Rule of Civil Procedure 26(a)(2)(B), attorneys should be cautious about the information they provide to experts. The rule requires that the disclosed expert's report contain "the data or other information *considered* by the witness in forming the opinions...." (emphasis added).

Furthermore, the 1993 Advisory Committee Notes to the rule state that "litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed."

Several courts have concluded that the term "considered" in the rule extends not just to documents actually relied on by an expert, but also to any documents provided to and reviewed by the expert. See *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 283 (E.D. Va. 2001); *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001); *Amway Corp. v. Procter & Gamble Co.*, 2001 U.S. Dist. LEXIS 5317, at \*3-4 (W.D. Mich. 2001).

Courts are split as to whether the work-product doctrine protects information considered by the expert that contains an attorney's mental impressions, opinions and litigation strategies. Some courts follow a bright-line standard requiring disclosure of all materials, including attorney opinions, provided to and considered by the ex-

pert. See *FDIC v. First Heights Bank, FSB*, 1998 U.S. Dist. LEXIS 21506, at \*13 (E.D. Mich. 1998); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of New York, Inc.*, 171 F.R.D. 57, 66 (S.D.N.Y. 1997); *W.R. Grace & Co. v. Zotos Int'l, Inc.*, 2000 U.S. Dist. LEXIS 18096, at \*10 (W.D.N.Y. 2000).

Other courts have concluded that Rule 26(a)(2)(B) disclosure extends only to factual materials provided to the expert and not to core attorney work product. See *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642-643 (E.D.N.Y. 1997); *Estate of Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 664 (S.D. Iowa 2000).

Some courts also require disclosure of draft reports prepared by the expert. See *W.R. Grace & Co.*, *supra*; *B.C.F. Oil Refining, Inc.*, *supra*. In addition, draft reports prepared by an attorney and provided to an expert, or draft reports prepared by an expert but edited by an attorney, are vulnerable to disclosure and could ultimately undermine the credibility of the expert's opinion. See *W.R. Grace & Co.*, *supra*; *Trigon Ins. Co.*, *supra*. As one court stated, "Since the job of the trier of fact is to decide which expert's opinion is more reliable and compelling, it is difficult to imagine there being more important documents for the trier of fact to see than drafts of the expert's opinion that were written or edited by someone else, e.g., by the lawyer who retained him." *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 116 F.R.D. 533, 540 (N.D. Cal. 1987).

Finally, the attorney and client risk sanctions if they destroy draft expert reports or other information considered by the expert in forming the expert's opinion. Sanctions could include a granting of dismissal or summary judgment, or an award of attorney's fees and costs incurred as a consequence of the destruction of evidence. Even if the adverse party did not formally request disclosure of draft reports, a court may find that Rule 26(a)(2)(B) placed the attorney on notice of an obligation to produce draft reports.

---

**Given the judicial trend, an attorney serves the client best by not stepping into the role of the expert.**

---

(Continued on page 58)

**Ethics Corner**

*(Continued from page 57)*

The rulings make it clear that attorneys should think twice before becoming overly involved with an expert witness who is forming an opinion. An attorney who provides his opinions, thoughts and strategies to an expert can expect opposing counsel to obtain those opinions, thoughts and strategies. Worse, an attorney who writes or edits early versions of the expert's opinion can expect a judge to order disclosure of those drafts. In that case, the expert's credibility could be decimated under

cross-examination. Given the judicial trend, an attorney serves the client best by not stepping into the role of the expert.

*Monica L. Dias is an associate at Frost Brown Todd LLC and a member of the firm's First Amendment, Media and Advertising Law Practice Group. Erin N. Rieger is an associate at Frost Brown Todd LLC and a member of the firm's Complex Business Litigation Practice Group.*

MEDIA LAW RESOURCE CENTER  
TWENTY-FOURTH ANNUAL DINNER

WEDNESDAY, NOVEMBER 17, 2004

WITH PRESENTATION OF THE  
**WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD**  
TO  
**TED TURNER**

WHO WILL BE INTERVIEWED ON THE OCCASION OF THE AWARD BY

**Tom Brokaw**  
**NBC News**

MLRC is honored to be able to present the WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD to Ted Turner, and to be able to do so in a program joined by Tom Brokaw. We believe this will be an extraordinary evening. And we look forward to your joining us.

6:00 p.m. Reception  
Sponsored by Media/Professional Insurance

7:30 p.m. Dinner  
*The Copacabana*  
*560 West 34th Street*  
*New York City*