

MILRC Media Law Resource Center

MEDIA LAW LETTER

Reporting Developments Through April 30, 2008

INTERNET

- 7th & 9th Cir.** **Circuit Courts Consider Scope of Section 230 Immunity** **3**
Decisions May Not Substantially Alter Broad Immunity Under Sec. 230
Chicago Lawyers Comm. v. Craigslist; Fair Housing Council v. Roommates.com
- N.J.** **Reasonable Expectation of Privacy in ISP Subscriber Information** **50**
Probable Cause Standard for Law Enforcement
State v. Reid

NEWS & UPDATES

- Ga.** **'Deal or No Deal TV' Game Show Promotion Not "Gambling"** **10**
Class Action Suit Dismissed
Hardin, et al. v. NBC Universal, Inc.

LIBEL / PRIVACY

- Ga. App.** **Georgia Court of Appeals Sends Libel-in-Fiction Case to Jury** **13**
Jury Could Find Novel Stated Actual Facts About Plaintiff
Smith v. Stewart
- N.Y. App.** **New York Appellate Court Rules City Attorney Not a Public Official** **17**
Plaintiff's Position not Sufficiently Important to Warrant Status
Porcari v. Gannett Satellite Information Network, Inc.
- 8th Cir.** **Jurisdictional Discovery Allowed in Privacy Claim Over Novel** **15**
Publisher's Contacts May Support General Jurisdiction
Steinbuch v. Cutler
- S.D.N.Y.** **Judge Runs 'Borat' Plaintiff Out of Court** **19**
Misappropriation Claim Dismissed
Lemerond v. Twentieth Century Fox Film Corp.
- S.D.N.Y.** **Civil Rights and Emotional Distress Claims to Proceed Against Network** **20**
Conrad v. NBC Universal
- Ga. App.** **\$6.35 Million Verdict Against Radio Host and Station Owner Affirmed** **22**
Liability Judgment Entered as a Discovery Sanction
Neely v. Strength
- S.C. C. P.** **Talk Radio Host Wins \$1.1 Million Libel Judgment From Rival** **23**
Second Recent Judgment Against Defendants
Rhodes v. Rejoice Network
- Nev. Dist. Ct.** **Judge Grants Summary Judgment to Libel Plaintiff** **24**
But Defense Counsel Says Case Is Likely to be Dropped
Rivers v. Tribune Media Group
- Ohio App.** **Fair Report Privilege Protects Broadcast of Wrong Mug Shot** **25**
Martinez v. WTVG, Inc.

Tex. App.	Fair Report Privilege Protects Article Based on Police Press Release <i>Plaintiff Sought to Exclude Evidence of Arrest on Summary Judgment</i> Goss v. Houston Community Newspapers	28
Ill. Cir. Ct.	Fair Report, Innocent Construction Defeat Lawyer’s Libel Claim <i>Article Based on Court Proceedings; Capable of Nondefamatory Meaning</i> Cueto v. The Madison County Record	29
Mich. Cir. Ct.	ESPN Wins One From the Gipper <i>Relatives Sue After Remains of Football Legend are Exhumed</i> Gipp v. Frueh	30
5th Cir.	Fifth Circuit Sanctions Libel Plaintiff Hamad v. Center for Jewish Studies	32
M.D. Fla.	Florida Court Finds No Jurisdiction Over Washington Website <i>Website Did Not Target Florida</i> Internet Solutions Corp. v. Marshall	33
Me.	Maine’s Anti-SLAPP Statute and “Actual Injury” <i>Court Strikes Libel Claim Over Letter to the Editor</i> Schelling v. Lindell	34
Fla. Cir.; Minn. Dist.	Criminal Libel: An Acquittal in Florida, Charges in Minnesota Florida v. Adams; Minnesota v. Klebel	36
9th Cir.	Drug Manufacturer’s Product Disparagement Lawsuit Against Pharmacy Information Publisher Results in a Series of Significant Decisions Schering v. First DataBank, Inc.	38
REPORTER’S PRIVILEGE		
Me.	Maine Enacts Shield Law To Protect Confidential Sources	42
INTERNATIONAL		
Canada	Protecting Confidential Sources in Canada – Good News and Not So Good St. Elizabeth Home Society v. Hamilton (Kenneth Peters) R. v. The National Post	44
COPYRIGHT		
C.D. Cal.	Able to Terminate Transfers in a Single Bound <i>Reflecting on the Superman Copyright Termination Case</i> Siegel v. Warner Bros. Entertainment	47
ACCESS		
N.D. Ill.	Northern District of Illinois Again Holds Police Disciplinary Files Produced In Civil Case Not Confidential; Media Await Seventh Circuit’s Decision On The Subject Talbert v. City of Chicago	49
MLRC		
Newsgathering	MLRC Newsgathering Committee: “Managing Materials” <i>What Some News Organizations Have Done</i>	41
	Ethics Consulting Within Law Firms and the Attorney-Client Privilege	52

Ninth and Seventh Circuits Consider Scope of Section 230 Immunity

Craigslist and Roommate Decisions May Not Substantially Alter Broad Immunity Under Sec. 230

By Patrick Carome and Samir Jain

Two federal courts of appeals recently tested the scope of the immunity provided by Section 230 of the Communications Decency Act, 47 USC § 230, in the context of claims under the Fair Housing Act.

In *Chicago Lawyers Committee v. Craigslist*, 519 F.3d 666 (7th Cir. Mar 14, 2008), the Seventh Circuit addressed whether an online classifieds site could be held liable for allegedly discriminatory advertisements in its housing section. In *Fair Housing Council v. Roommates.com*, Nos. 04-56916, 04-57173; 2008 WL 879293 (9th Cir. Apr. 3, 2008), the Ninth Circuit considered, *en banc*, whether an online roommate-search service could be held liable for eliciting allegedly unlawful housing preferences from its users and providing tools that enabled users to find profiles based on such preferences.

Though the decisions considered different aspects of Section 230 and reached different results regarding the extent to which the service provider defendant was immune, neither decision appears to depart significantly from the consensus interpretation of Section 230 that has been adopted by courts across the country.

Protecting the Robust Nature of Internet Communications

Section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” An “information content provider,” in turn, is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” Thus, subject to a few exceptions specified in the statute, Section 230 prevents courts from assessing liability on the provider of an interactive computer service if doing so would “treat” the provider as the “publisher or speaker” of information that came from a third party.

As many courts have recognized, Congress passed Section 230 to serve two important goals: facilitating the growth of Internet communications and eliminating disincentives for service providers to remove offensive or illegal content. Congress understood that allowing service providers to be held liable for

third-party speech would have a chilling effect on Internet communication by creating a “heckler’s veto,” under which service providers faced with complaints that particular content was tortious or otherwise unlawful would have strong reasons to remove the content regardless of the validity of the complaint.

Additionally, Congress sought to negate the effect of a New York case, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. May 24, 1995), where Prodigy was held liable as a “publisher” of a defamatory bulletin board posting. In the *Stratton Oakmont* court’s view, Prodigy had acted like a publisher by screening at least some of the content on its network. Congress found that the *Stratton Oakmont* decision actually discouraged service providers from regulating third party content because doing so would increase, rather than decrease, their risk of liability. Section 230’s grant of immunity corrected the incentive scheme.

Consistent with these important purposes, courts have read Section 230 to provide broad-based immunity for providers of interactive computer services. Beginning with the Fourth Circuit’s decision in *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), courts have consistently endorsed the view that this immunity bars *any* cause of action that would make service providers liable on the basis of information originating from a third party. As Judge Wilkinson recognized in *Zeran*, “Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”

The First, Third, Ninth and Tenth Circuits all adopted the Fourth Circuit’s interpretation of Section 230, and the industry has generally relied on this interpretation over the past decade.

Craigslist and Liability for Third-Party Housing Ads

In the *Craigslist* case, the plaintiff argued that the website operator was liable under the Fair Housing Act for the allegedly discriminatory content of third-party housing ads that users had posted on the site. The Fair Housing Act makes it unlawful “[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference,

(Continued on page 4)

Ninth and Seventh Circuits Consider Scope of Section 230 Immunity

(Continued from page 3)

limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.” 42 U.S.C. 3604 (c).

The district court, in a 2006 decision, rejected the *Zeran* approach, which bars all claims based on third-party content, but nonetheless held for Craigslist. 461 F.Supp.2d 681, 696 (N.D.Ill. 2006). Citing a snippet of *dicta* from *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (Easterbrook, J.), the district court held that Section 230(c)(1) provides protection from only those claims for which publishing is an element, and that Section 3604(c) was such a claim.

On March 14, 2008, the Seventh Circuit affirmed and held that Section 230(c)(1) protects Craigslist from the Fair Housing Act claims. Aside from its direct holding, the Circuit’s relatively brief decision, penned by Chief Judge Easterbrook for a unanimous three-judge panel, is largely inconclusive about the scope of Section 230.

The grounds for the Seventh Circuit’s decision in favor of Craigslist are not entirely clear. Judge Easterbrook’s opinion begins with a lengthy, verbatim recitation of his *dicta* in the *Doe v. GTE* case, in which he had mused about possible alternative interpretations of Section 230(c)(1) immunity before ruling in favor of the defendants on state law grounds. This *dicta*, Judge Easterbrook writes in *Craigslist*, explains why Section 230 “cannot be understood as a general prohibition of civil liability for web-site operators.”

Judge Easterbrook also cited to the Supreme Court’s decision in the famous *Grokster* copyright case as support for this same proposition. This reference to *Grokster* is curious, given that Section 230 contains an explicit exception for intellectual property claims, which would seem to make that case irrelevant to the statute’s scope.

See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

Judge Easterbrook’s discussion of *Doe* and *Grokster* appears to be prefatory, and an acknowledgment of the plaintiffs’ primary argument for abandoning the corpus of case law developed from *Zeran* on. Indeed, the bulk of his lengthy recitation from *Doe* suggests that subsection 230(c)(1) — the provision of the statute on which Craigslist relied — has no independent function, but

merely defines how a separate part of the statute (subsection 230(c)(2)) is supposed to operate.

Yet Judge Easterbrook’s opinion in *Craigslist* could not have been clearer in rejecting his earlier suggestion: “We read each [subsection] to do exactly what it says. So did the district court. A natural reading of 230(c)(1) in conjunction with [the Fair Housing Act] led that court to grant summary judgment for Craigslist.”

Beyond this acknowledgment of agreement with the district court’s holding, the affirmative reasoning supporting the holding in *Craigslist* is rather opaque, and does not offer much of a window into the appellate court’s interpretation of the statute. As noted above, the district court had held, based on two lines of the *Doe dicta*, that Section 230 bars only claims (such as defamation) for which “publishing” is an explicit element.

The Seventh Circuit’s opinion, while endorsing the district court’s decision generally, does not indicate whether it endorses the full scope of the district court’s analysis, or simply its result, or something in between. Indeed, although some language in the Judge Easterbrook’s opinion suggests that the Court was inclined to adopt a narrower reading of Section 230 than the prevailing interpretation, the opinion also recognized the difficulties that would be imposed by requiring a service such as Craigslist to filter or screen for discriminatory content and how imposing such a duty would make the service impractical or substantially increase its costs.

All told, *Craigslist* does not appear to represent a significant departure from the body of case law interpreting Section 230. The facts presented a relatively easy case that did not entail a nuanced analysis of the scope of Section 230 immunity. Even under the narrowest reading of the statute, ignoring the broad formulation endorsed by *Zeran* and its progeny, Craigslist would prevail because the advertising ban in the Fair Housing

Act involves “publishing” as one of its elements. The Seventh Circuit did

not have to choose between a narrow and broad reading of Section 230. *Craigslist* therefore seems to leave for a later day any definitive ruling from the Seventh Circuit regarding the general scope of protection afforded by Section 230(c)(1).

(Continued on page 5)

Among all the Section 230 cases to date, the Roommates decision presents the most thorough analysis of the meaning of the term “information provided by another information content provider.”

Ninth and Seventh Circuits Consider Scope of Section 230 Immunity

(Continued from page 4)

Roommates.com and “Neutral Tools”

In contrast to the *Craigslist* decision, the Ninth Circuit’s en banc opinion in the *Roommates* case, Nos. 04-56916, 04-57173; 2008 WL 879293 (9th Cir. Apr. 3, 2008), initially might appear to be a new benchmark, potentially opening the door to greater liability for providers of interactive computer services. Among all the Section 230 cases to date, the *Roommates* decision presents the most thorough analysis of the meaning of the term “information content provider.”

The decision, however, does not announce itself as a watershed moment in Section 230 law and, indeed, goes to great lengths to square its holding with prior precedents supporting broad immunity. Because the holding itself is limited narrowly to the specific architecture of the *Roommates* web site, the decision ultimately does not change the landscape significantly.

The *Roommates* case involved a website, *Roommates.com*, which helps to match prospective roommates by allowing its users to create profiles indicating personal information about themselves and their roommate preferences. The plaintiffs argued that the site violated the Fair Housing Act by requiring users to answer questions about their gender and family status – prohibited discriminatory grounds under the Act – as well as allowing users to search for potential roommates using those criteria, and giving users space to fill in “additional comments” without specific guidance.

In a thorough decision authored by Chief Judge Kozinski for an 8-3 majority of the *en banc* court, the Ninth Circuit held

that *Roommates* could be held liable for requiring users to enter discriminatory criteria and giving them the ability to search based on such criteria, but that it had immunity from claims based on the additional comments box.

Unlike the Seventh Circuit, which appeared to focus on the “publishing” element of Section 230 immunity, the Ninth Circuit concentrated on whether *Roommates* could itself be deemed an “information content provider” of the allegedly illegal information on its service. Significantly, the *en banc* court

held unanimously, and consistently with *Zeran* and its own Section 230 cases, that *Roommates* could not be held liable for the “additional comments” users entered without a prompt.

The court found, however, that *Roommates* had “developed,” at least in part, the portions of its users’ profiles generated by their answers to certain

specific questions about their preferences. Users could not create profiles of themselves for display on the *Roommates.com* site without answering these questions, and they could answer these questions only by choosing from a list of pre-set responses provided in a drop-down menu. As a co-developer of the portions of user profiles derived from these compelled answers, Judge Kozinski reasoned, the resulting material was not “information provided by another content provider,” and therefore immunity was unavailable. Further, Judge Kozinski held that *Roommates* lacked immunity for allowing users to search for roommates based on the criteria embodied by those illegal questions.

The *en banc* Court was careful to base its decision on the

(Continued on page 6)

Ninth and Seventh Circuits Consider Scope of Section 230 Immunity

(Continued from page 5)

particular facts of the Roommates.com site. This is particularly evident from its discussion of how its holdings are consistent with prior Ninth Circuit precedent. In *Carafano v. Metro-plash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003), the court had

held that the provider of a dating website could not be treated as an “information content provider” of its profiles, even though the site required its users to answer a pre-set list of multiple-choice answers in order to create their profiles.

In the court’s view, the users were still making the choices, even if the web site structured their responses. To distinguish the *Carafano* holding from *Roommates*, Judge Kozinski explained that the questions on Roommates.com had “materially contributed” to the illegality of the responses – Roommates required its users to provide illegal information. By contrast, the dating web site in *Carafano* provided only “neutral tools” which had been abused by a hoaxster who created a fake and defamatory profile of the plaintiff.

In making this distinction, Judge Kozinski seemed to be crafting a new test for determining when content ceases to be third-party content for which immunity is available: a web site that affirmatively compels its users to submit illegal information will not have immunity, while a web site that provides only “neutral tools” — including search engines such as those provided by Google and Yahoo! — will retain immunity.

As the dissenting opinion of Judge McKeown explained, Judge Kozinski’s approach to this question is troubling at least theoretically because it arguably makes the meaning of the phrase “information provided by another information content provider” dependent on an analysis of whether the content was in fact illegal. Whether or not *Roommates* creates a new test, though, its analysis is tightly bound to the specific facts of the case.

The Court was presented with the rare situation where a website elicits answers that are (allegedly) illegal in every pos-

sible permutation and additionally requires users to answer those questions as a condition of posting a profile. In light of these unusual facts, the opinion does not purport to disagree

Interactive service providers and their clients should not rush to overcompensate by, for example, removing all multiple choice questions or drop-down menus from their sites.

with *Zeran* and the other leading precedents, and it may

prove to be of little practical relevance to the vast majority of interactive services.

Section 230 After Craigslist and Roommates

Ultimately, the much-anticipated decisions in both *Craigslist* and *Roommates* may not substantially alter the broad immunity courts have afforded interactive service providers under Section 230. Writing on the issue *de novo* in the Seventh Circuit, the panel in *Craigslist* issued a decision that was short on law and devoid of any clear pronouncements that can be easily extrapolated to future cases. The Ninth Circuit, given the opportunity to reshape its doctrine of Section 230 liability, opted instead to limit its decision to the unique factual situation of the Roommate website.

Because these decisions do not substantively disturb the doctrine, interactive service providers and their clients should not rush to overcompensate by, for example, removing all multiple choice questions or drop-down menus from their sites. Allowing users to provide dynamic, standardized sets of information and preferences that are easily searchable has contributed to the growth, usefulness, and pervasiveness of Internet services in every day life – just as Congress intended when it passed Section 230 over a decade ago.

Pat Carome and Samir Jain are partners at Wilmer Cutler Pickering Hale and Dorr. They represented Craigslist in the Seventh Circuit and various amici in the Ninth Circuit Roommates case. The views expressed herein are their own and do not necessarily reflect those of their clients.

Legal Frontiers in Digital Media

A joint conference of:

The Media Law Resource Center • Stanford Publishing Courses •
Stanford Law School Center for Internet & Society

Stanford University

Stanford, California
May 15 & 16, 2008



A conference on the emerging legal issues
surrounding digital publishing and content distribution.

To register follow the link: <http://publishingcourses.stanford.edu/legal-frontiers/registration.html>

Designed for in-house and outside lawyers representing media and digital content companies, as well as for Web publishing professionals who need to understand emerging legal issues in digital publishing and content distribution, this conference explores:

Liability of site owners for third-party content • Digital content licensing, copyright and fair use • Behavioral targeting, geo-targeting and related privacy issues • Legal issues surrounding online advertising and keyword buying • Ethics of geo-filtering, data-scraping and user-profiling • Emerging issues in mobile content distribution

Join legal experts from Google, YouTube, Disney, Microsoft, T-Mobile, CBS, WashingtonPost/Newsweek Interactive, the Electronic Frontier Foundation, Stanford's Center for Internet & Society, UC Berkeley's Center for Law & Technology and key law firms across the country, among others, in a series of provocative discussions of the issues arising from producing and distributing digital content in today's multi-platform world.

This conference includes six sessions that run over one afternoon and the following morning. A reception at the Stanford Faculty Club is planned for all attendees at the end of the first day of the conference.

Behind the Browser: What You Need to Know About Current and Emerging Internet Technologies

A review of the technologies that power the Internet of today, and a glimpse at the innovations that will shape the user experience of tomorrow. Our technology experts will discuss how information is delivered and displayed to users, how search engines find and index that information, how data scrapers steal it, and how websites protect it. We'll get a tutorial on web analytics, data mining, user profiling, and behavioral targeting of ads. And we'll hear about the technologies on the horizon that will shift the paradigm again.

Panelists:

- Bill Allman, General Manager and Chief Content/Creative Officer, The HeathCentral Network, Arlington, VA
- Matt Cohen, Chief Executive Officer and Founder, OneSpot.com, Austin, TX
- Brad Mohs, Chief Technology Officer, yellowpages.com, Glendale, CA
- Rick Smolan, President, Against All Odds Productions, San Francisco, CA

Moderator:

- Jon Hart, Member, Dow Lohnes PLLC, Washington, DC

Liability for User-Supplied Content: How Safe Are the Safe Harbors?

Websites and other online intermediaries disseminate torrents of user-generated content, some of which inevitably is unlawful. This panel will explore legal risks that these intermediaries face, and special protections they may enjoy, as platforms for all manner of user-supplied content.

Topics include:

- *Have courts reached a consensus about the scope of immunities created by the federal Communications Decency Act?*
- *Do websites forfeit CDA immunity by soliciting, channeling or editing user-supplied material?*
- *Does the Digital Millennium Copyright Act adequately protect copyright owners' rights, or does it unnecessarily squelch free speech?*
- *Are social networking sites accountable for real-world harms that may follow seemingly innocuous online liaisons?*

Panelists:

- J. Anthony Kline, Presiding Justice, California Court of Appeal, 1st District, San Francisco, CA
- Alfred Perry, VP Business and Legal Affairs, Paramount Pictures, Hollywood, CA
- Steve Tapia, Senior Attorney, Microsoft, Redmond, WA
- Nicole Wong, Deputy General Counsel/Products & IP, Google, Mountain View, CA

Moderator:

- Patrick J. Carome, Partner, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC

Digital Privacy Protection and Liability: Nobody Knows the Data I've Seen

Media and online experts will address privacy concerns, protections, and potential liabilities. The panel will cover data collection (including cookies, privacy policies, and FTC enforcement), data security risks and requirements (phishing, spyware, inadvertent disclosure), behavioral tracking & targeting (including the new FTC "Online Behavioral Advertising Privacy Principles"), international privacy requirements, subpoenas for user information, and more.

Panelists:

- Jonathan Avila, Vice President & Chief Privacy Officer, Disney, Burbank, CA
- Chris Hoofnagle, U.C. Berkeley's Samuelson Law, Technology & Public Policy Clinic; and Berkeley Center for Law & Technology, Berkeley, CA
- Susan Infantino, Sr. Product Counsel, Google, Mountain View, CA

Moderator

- Sherrese Smith, Deputy General Counsel, Washington Post/Newsweek Interactive, Arlington, VA

Content, Copyright and Fair Use

This panel will consider new and emerging content licensing opportunities and whether a license is always necessary. With potential exposures including copyright, trademark and right of publicity infringements, the panel will discuss when it is most appropriate to license content and when to rely on exceptions/defenses such as fair use. The panel will consider the limits of such exceptions and defenses as well as the ramifications of licensing content.

Panelists:

- Anthony Falzone, Executive Director/Fair Use Project, Stanford Center for Internet & Society, Stanford, CA
- Zahavah Levine, General Counsel & VP Business Affairs, YouTube, San Bruno, CA
- Alison Wauk, Assistant General Counsel, CBS Corporation, Los Angeles, CA

Moderator:

- Andrew P. Bridges, Partner, Winston & Strawn, San Francisco, CA

Emerging Issues in Mobile Content Distribution

Via mobile devices, consumers are increasingly watching video, reading the news, finding restaurant locations and reviews, blogging, and consuming various other content and services. Recent development in mobile service delivery is rapidly creating new content distribution opportunities for carriers and new media companies alike. This session addresses current business models for mobile content distribution, and examines emerging content liability, advertising and licensing issues, the explosion of mobile content, and the effect of mobile devices on the new generation of "tweeners."

Panelists:

- Rajeev Chand, Managing Director and Senior Equity Research Analyst, Wireless, Rutberg & Company LLC, San Francisco, CA
- Edward Fallon, Senior Corporate Counsel, Mobile Content and Marketing, T-Mobile, Bellevue, WA
- Jodi Sherman Jahic, Principal, Voyager Capital, Menlo Park, CA
- Victoria Libin, Vice President, Business and Legal Affairs, MTV Networks West Coast Digital, San Francisco, CA
- Jeffrey Neuberger, Partner, Proskauer Rose, New York, NY

Moderator:

- Daniel M. Waggoner, Partner, Davis Wright Tremaine LLP, Seattle, WA

Advertising Rules of the Future

This session examines the legal issues that advertisers, counselors, courts and policymakers will confront as online advertising models change, and considers the key factual determinations that will - or should - shape the online advertising rules of the future. Our panel will look at emerging issues in keyword advertising, metatags, behavioral advertising, ad syndication models and more with a focus on how evidence about consumers' actual perception and interaction with online advertising formats should determine legal rules and outcomes.

Panelists:

- Eric Goldman, Assistant Professor and Academic Director of the High Tech Law Institute, Santa Clara University Law School, Santa Clara, CA
- Jason Rynning, Attorney, Microsoft Corporation, Redmond, WA
- Lee Tien, Senior Counsel, Electronic Frontier Foundation, San Francisco, CA

Moderator:

- Scott Dailard, Member, Dow Lohnes PLLC, Washington, DC

TV Game Show Promotion Offered In Connection With *Deal Or No Deal* Is Not “Gambling”

By L. Joseph Loveland, S. Stewart Haskins, II and Jonathan R. Chally

As with many reality television shows, the organizers of *Deal or No Deal* promoted the show by, among other things, sponsoring and administering the “Lucky Case Game,” a promotion designed to foster viewer participation in each broadcast. During each broadcast of *Deal or No Deal*, six gold briefcases were displayed on-air, and an announcer invited viewers to enter the Lucky Case Game and select the winning briefcase.

Later in the show, the winning briefcase was revealed, and one of the entrants who selected that case was randomly chosen as the winner of the promotion. Viewers could enter the Lucky Case Game either through the Internet, for free, or by sending a text message on their cellular phones, for a \$.99 fee in addition to standard text-messaging rates.

In *Hardin, et al. v. NBC Universal, Inc., et al.*, a putative class action filed in the United States District Court for the Northern District of Georgia, the plaintiffs challenged these promotional games, particularly the Lucky Case Game, claiming that the premium fee paid to enter these promotions via text message is illegal gambling under Georgia law. The plaintiffs sought to represent all Georgia residents who entered these promotions via text message. On behalf of the alleged class, the plaintiffs in *Hardin* attempted to recover the fees under O.C.G.A. § 13-8-3(b), a Georgia statute that allows a “loser” of “gambling consideration” to recover that consideration from the “winner.”

On certified questions from the District Court following the defendants’ motion to dismiss, the Georgia Supreme Court recently ruled in favor of the defendants. See *Hardin v. NBC Universal, Inc.*, No. S08Q0323 (Ga. April 22, 2008). The Court held that O.C.G.A. § 13-8-3(b) did not provide the plaintiffs a civil claim for relief to recover the text message fees paid to enter the Lucky Case Game. The Georgia Supreme Court held that the Lucky Case Game was not “gambling” as prohibited by O.C.G.A. § 13-8-3(b). Immediately after the Supreme Court’s opinion, the plaintiffs in *Hardin* dismissed their case.

The *Hardin* decision is a noteworthy development in the defense of these widely popular promotional games. This article describes the *Hardin* case, beginning with a discussion of the defendants’ arguments in their motion to dismiss the complaint, the motion that ultimately led to the dismissal of the lawsuit.

Lucky Case Game Did Not Involve Gambling

Shortly after the plaintiffs filed the *Hardin* complaint, the defendants jointly moved to dismiss. The defendants argued that the Lucky Case Game was not “gambling” as prohibited by O.C.G.A. § 13-8-3(b). The Georgia Supreme Court had construed O.C.G.A. § 13-8-3(b) in *Martin v. Citizens’ Bank of Marshallville*, 171 S.E. 711, 713 (Ga. 1933), and held that the essence of an agreement to gamble is that two or more parties “bet” or “wager” on the outcome of an uncertain, chance, or contingent event: “In a gambling contract one of them is certain to lose. By the terms of such a contract the consideration must fall to the one or the other upon the determination of the specified event.” *Id.*

The defendants argued to the District Court that the *Martin* case was squarely on point and that it required dismissal of the plaintiffs’ claim. In the Lucky Case Game, neither party incurred “risk” with regard to the \$.99 fee that the plaintiffs paid to enter the promotion. The defendants designated the prize amounts in advance of the promotion and were obligated to pay those amounts regardless of the outcome of the promotion. In other words, the defendants’ obligation to award the prize was not contingent on which “Lucky Case” happened to be the winning case. Likewise, those participants who chose to enter the contest via text message did not risk the \$.99 charge because the obligation to pay that charge was in no way dependent on the outcome of the promotion. Regardless of which Lucky Case was the winning case, participants who chose to play via text message were obligated to pay that charge.

The District of New Jersey recently considered an analogous issue in *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *7-8 (D.N.J. June 20, 2007). The plaintiff in *Humphrey* challenged the validity of an Internet-based “fantasy sports league” in which participants paid a fee in order to play a fantasy sports game with the prospect of winning a prize if they won the contest. *Id.* at *7-10. The court rejected this claim on a number of grounds, including that the fee charged to enter the contest did not constitute “gambling” consideration. *Id.* Relying in part on Georgia law, the *Humphrey* court observed:

[I]n paying for the right to participate . . . and receive Defendants’ services, participants simply do not “lose” anything, and certainly suffer no cognizable “gambling” loss. Whether or not a participant is a successful league

(Continued on page 11)

TV Game Show Promotion Offered In Connection With Deal Or No Deal Is Not “Gambling”

(Continued from page 10)

manager [and thus wins a prize], their entry fee never hangs in the balance in any way in connection with their participation in the league. Indeed, once participants have selected their team and begin their season, the fee cannot be recovered. There is no “loss” on these facts, and this exchange of consideration is an “ordinary contract,” in which “both parties may ultimately gain by entering into the agreement.” *Id.* at *10 (citing *Martin*, 171 S.E. at 713).

According to the defendants in *Hardin*, the same logic applied with regard to the Lucky Case Game. The text message fees did not hang in the balance of the Lucky Case Game. Rather, the participants chose to pay that fee because they wished to play the promotion by text message. Once that charge was incurred, it had no bearing on the promotion.

Defendants Not Winners Of Lucky Case Game

Moreover, as the defendants in *Hardin* argued, the defendants were not the “winners” of the Lucky Case Game, and, therefore, could not be held liable under O.C.G.A. § 13-8-3(b). O.C.G.A. § 13-8-3(b) allows “[m]oney paid or property delivered upon a gambling consideration” to be recovered only “from the winner.” (Emphasis added). The defendants, as the sponsors of the promotion, awarded the prize. The defendants did not participate in the promotion and certainly did not win the prize. Nor could they. According to the rules of the Lucky Case Game, the defendants could not “win” the promotion under any circumstances.

Because the defendants could not even participate in the promotions, the defendants could not be the winners of those promotions. On this issue, the *Humphrey* decision was again instructive: “To suggest that one can be a winner without risking the possibility of being a loser defies logic and finds no support in the law.” *See, e.g., Humphrey*, 2007 WL 1797648 at *9-10 (rejecting the argument that receipt of fees paid by contest participants made defendants who awarded prizes “winners”); *see also Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86 (Nev. 1961) (offering prize to winner of athletic or similar competition does not give rise to a wagering contract if the offeror does not participate and has no chance of gaining back the prize offered).

According to the clear terms of the promotion’s rules, therefore, the defendants argued that they were not winners of the Lucky Case Game.

Plaintiffs’ Response to Motion to Dismiss

In response to the defendants’ motion, the *Hardin* plaintiffs injected a new theory into the case. In their opposition brief, the plaintiffs claimed that the Lucky Case Game was a “lottery” as prohibited by Georgia’s criminal code. The plaintiffs further argued that this lottery allegation alone was sufficient to state a claim for liability under the civil recovery statute, O.C.G.A. § 13-8-3(b). In other words, according to the plaintiffs, because the Lucky Case Game meets the criminal definition of a “lottery,” it no doubt constitutes “gambling” under O.C.G.A. § 13-8-3(b).

While the defendants disputed the plaintiffs’ allegation that the Lucky Case Game was a lottery, the defendants responded to this new theory primarily by relying on various authority in which Georgia courts concluded that the “gambling” activity prohibited by O.C.G.A. § 13-8-3(b) did not include activity alleged to be a “lottery” under Georgia’s criminal code. *See Lasseter v. O’Neill*, 162 Ga. 826 (1926) (discussing predecessor version of O.C.G.A. § 13-8-3(b), noting that it historically did not address lotteries); *Moore v. Atlanta Athletic Club*, 79 Ga. App. 41 (1949) (holding that a slot machine was a lottery but not gambling and therefore was outside the reach of Section 13-8-3); *Thompson v. Ledbetter*, 74 Ga. App. 427 (1946) (same).

In *Thompson*, for example, the plaintiff sued to recover losses sustained by playing slot machines, a practice that Georgia courts had repeatedly recognized to constitute a lottery prohibited by the criminal code. 74 Ga. App. at 428. Despite the fact that Georgia law criminalized the maintenance of a lottery, the court held that the plaintiff could not recover under the civil recovery statute. *Id.* at 428-29. According to the court,

Although all gaming and gaming or wagering contracts are denounced by our law, the instance stated above [the predecessor to O.C.G.A. § 13-8-3(b)] is the only one in which there is legislative authority for a loser to recover from a winner money or property paid by the loser on a gaming contract. All other instances of gaming, including lotteries and transactions in the nature of lotteries, would come under the general principle that illegal contracts will not generally be enforced, the law leaving the parties where it finds them. When money is actually paid over upon an illegal contract it is clear that it cannot be recovered back, the contract being executed and both parties being in *pari delicto*. The only exception to this general rule is that contained in [O.C.G.A. § 13-8-3(b)]

(Continued on page 12)

TV Game Show Promotion Offered In Connection With Deal Or No Deal Is Not “Gambling”*(Continued from page 11)*

which we do not think is applicable to the facts of the instant case because the transaction here involved was a lottery. Even though lotteries are illegal, there seems to be no statute authorizing the recovery of money paid out or lost in the operation of a lottery. *Id.* at 429 (citations and internal quotations omitted) (emphasis added).

The plaintiffs sought to distinguish this authority, contending that it had been abrogated by the Georgia Legislature when the Legislature amended O.C.G.A. § 13-8-3(b). The plaintiffs further contended that even if the Legislature had not abrogated this rule, the Court should not follow it in *Hardin*.

Certified Question to State Supreme Court

On October 23, 2007, the District Court issued an order in response to the defendants’ motion to dismiss, certifying questions to the Georgia Supreme Court. Specifically, the District Court agreed with the defendants that the Lucky Case Game was not “gambling” as the Georgia Supreme Court had defined the term in *Martin*. But, the District Court held that the plaintiffs’ allegation that the Lucky Case Game was a lottery might nevertheless be sufficient to allow their claim to proceed. The District Court, therefore, requested that the Georgia Supreme Court construe O.C.G.A. § 13-8-3(b), and certified the following two questions to the Court:

- (1) Does O.C.G.A. § 13-8-3(b) authorize the filing and maintenance of a civil suit to recover money paid out or lost on account of one’s participation in an illegal lottery?
- (2) If § 13-8-3(b) authorizes a civil suit to recover money paid out or lost on account of an illegal lottery, may the plaintiff in such a suit recover from the lottery’s promoter or organizers?

Game Did Not Involve Gambling

On April 21, 2008, in a unanimous decision, the Georgia Supreme Court held that the Lucky Case Game was not gambling. Relying on *Martin*, the Court held that the Lucky Case Game “does not involve a bet or wager, neither defendants nor any participant is certain to lose, and the contract’s consideration [the \$.99 text messaging entry fee] never hangs in the balance.” Slip. Op. at 5 (citing *Martin*).

The Court further held that the Georgia Legislature had not abrogated this definition of “gambling” activity as provided in *Martin*. The Court also concluded that “gambling” as defined for purposes of O.C.G.A. § 13-8-3(b) was distinct from a lottery as defined in Georgia’s criminal code. Therefore, the plaintiffs’ allegation that the Lucky Case Game was a lottery, whether factually accurate or not, had no bearing on the plaintiffs’ claim for relief under O.C.G.A. § 13-8-3(b).

Ultimately, the Court held that “O.C.G.A. § 13-8-3(b) does not authorize the filing of a civil suit to recover the text message fees paid by plaintiffs in this case.” *Id.* at 7. Having ruled for the defendants on this first question, the Court failed to reach the second question that the District Court certified.

Of course, the *Hardin* decision construes Georgia law and is

The Georgia Supreme Court’s emphatic conclusion that there was no “gambling contract” created in connection with the Lucky Case Game is a significant development in defense of this and other, similar promotional games.

n o t
n e c -

essarily binding on other courts considering challenges to other promotional games under other state’s laws. Nevertheless, the opinion, and the Georgia Supreme Court’s emphatic conclusion that there was no “gambling contract” created in connection with the Lucky Case Game, is a significant development in defense of this and other, similar promotional games.

L. Joseph Loveland is a senior litigation partner in King & Spalding’s Atlanta office and was lead counsel representing the defendants in this case. S. Stewart Haskins, a partner in King & Spalding’s Business Litigation Practice Group, also represented the defendants in the Hardin case together with Jonathan R. Chally, an associate in the firm’s Business Litigation Practice Group. Plaintiffs were represented by Jerry Buchanan of Columbus, Georgia.

Georgia Court of Appeals Sends Libel-in-Fiction Case to Jury

Jury Could Find Novel Stated Actual Facts About Plaintiff

By Jonathan Bloom

The Court of Appeals of Georgia affirmed the denial of summary judgment for the author and publisher of the popular novel *The Red Hat Club*, finding triable issues of fact as to whether a reasonable reader would have ascribed the defamatory characteristics of one of the novel's characters to the plaintiff, on whom the character concededly was based in part. *Smith v. Stewart*, No. A07A1751, 2008 WL 820751 (Ga. App. March 28, 2008).

In doing so, the court rejected the defendants' argument that the novel, taken as a whole, was obviously a work of fiction and that there was no evidence that any of the plaintiff's acquaintances reasonably believed that the plaintiff, like the character, was a promiscuous alcoholic.

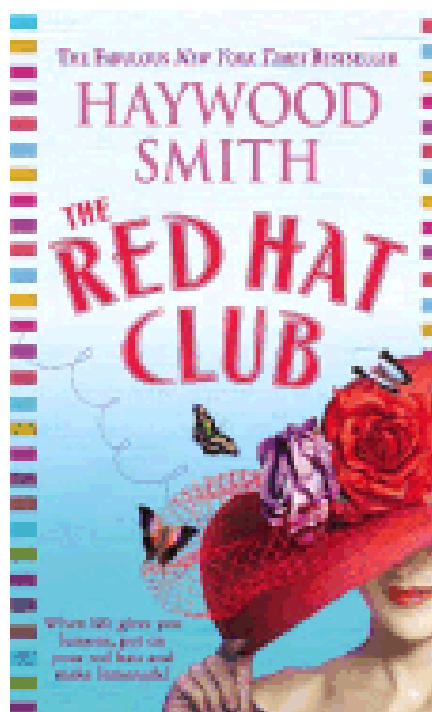
Background

Plaintiff Vickie Stewart and defendant Haywood Smith, the author of the bestselling novel *The Red Hat Club*, published in 2003 by St. Martin's Press, have known one another for some fifty years. As children, they lived down the street from one another in the Buckhead area of Atlanta.

As adults, Stewart told Smith stories of her life that, Smith testified, she thought were "really good" and that she decided to work into the novel she was writing. Among the events of Stewart's life that served as material for Smith were the following: Stewart married and had two children, including a daughter named Mindunn. After her husband was killed in a car accident, she received a substantial insurance settlement. Thereafter, she became engaged to one Harold Stewart, who owned nursing homes in Florida, unaware that, at the time, he also was engaged to another woman. Stewart married Harold in 1983, but they divorced after he moved to Florida, stole her insurance money, and transferred his assets to his mistress. Stewart was awarded \$750,000 by a Fulton County court but was unable to collect the award and resorted to placing ads in a Florida newspaper offering a reward for information as to when Harold was in Georgia so he could be held in contempt of court. When in her fifties, Stewart became a flight attendant.

Red Hat Club Novel

Smith's novel, which she wrote in 2002, centers on five middle-aged women who live in Buckhead and belong to a group called the "Red Hat Club." One of them is named Susan Virginia McIntyre Harris Cates, nicknamed SuSu. In the novel, SuSu's story loosely tracks Stewart's misadventures with Harold described above. In significant respects, however, SuSu is unlike Stewart. In particular, she is an alcoholic who, while working as a flight attendant, frequently becomes intoxicated during flights. She also is



extremely promiscuous, dressing provocatively, engaging regularly in one-night stands with passengers on her flights, having casual sex with young "stud puppies," and so on.

The Red Hat Club is clearly designated "A Novel" on the front cover, and it includes a number of highly fanciful plot typical of the popular fiction genre. Among them, the women of the Red Hat Club conduct

technologically sophisticated surveillance on one of the member's husbands (named Harold), who was having an affair and was involved in bank fraud. The women covertly access his email account and personal documents, confront him with evidence of his malfeasance, and force him to agree to a divorce settlement favorable to his wife.

Upon reading the novel, Stewart and her friends concluded that SuSu must have been based on Stewart. Stewart was "upset, hurt, and shocked." Friends of Stewart gossiped about whether Stewart was the promiscuous alcoholic

(Continued on page 14)

Georgia Court of Appeals Sends Libel-in-Fiction Case to Jury

(Continued from page 13)

depicted in the book and refrained from mentioning the book to avoid embarrassing her. One friend of Stewart's testified that the book made Stewart look "awful."

Lawsuit

Stewart brought suit in Hall County, Georgia against Smith, initial hardcover publisher St. Martin's Press, and the "secondary publishers" – entities that published the novel in audio book, Internet download, and large-print formats – asserting claims for defamation, invasion of privacy, and negligent and intentional infliction of emotional distress. After the suit was filed, St. Martin's brought out a paperback edition that, at Smith's request, included a disclaimer that the novel was "a work of fiction" and that "[a]ll the characters and events portrayed in this novel are either products of the author's imagination or are used fictitiously." Smith conceded that she based SuSu and her story partly on Stewart and specific events from Stewart's life but testified that she made up the stories about SuSu's alcoholism and promiscuous behavior. (In the "Acknowledgements," Smith refers to the "real people whose stories provided a jumping-off point for my overactive imagination").

The defendants moved for summary judgment on the grounds that the novel was obviously a work of fiction and that the defamatory aspects of the SuSu character could not reasonably be understood as stating actual facts about Stewart. Stewart cross-moved for partial summary judgment. The trial court denied the summary judgment motions, finding, *inter alia*, a jury question as to whether the novel contained false and defamatory statements that reasonably could be understood to state actual facts "of and concerning" Stewart. The court also found a jury question as to whether St. Martin's and the secondary publishers had been negligent.

Court of Appeals' Decision

On appeal, the Court of Appeals articulated the "of and

concerning" test with respect to works of fiction as "whether persons who knew or knew of the plaintiff could reasonably have understood that the fictional character was a portrayal of the plaintiff." The record in this regard, the court noted, revealed numerous unique facts about Stewart's life, as well as personal characteristics such as hair color, chain-smoking, and chronic lateness, that Smith drew upon in creating SuSu. The court found that the differences cited by the defendants – *e.g.*, different names, the fact that SuSu, but not Stewart, was a high school cheerleader and sorority member and a member of the Red Hat Club – "merely create a jury issue as to whether the character of SuSu was a portrayal of Stewart."

As to the key issue of whether the allegedly defamatory aspects of SuSu reasonably could be understood as stating actual facts about Stewart, the court rejected the defendants' argument that because the book was clearly a work of fiction, filled with "whimsically outlandish" and "implausible" elements, no reasonable reader would mistake SuSu as a depiction of Stewart. Noting that the book was based on true stories, is set in actual places, includes stories about "real adult issues," and intermingles the defamatory aspects of SuSu's character with specific references drawn from Stewart's life, the court declined to find that the alleged defamatory assertions to be "so implausible, fanciful or ridiculous that no one could reasonably interpret them as stating actual facts." The court added that merely labeling a book "fiction" or a "novel" does not insulate it from liability. (The court also agreed with the trial court that the passages portraying SuSu – and therefore potentially Stewart – as a promiscuous alcoholic are defamatory per se, such that Stewart need not plead and prove special damages.)

... the court declined to find that the alleged defamatory assertions to be "so implausible, fanciful or ridiculous that no one could reasonably interpret them as stating actual facts."

Evidence of Negligence

Turning to the claim of negligence against St. Martin's, the court pointed to the evidence

that Smith's editor never asked her if the book was in part autobiographical or based on real people or events and, because the book was a novel, did not ask the legal department to do a "libel check." After Smith informed her editor that an acquaintance had threatened to sue based on the

(Continued on page 15)

Georgia Court of Appeals Sends Libel-in-Fiction Case to Jury

(Continued from page 14)

SuSu character, the editor told Smith not to apologize to Stewart or initiate any contact with her about the book, but she did not inquire as to why Stewart was upset or why Smith insisted on the disclaimer in the paperback edition.

Based on this evidence, the court found a jury question as to whether St. Martin's had "exercised ordinary care by undertaking reasonable steps to protect a private person from defamatory statements." As to the secondary publishers, however, the court found that none of them had any actual knowledge of Stewart or her claims prior to publication and ordered that judgment be entered in their favor.

On the remaining claims, the court found jury issues as to Stewart's public disclosure of private facts claim, but it court found that summary judgment should have been granted on Stewart's false light claim on the ground that it was duplicative of the defamation claim. Finally, the court found Stewart's claims for negligent infliction of emotion distress against Smith and St. Martin's and for intentional infliction of emotional distress against Smith to be defective, given the absence of any evidence of physical injury resulting from the alleged negligence or evidence that Smith's writing and publishing the book were directed to-

ward Stewart.

The defendants intend to seek review by the Supreme Court of Georgia. They presumably will urge the Court to adopt a more demanding view of the required showing that reasonable readers familiar with the plaintiff would have believed not just that the fictional character was based on the plaintiff but that the defamatory conduct of the fictional character depicts actual conduct by the plaintiff.

The Court of Appeals' ruling indicates, however, how legally perilous it can be for fiction writers to hew too closely, in crafting unsavory characters, to the life experiences and personal characteristics of real-life acquaintances on the assumption that the expressly fictional nature of the work as a whole will protect them from having to go before a jury.

Jonathan Bloom, counsel to Weil, Gotshal & Manges LLP, wrote an amicus brief in the case on behalf of the Association of American Publishers, Inc. The defendants were represented by Peter Canfield, Thomas Clyde and Lesli Nicole Green, Dow Lohnes PLLC in Atlanta. Plaintiff was represented by Jeffrey D. Horst of Krevolin & Horst in Atlanta.

Jurisdictional Discovery Allowed in Privacy Claim Over Novel *Publisher's Contacts May Support General Jurisdiction*

The Eighth Circuit affirmed dismissal against all but one defendant in a privacy case over a fictional book allegedly based on the author's real life Capitol Hill sexual escapades. *Steinbuch v. Cutler*, No. 07-1509, 2008 WL 596747 (8th Cir. Mar. 6, 2008) (Loken, Murphy, Jarvey, JJ.).

The plaintiff, Robert Steinbuch, was counsel to former Ohio Senator Mike DeWine. He is now a law professor at the University of Arkansas. In 2004 he had a sexual relationship with another Senate staffer, Jessica Cutler. Cutler gained attention by writing a blog known as *The Washingtonienne*, where she discussed her sexual relationships with men in Washington, D.C. Although she never identified Steinbuch by his full name, she did refer to his initials or 'Rob' and provided certain descriptions about him, includ-

ing his job, his looks and his religion.

In 2005, Cutler wrote a fictional novel of the same name which describes, in the words of the Eighth Circuit, "a young woman's trysts with numerous men in Washington, D.C., including a Congressional committee staff lawyer." The novel, the court noted, concerns fictional characters and does not refer to Steinbuch by name or by his initials.

The book was published by Hyperion Books, a subsidiary of The Walt Disney Company. Home Box Office (HBO) secured rights to turn the novel into a television series. Steinbuch sued Cutler, Hyperion, Disney, HBO and HBO's parent Time Warner for invasion of privacy and intentional infliction of emotional distress, alleging the book

(Continued on page 16)

Jurisdictional Discovery Allowed in Privacy Claim Over Novel

(Continued from page 15)

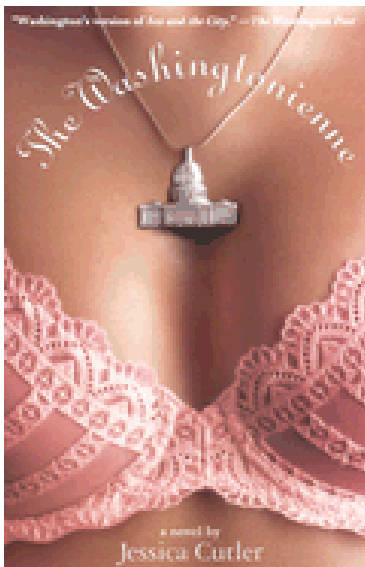
revealed intimate details about him. The district court dismissed Steinbuch’s claims against Cutler, Hyperion and Disney for lack of personal jurisdiction. It also dismissed the claims against HBO and Time Warner for failure to state a claim.

The Eighth Circuit affirmed the dismissals, except as to Hyperion. (The appeal against Cutler is currently stayed due to her filing a bankruptcy petition in New York.) Plaintiff argued that Hyperion had sufficient contacts with Arkansas to establish specific and general jurisdiction. As to the latter, the Eighth Circuit deemed it “an unlikely proposition” because plaintiff moved to Arkansas around the same time the book was published. Thus Hyperion could not have targeted the state.

However, the Eighth Circuit found that some of the facts could support general jurisdiction over Hyperion. Steinbuch alleged that approximately thirty different Hyperion

book titles were available in a particular Arkansas bookstore. And he included affidavits stating that Cutler’s novel was available in major Arkansas bookstores, public libraries and was bought by Arkansas residents.

The Arkansas federal district court had noted that only 50 copies of the book were sold or delivered to Arkansas and that there was no substantial advertising campaign for the book in the state. Reversing, the Eighth Circuit panel noted that in a general jurisdiction inquiry a court should look not to the sales of that particular novel but to the publisher’s general presence in the state – remanding the case for further discovery.



Plaintiff is represented by J. Thomas Sullivan, Little Rock, AK and Jonathan Rosen, Bedminster, NJ. Hyperion and Disney Publishing were represented by Philip Anderson, Williams & Anderson, Little Rock, AK HBO and Time Warner were represented by Nathan M. Norton.

Recent MLRC Bulletin Article Analyzes Libel in Fiction Cases

MLRC’s recent [New Developments Bulletin, 2007:4](#), contains an excellent article analyzing libel in fiction cases. “When Is a Fictional Character Defamatory?” by Jonathan Bloom, Weil, Gotshal & Manges LLP, surveys the use of real people as the inspiration of fictional works, and how courts have grappled with applying the elements of identity, fact and fault in this genre. Publishers, the article argues, “must be able to rely on the reasonable presumption that works presented as fiction – even where actual persons are used as models – are, in fact, fictional, absent some basis to suspect that the work is a vendetta in disguise.”

INTRODUCTION	1
PART I ARTICLES ON NEW DEVELOPMENTS	
KEYWORD ADVERTISING PROGRAMS TO BUY OR NOT TO BUY? <i>By Mitchell H. Shalby</i>	1
WHEN IS A FICTIONAL CHARACTER DEFAMATORY? <i>By Jonathan Bloom</i>	29
REYNOLDS PRIVILEGE: WHERE ARE WE NOW? <i>By Kevin Rapp and Paul Chamberlain</i>	40
PART II NEW DEVELOPMENTS	
A. MEDIA LIBEL LAW	
1. Defamatory Meaning	71
- Actual Characterization Rule	72
- Defamation by Implication	73
- Of and Concerning	74
- Group Libel	75
2. Opinion	75
3. Truth/Falsity	77
4. Fault	77
- Public Official/Star	77

New York Appellate Court Rules City Attorney Not a Public Official *Plaintiff's Position Not Sufficiently Important To Warrant Status*

In an interesting ruling this month, a New York appellate court unanimously ruled that a city attorney was not a public official for purposes of a libel suit against a suburban New York newspaper. *Porcari v. Gannett Satellite Information Network, Inc.*, 2009 N.Y. Slip Op. 03618, 2008 WL 1821469 (N.Y. App. Div. 2, 2008) (Skellos, Dillon, Leventhal, Chambers, JJ.).

The plaintiff is an associate corporation counsel employed by the City of Yonkers. He brought a libel action against the *Journal News Westchester* for a September 20, 2006 article reporting that a Lawrence Porcari, described as an attorney in the Office of the City of Yonkers Corporation Counsel, had been sanctioned in court for frivolous conduct while representing a client in a private practice matter. The lawyer who was sanctioned was "Lawrence A. Porcari," the plaintiff's father, who has a private law practice in Yonkers. The newspaper published a retraction and correction the next day.

Plaintiff sued the newspaper, reporter, and corporate owner for libel and last year the trial court denied defendants' motion to dismiss the complaint for failure to state a cause of action.

Appeals Court Decision

In a short decision the appellate court affirmed, holding that the trial court had properly ruled that plaintiff was not required to plead or prove actual malice because his position as an associate corporation counsel did not qualify as a "public official" under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The position of associate corporation counsel is not a position of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifica-

tions and performance of all government employees.

Porcari at *1 (citing *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966); *Lambert v. Corcoran*, 209 A.D.2d 674, 676 (N.Y. App. Div. 2, 1994)).

Instead, plaintiff's complaint would be subject to New

York's "gross irresponsibility" standard for statement about a private person involving an issue of public concern.

See *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 379 N.Y.S.2d 61 (1975).

Under the *Chapadeau* standard, the plaintiff must plead and prove that the publisher "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Id.* at 199. Here the plaintiff had sufficiently pleaded gross irresponsibility.

Finally, the court affirmed that New York's single instance rule did not apply. Under the single instance rule "language charging a professional man with ignorance or mistake on a single occasion only and not accusing him of general ignorance or lack of skill cannot be considered defamatory on its face and so is not actionable unless special damages are pleaded." See *November v. Time Inc.*, 13 N.Y.2d 175, 178, 244 N.Y.S.2d 309 (1963).

Here, however, "the defamatory statements accuse the plaintiff of much more than a mere mistake, dereliction, or lapse in judgment on a single occasion, as they indicate that he had been sanctioned by a judge for ongoing frivolous conduct and noncompliance with prior court orders. Under such circumstances, the single instance rule is inapplicable." *Porcari* at *2 (citations omitted).

Defendants are represented by Mark A. Fowler, Benjamin Means and Glenn C. Edwards Satterlee Stephens Burke & Burke, LLP, New York. Plaintiff was represented in the trial court by Robert Schneider

An associate corporation counsel did not qualify as a "public official" under *New York Times Co. v. Sullivan*.

Judge Runs *Borat* Plaintiff Out of Court

By Laura M. Leitner

A judge in the Southern District of New York has dismissed a lawsuit based on a commercial misappropriation claim brought by a person who unknowingly appeared in the hugely popular movie, *Borat – Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan*. In *Lemerond v. Twentieth Century Fox Film Corp.*, No. 07-cv-04635 (LAP), 2008 WL 918579 (S.D.N.Y. Mar. 31, 2008), Judge Loretta A. Preska dismissed plaintiff's complaint, holding that the film was clearly newsworthy and that plaintiff's appearance in the film had a real relationship to the newsworthy purpose.

Background

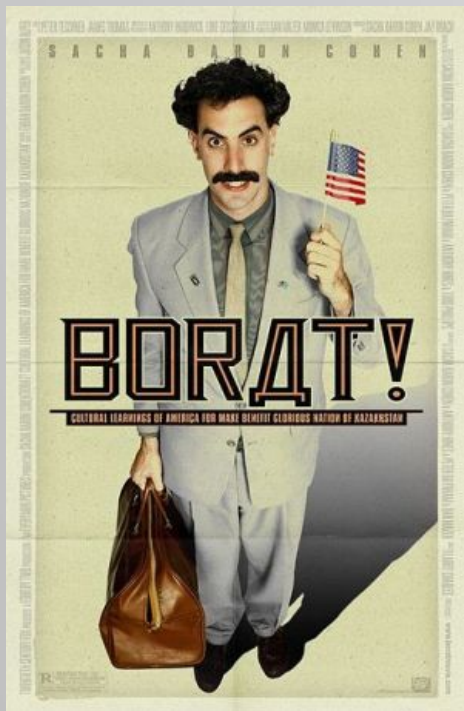
In the documentary-style film, which was distributed by Fox, comedian and actor Sacha Baron Cohen plays Borat Sagdiyev, a Kazakh TV personality dispatched to the United States by the Kazakhstan Ministry of Information to report on the American people. Borat travels across America with his friend and producer, Azamat Bagatov. During this transcontinental journey, Borat employs antics ranging from fish-out-of-water buffoonery to eccentric and prejudicial commentary, to evoke reactions from the Americans he encounters, addressing themes of racism, sexism, homophobia, xenophobia, anti-Semitism, and ethnocentrism. One of the themes of the film is to use comedy to reveal how Americans respond to a foreign visitor's idiosyncratic behavior.

One sequence in the movie shows scenes of Borat interacting with various individuals on the streets and subways of New York. During one such scene, which lasts approximately 13 seconds, Borat is shown on the corner of Fifth

Avenue and 57th Street in Manhattan, approaching a man in tan pants and a blue shirt. Borat extends his hand to the man, who later turned out to be plaintiff Lemerond, and says in a heavily accented voice, "Hello, nice meet you. I'm new in town. My name a Borat." By the time Borat utters "nice to meet you", and without any further provocation, plaintiff sprints around the corner and begins to run away. While running, plaintiff screams, "Get away!" and "What are you doing?" Borat runs after him responding, "I want to say hello. What is the problem?" Plaintiff is running during the scene, so it is difficult to see his face, although there is one short period of less than two seconds when his face is in closer focus (when he is running by the camera). Plaintiff also briefly appears at the end of the film, and also in the trailer for the movie, with his face digitized.

The Decision

Plaintiff's primary cause of action was based on N.Y. Civil Rights Law § 51 ("Section 51"), the only privacy tort under the law of the State of New York. Section 51 provides a cause of action for a plaintiff whose



(Continued on page 19)

(Continued from page 18)

name, portrait, picture or voice is used for trade or advertising purposes without written consent. Because neither side disputed that plaintiff's likeness was used without his written consent, the court only examined whether the use of plaintiff's likeness was for trade or advertising purposes.

The court observed that there is a "newsworthiness" or "public interest" exception to Section 51, and that this exception is to be broadly construed. Whether an item is newsworthy is a question of law for the court to decide, and courts should be careful not to "supplant the editorial judgment of the media in determining what is newsworthy or of public interest;" rather, newsworthiness is defined in

the "most liberal and far reaching terms." The court observed New York courts have found a variety of works to fall within the newsworthiness exception to Section 51, including comedic skits.

In holding that it was "beyond doubt" that *Borat* also fit within the newsworthiness exception, the court said that *Borat* was attempting "an ironic commentary of 'modern' American culture, contrasting the backwardness of its protagonist with the social ills [that] afflict supposedly sophisticated society." The court further observed that the movie "challenges its viewers to confront, not only the bizarre and offensive Borat character himself, but the equally bizarre and offensive reactions he elicits from 'average' Americans." The court found that this was clearly newsworthy or in the public interest, notwithstanding the fact that the film also generated significant revenues.

The court also held that there was clearly a relationship between plaintiff's appearance in the film and the newsworthy purpose of the film because plaintiff's appearance was "part of a series of clips showing Borat's first exposure to American culture that emphasizes the differences between Borat's home village and his American destination." The court held that because the scene with Lemerond highlights those differences, it bears a direct relationship to the theme of "otherness", and thus, was not actionable under Section 51.

The court also dismissed plaintiff's common law claims for unjust enrichment and quantum meruit as subsumed within Section 51.

This decision is significant in that it is a striking example of how the newsworthiness exception to Section 51 applies to comedic motion pictures. The court appreciated that the movie used humor to provide the viewer not only with an entertaining motion picture experience, but also with a probing examination of the vagaries of American culture. As such, it was a protected form of speech, not trade or advertising, and the use of plaintiff's image was not actionable.



Laura M. Leitner is an associate at Hogan & Hartson LLP in New York City. Defendant Twentieth Century Fox Film Corporation was represented by Slade R. Metcalf, Katherine M. Bolger and Jason P. Conti of Hogan & Hartson LLP, New York City. Plaintiff Jeffrey Lemerond was represented by Richard D. Emery and Eric Hecker of Emery Celli Brinckerhoff & Abady LLP, New York City.

Federal Court Permits Civil Rights and Intentional Infliction of Emotional Distress Claims to Proceed Against Television Network

By Hilary Lane and Amanda Leith

A federal court in New York recently permitted a lawsuit to go forward seeking to hold NBC responsible for the suicide of a Texas prosecutor who was accused of soliciting a minor online. *Conradt v. NBC Universal*, 536 F. Supp. 2d 380 (S.D.N.Y. Feb. 26, 2008) (Chin, J.).

The court upheld claims for intentional infliction of emotional distress and civil rights violations asserted on behalf of the estate, finding that plaintiff's allegations that NBC "persuaded the police officers to engage in tactics principally for dramatic effect and to make a more sensational television show, in a manner they knew would publicly humiliate a public servant who had always been an upstanding member of the community" were sufficiently plausible to let those claims proceed.

Background

NBC produces and broadcasts a series called "To Catch a Predator" on the program Dateline NBC. The program reports on the efforts of law enforcement authorities and a group called Perverted Justice to identify and arrest sexual predators who solicit minors online. In November 2006, Dateline covered a Perverted Justice operation conducted in Murphy, Texas. Approximately 24 men were arrested during that operation.

William Conradt was a former District Attorney and a prosecutor in Rockwell County, Texas. During the Murphy operation, Conradt engaged in sexually explicit online and telephone communications with a decoy posing as a thirteen-year old boy but did not go to the house where Perverted Justice was conducting the operation.

Conradt's sister sued NBC on behalf of herself and Conradt's estate. She alleged that Dateline "insisted" that the police obtain warrants to arrest Conradt and search his house. According to the complaint, Dateline personnel were present outside Conradt's house as the warrants were executed. Conradt did not respond when the officers knocked on his front door. The police believed he was home because a television and a computer were on in the house. The police called in a SWAT team. The SWAT team opened the rear door of the house and entered. When they encountered Conradt inside the house he shot himself with a handgun.

Plaintiff asserted claims for violation of 18 U.S.C. § 1964(c) (RICO) and 42 U.S.C. § 1983 (Civil Rights Act) and for intentional infliction of emotional distress, negligence and unjust enrichment on behalf of the estate. She also asserted claims on her own behalf for intrusion, disclosure of private facts, intentional infliction of emotional distress and negligence. Plaintiff contended that *Dateline*

pressured Texas authorities to arrest Conradt, thereby causing his death and harm to his reputation and "good name."

NBC moved to dismiss the complaint. The court upheld the Section 1983 claims and the claim for intentional infliction of emotional distress asserted on behalf of the estate and dismissed the remaining claims, including the claims asserted by plaintiff on her own behalf.

Section 1983 Claims

The complaint alleged that Conradt's constitutional rights were violated in two respects: (1) he was subjected to an unreasonable search and seizure in violation of the Fourth Amendment and (2) he was deprived of life, liberty and property without due process of law in violation of the Fourteenth Amendment. The court assumed, for the purpose of the motion that the "actions of the police officers must be imputed to NBC," and thus that NBC was a state actor.

With respect to the Fourth Amendment claim, the court concluded, based on the allegations of the complaint, that "a reasonable jury could find that the intrusion on Conradt's privacy substantially outweighed the promotion of legitimate public interests." The court recognized that there are legitimate reasons for publicizing arrests, but stated that "the amended Complaint plausibly asserts that many of the police officers' actions were motivated not by a genuine law enforcement need, but by *Dateline's* desire for more sensational footage."

Relying on media "ride along" cases such as *Wilson v. Layne*, 526 U.S. 603 (1999) and *Hanlon v. Berger*, 526 U.S. 808, 809-10 (1999), the court stated that "the Supreme Court has recognized that the Fourth Amendment is violated if the media overly intrudes into a law enforcement operation." The court acknowledged that the complaint does not allege that *Dateline* representatives entered the house, but concluded that the complaint "does plausibly allege, in substance, that Dateline personnel were 'active participants in planned activity that transformed the execution of the warrants into television entertainment.'"

The court rejected the argument that there could be no Fourth Amendment violation because the search and arrest warrants authorized the police to enter the house, stating that the complaint alleges that the warrants could be void because "the judges were not fully apprised (if at all) of NBC's involvement" and the warrants "were issued primarily for dramatic effect, for the sake of a more exciting television show."

The court distinguished *Caldarola v. County of Westchester*, 343

(Continued on page 21)

Federal Court Permits Civil Rights and Intentional Infliction of Emotional Distress Claims to Proceed Against Television Network

(Continued from page 20)

F.3d 570 (2d Cir. 2003) where the court found a legitimate law enforcement purpose to distribute a “perp walk” video to the media because here the complaint alleged that *Dateline* played an active role in planning the execution of the warrants. Moreover “some aspects of the execution of the warrants were ‘inherently fictional dramatizations’ that served no legitimate law enforcement purpose.” Thus, *Dateline* served more than just “its traditional role as an observer.”

The court also found that the complaint sufficiently alleged facts to support the claim that Conradt’s Fourteenth Amendment rights were violated. The court rejected NBC’s argument that the plaintiff could not state a claim because the complaint did not allege that NBC had actual knowledge of a substantial risk that Conradt would commit suicide.

The court found that the allegation that the suicide was “reasonably foreseeable” was sufficient to support the claim. The court held that this allegation was plausible based on the allegation in the complaint that “Conradt was an upstanding citizen, a leader in his community [and] an assistant district attorney.” The court construed the complaint to allege that, “as he was about to be arrested for soliciting sex with a minor,” Conradt likely “envisioned being brought out of the house, hands handcuffed behind his back, escorted by armed police officers, with television cameras rolling, and his career and life in ruins.”

The court concluded that, “[u]nder these circumstances, a reasonable jury could find that his ‘emotional state might be frail,’ and that the risk of suicide was substantial.” The court further found that NBC acted with deliberate indifference to Conradt’s rights and the risk of suicide.

Intentional Infliction of Emotional Distress

The court recognized that a claim for intentional infliction of emotional distress is “a ‘gap-filler’ tort never intended to supplant duplicate existing statutory or common-law remedies.” However, the court held that it was premature to dismiss the claim on these grounds because it is plausible that “this is one of ‘those rare instances’ in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress.”

The court also held that reasonable minds could differ as to whether NBC’s conduct was so outrageous and extreme as to exceed all possible bounds of decency. The court noted that “two of the circumstances that give rise to a finding of outrageousness are present here: NBC was in a position of power, both with its ability to disseminate information to the public and with its apparent influence

over the police, and NBC knew or should have known that Conradt was peculiarly susceptible to emotional distress and suicide.”

The court held that in considering whether NBC’s conduct was outrageous, a jury could find that *Dateline* violated “numerous journalistic standards” by “failing to take steps to minimize the harm to Conradt, by pandering to lurid curiosity, by staging (or overly dramatizing) certain events, by paying Perverted Justice and providing equipment and other consideration to law enforcement, by failing to be judicious about publicizing allegations before the filing of charges, by advocating a cause rather than independently examining a problem, and by manufacturing the news rather than merely reporting it.”

The court concluded that “in light of the consequences here, an ‘average member of the community’ could find that NBC abused its power – the power of the press enhanced by the involvement of law enforcement – in reckless disregard of Conradt’s rights, in a manner that overstepped ‘all possible bounds of decency.’”

Remaining Claims

The court dismissed the RICO claim from the bench at oral argument because the plaintiff “failed to allege that the RICO defendant – NBC – and the RICO “enterprise” were separate and distinct, as required for a RICO claim.” The court also held that both the estate and the individual negligence claims failed because the claims “clearly sound in intentional or reckless — not negligent — conduct” and therefore “do not properly sound in negligence.” The court dismissed the unjust enrichment claim because there was “no allegation of an implied or quasi-contract between Conradt and NBC” as necessary to state such a claim, “nor could there be.”

The court dismissed the remaining three claims plaintiff asserted on her own behalf. The court held that plaintiff lacked standing to assert the claims for intrusion and disclosure of private facts in her own name. “Under Texas law, claims for injury to reputation and invasion of the right to privacy may only be brought by or on behalf of individuals who are actually the subject of the wrongful acts.”

Thus, “where the invasion was directed primarily at the deceased, a relative of the deceased has no claim for invasion of privacy.” Similarly, plaintiff’s individual claim for intentional infliction of emotional distress failed because “Texas law does not permit a plaintiff to sue for intentional infliction . . . unless the defendant’s conduct is ‘about or directed at’ the plaintiff.”

Hilary Lane, at NBC Universal, represented Dateline in this matter with Susan Weiner, NBC Universal, Inc.; and Lee Levine and Amanda Leith of Levine Sullivan Koch & Schulz LLP. Plaintiff is represented by Bruce Baron, Baron Associates P.C., Brooklyn, N.Y.

\$6.35 Million Verdict Against Radio Host and Station Owner Affirmed

Liability Judgment Entered as a Discovery Sanction

The Georgia Court of Appeals this month affirmed a \$6.35 million judgment to a local sheriff who had been accused of murder and other crimes by a notorious talk radio show host. *Neely v. Strength*, No. A08A0690, 2008 WL 1836358 (Ga. App. Apr. 25, 2008) (Johnson, Barnes, Phipps, JJ.).

Background

The plaintiff, Ronald Strength, is the sheriff of Richmond County, Georgia. He filed a defamation action against Brian Lamont Doyle, a radio talk show host, known on air as “Ryan B.” and Frank Neely, owner of the Rejoice Network, a gospel-oriented radio broadcasting company. During a broadcast on WAAW in Aiken, South Carolina (a town near the Georgia state line), Doyle allegedly accused plaintiff of murdering a criminal suspect in the 1970s and said that drug dealers paid plaintiff’s dues at a country club. Plaintiff was not a police officer at the time.

The defendants answered the complaint, but apparently did not cooperate with discovery. Plaintiff filed a motion to compel the defendants to respond to discovery. After a hearing on the motion, the trial court entered an order finding that the defendants had willfully refused to comply with discovery, the court struck their responsive pleadings and placed the case in default. The defendants’ attorney had previously filed a motion to withdraw as counsel, but withdrew that motion and represented the defendants at the hearing.

In October 2007, Superior Court Judge Duncan Wheale conducted a bench trial on damages, awarding plaintiff \$350,000 in compensatory damages and \$1.5 million in punitive damages against the talk show host; and \$500,000 in compensatory damages and \$4 million in punitive damages against the station owner. The owner appealed the verdict.

Appeals Court Affirms Award

In a brief decision, the Court of Appeals affirmed. The station owner claimed he was not a proper party to the case, but the court held that objection was waived at trial. As to the merits, the defendant curiously did not file the transcript of the bench trial with his appeal – in fact, his notice of appeal requested that the transcript not be included in the record on appeal.

“Absent a trial transcript,” the court stated, “we must presume that the evidence considered by the trial court supported the finding made by the court.... It is well established that one cannot complain of a judgment, order, or ruling that his own procedure or conduct procured or aided in causing, and thus Neely's claim is waived for purposes of appeal.”

Conclusion

According to local news reports, Doyle has been a notoriously inflammatory and racially divisive local radio show host. In an editorial, the *Augusta Chronicle* hailed the trial verdict as a “[Victory Against Hate](#),” describing Doyle as a “vicious race-baiter.” The newspaper also reported that at least six other defamation lawsuits have been filed against Doyle.

Indeed, this month Austin Rhodes, an Augusta, Georgia talk radio show host, won a \$1,065,000 judgment against WAAW, for statements by Doyle falsely accusing Rhodes of being a convicted sexual predator.

Plaintiff was represented by Emory Freddie Sanders, Sr. Defendant was represented Michael M. Calabro.

Talk Radio Host Wins \$1.1 Million Libel Judgment From Rival Second Recent Judgment Against Defendants

Three weeks before the Georgia Court of Appeals upheld a \$6.35 million judgment against him (see report on page 22), WAAW-FM radio host “Ryan B,” whose given name is Brian Lamont Doyle, lost another defamation case – this one for \$1.065 million – in South Carolina court. *Rhodes v. The Rejoice Network Inc.*, Case No. 06-CP-02-1075 (S.C. C.P. default award March 28, 2008).

The South Carolina suit was brought by rival talk show host Austin Rhodes of WGAC-AM in Augusta, Ga. Rhodes sued Doyle, his co-host Charles “Champ” Walker (who was also manager of the weekly *Augusta Focus* newspaper), and WAAW owners Rejoice Network, Inc. and Frank Neely over on-air statements by Doyle and Walker that Rhodes had been arrested for indecent exposure, sex offenses, and that he had been convicted of spousal abuse. The suit also alleged that the defendants had coordinated a boycott of advertisers on Rhode’s WGAC program and his local cable show.

In July 2006, Rhodes sued the defendants for slander and unfair trade practices. The next month, Circuit Court Judge Jack Early denied a motion by Rhodes seeking an injunction preventing Doyle from repeating the disputed statements on the air.

While the defendants appeared in court to oppose that motion,

they did not appear at a January 2, 2007 hearing in the case, and were held in default. By April 2007, Rhodes and defendant Walker had reached a settlement, leaving Doyle and Neely’s Rejoice Network as the remaining defendants.

After holding them in default, the court ordered the defendants to correct and retract the statements, and plaintiff’s counsel sent a cease-and-desist letter. But Doyle refused to retract the statements, and reportedly mocked the letter on the air. After a November 7, 2007 hearing on damages, at which both parties appeared, on March 28, 2008 Aiken County Master in Equity Robert Smoak, Jr., after noting that the defendants had acted with actual malice against a marketplace competitor, awarded a total of \$1,065,000 in compensatory and punitive damages: \$490,000 compensatory and \$350,000 punitive on the slander claim, and \$75,000 for the unfair practices claim, which is trebled under South Carolina law to \$225,000.

Besides the lawsuits brought by Rhodes and Sheriff Strength, Doyle and WAAW have been named as defendants in at least five other slander suits brought by prominent residents of the area.

The defendants were represented by Eleazer R. Carter of Reddix-Small & Carter Law Firm in Columbia, S.C. Plaintiff was represented by John Harte of Aikin, S.C.

Now Available: Basic Guide to Employment Defamation and Privacy Law

This pamphlet provides a practical overview of defamation and privacy issues in the workplace and is intended to assist non-lawyers – supervisors and human resource professionals – who face these issues on a daily basis.

ORDER FORM

QUANTITY	TITLE	PRICE	TOTAL
1	Basic Guide to Employment Defamation and Privacy Law	\$ 3 each	
		Sales Tax (New York State orders only)	
		Total	

Name: _____

Firm/Organization: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____ E-mail: _____

Make check payable and send order to:
Media Law Resource Center
520 Eighth Ave., North Twr. 20th Fl.
New York, NY 10018

Judge Grants Summary Judgment to Libel Plaintiff *But Defense Counsel Says Case Is Likely to be Dropped*

A Nevada state judge has granted summary judgment to the plaintiff in a libel case against a weekly Las Vegas newspaper. *Rivers v. Tribune Media Group Corp.*, No. A559364 (Nev. Dist. Ct. order April 4, 2008). But defense counsel told MLRC that the case is likely to be dismissed.

The lawsuit stemmed from an article published in the weekly *Las Vegas Tribune* on March 12. The article, headlined, “A Judicial Candidate With History of Domestic Violence,” stated that state court judicial candidate David J. Rivers was born with another last name, which he changed “when he was adopted by his stepfather,” and later “changed his name [again]... to become ‘more Americanized.’” The article also cited to alleged court papers showing that plaintiff was delinquent in child support payments and admitted to “beating up his third wife” and having a problem with alcohol.

Eight days later, on March 20, 2008, Rivers and his mother sued the *Tribune* for libel and slander. (The mother’s claims were based on the article’s alleged implication that Rivers was born illegitimately.) They sought compensatory and punitive damages, and also sought an injunction requiring the newspaper to publish a retraction. At a March 28 hearing on the motion for a temporary restraining order, District Judge Sally Loehrer granted, *sua sponte*, summary judgment to the plaintiffs, and scheduled a trial for damages.

“Defamation is a legal issue,” Judge Loehrer said, according to the court transcript. “Only those published statements which are subject to some type of, could be one way or could be the other way, are things that the jury has to make a decision on. But where it’s clear, it’s a matter of law for the court to determine.”

Judge Loehrer then proceeded to announce her conclusion that each of the statements in the *Tribune* article were incorrect, and therefore libelous. In her bench ruling, Judge Loehrer noted that the newspaper had not presented any evidence that its statements were true. She did not rule as to plaintiffs’ status as public or private figures, and did not

make any finding that the newspaper had acted with actual malice. She also ignored plaintiff’s acknowledgment that some portions of the article were true: for example, he did once have a drinking problem, and that he once slapped his wife and gave her a black eye.

“Your client can write anything at all that he wants about someone,” Judge Loehrer said to the newspaper’s attorney, “but there are consequences. He has the First Amendment right to lie about anything he wants to, but that constitutional right to publish anything you want is not without consequences, and the consequences are damages...”

Judge Loehrer’s ruling on the injunction – the matter actually at hand in the hearing – is unclear. At one point, she said that “Mr. Rivers is going to prepare a court order, and Mr. Rivers can do whatever with his Court order that he likes” But she later told the newspaper’s counsel that “whether your client wants to print a sincere apology and retraction is up to him....” And, finally, she announced that she was “joining the matter of the injunctive relief and the trial on the merits,” and set the matter for trial in June.

Defense counsel Chris Rasmussen told MLRC that the parties were negotiating a stipulated dismissal of the case.

This is not the first libel trial for Judge Loehrer. She presided over the 1997 libel trial brought by casino mogul Steve Wynn against the author and publisher of an unauthorized biography, which resulted in a \$3.1 million verdict. The verdict was reversed on appeal because of Judge Loehrer’s improper instruction on actual malice. *See Wynn v. Smith*, 117 Nev. 6, 16 P.3d 424 (Nev. 2001); *see also LDRC LibelLetter*, Feb. 2001 at 3. That case eventually settled prior to retrial. *See MLRC MediaLawLetter*, July 2004 at 20.

The Las Vegas Tribune is represented by Chris T. Rasmussen of Las Vegas. Rivers is represented by his law partner K. Michael Leavitt of Leavitt, Sully & Rivers in Las Vegas.

Fair Report Privilege Protects Broadcast of Wrong Mug Shot

By Indira Satyendra

An Ohio Court of Appeals affirmed dismissal of a defamation suit against an ABC-owned Toledo television station brought by a man who claimed the station mistakenly broadcast his mug shot in connection with a report on the indictment of an individual with the same name on charges of child molestation. *Martinez v. WTVG, Inc.*, No. L-07-1269, 2008 WL 1700443 (Ohio App. 6 Dist. April 11, 2008) (Singer, J.).

The decision represents a robust application of Ohio's statutory fair report privilege. The court held that the news report was protected by the privilege despite the fact that the mug shot was not included in the official indictment but was separately provided by the police and despite the fact that the station rebroadcast the same mug shot a second time after plaintiff called up to complain.

Background

On February 24, 2005, during WTVG-TV Channel 13's regular eleven o'clock news report, *Nightbeat*, a news anchor reported the recent grand jury indictments of Misty Davis, Jeffrey Lauharn and Ricardo Martinez for the rape of a 12-year old girl. While the anchor read a description of the indictment, the station broadcast mug shots of the three individuals. The mug shot that was displayed for Ricardo Martinez, however, was not the mug shot of the recently-indicted Ricardo Martinez, but instead was plaintiff's mug shot. Plaintiff had never been indicted for rape or any other sexually-related offense.

WTVG had obtained plaintiff's mug shot from the Lucas County, Ohio, Sheriff's Department in accordance with its general practice of obtaining mug shots from the police department for news reports. The night assignment editor called the Sheriff's Department and requested the mug shots by stating the name of each suspect in connection with the rape indictments. The officer who took the call responded that he knew the story and that the other television stations were asking for the same mug shots, and said that he would leave them on the counter for someone from the station to pick up. Later that day, a WTVG photographer picked up

the three mug shots, which were then used in the *Nightbeat* broadcast.

After seeing his mug shot broadcast on the eleven o'clock news report, plaintiff immediately called the station and told the night assignment editor that the station had the wrong mug shot in the rape indictment report and demanded that they not use the photo again. The night assignment editor told the caller that someone would call him back. The evening news anchor, who was also the managing editor, e-mailed the news director about the call and said that they needed to double-check to ensure they had the correct mug shot. No one called plaintiff back. The mug shot was shown to viewers once again on the station's 2:30 a.m. automatic re-broadcast of *Nightbeat*, but it was not used in the next live morning broadcast.

Plaintiff filed suit against WTVG in the Lucas County Court of Common Pleas, asserting two counts of defamation, one for each broadcast of the mug shot, negligence and intentional infliction of emotional distress. WTVG filed a motion for summary judgment on statutory and common-law fair report privilege grounds.

Ohio's statutory fair report privilege provides, in relevant part:

The publication of a fair and impartial report of the return of any indictment, the issuing of any warrant, the arrest of any person accused of crime, or the filing of any affidavit, pleading, or other document in any in any criminal or civil cause in any court of competent jurisdiction, or of a fair and impartial report of the contents thereof, is privileged. . . . O.R.C. 2317.05.

The privilege is qualified and may be overcome if plaintiff can prove that the report was published "maliciously," or that defendant "refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable written explanation or contradiction thereof by the plaintiff." O.R.C. 2317.05.

The trial court granted WTVG's motion for summary judgment based on the statutory privilege, holding that even though the station used the wrong mug shot, the report was

(Continued on page 26)

Fair Report Privilege Protects Broadcast of Wrong Mug Shot

(Continued from page 25)

protected by the privilege because defendant obtained its information from a government source and did not publish the report maliciously. The court also dismissed the intentional infliction of emotional distress claim because it was based on the same facts as the defamation claim.

Appeals Court Decision

Plaintiff appealed, asserting that the news report was not protected by the fair report privilege because the mug shot was extraneous to the grand jury indictment and also because defendant acted maliciously by not confirming that it had the correct mug shot after plaintiff called to complain, and by broadcasting plaintiff's mug shot twice. The Court of Appeals affirmed summary judgment for defendant but applied a more rigorous analysis than the trial court to what, precisely, constituted the official record sources for the broadcast, and whether or not WTVG's report of those sources was substantially fair and accurate.

The court found, first, that WTVG gave a substantially accurate report of the return of a grand jury indictment, which is specifically protected by O.R.C. 2317.05. Second, the station broadcast plaintiff's mug shot, which by itself is specifically protected by the statute because it is a fair and impartial report of plaintiff's arrest record. The court found however, that the report of the mug shot *in connection* with the grand jury indictments was *not* a substantially fair and impartial report of either of these official records because it misled viewers into thinking that plaintiff was indicted by a grand jury for rape. Nevertheless, the news report was protected by the privilege because it was the police officer who inaccurately accessed the arrest record and represented to defendants that plaintiff was the recently indicted Ricardo Martinez. In finding the information provided by the officer privileged, the court referred to the public policy underlying the privilege:

The purpose of the privilege in R.C. 2317.05 is to protect news media and others from defamation claims when making substantially accurate reports of information contained in official records. In cases in which the only reasonable way to access an official record is to request the record from a

government official, the purpose of the privilege would be defeated if the actions of the government official in merely accessing the record are considered outside the privilege.

The court found that because WTVG had to rely on a government officer to access the arrest records of the recently indicted individuals, and the news broadcast was a substantially accurate report of the records that were provided by the officer, the news report was protected by the statutory privilege.

The court's holding followed *Smitek v. Lorain County Printing & Publishing Co.*, No. 94CA006023, 1995 WL 599036 (Ohio App. 9 Dist. Oct. 11, 1995). In *Smitek*, a county auditor's records were inaccurate in naming the plaintiff's husband, and not the plaintiff, as the owner of certain property that violated several land use ordinances. The mayor was given that inaccurate information and used it in a press conference, and a newspaper reported on the press conference. Even though the newspaper was given notice that the report was incorrect, the court nevertheless held that the newspaper was protected by the fair report privilege because the news media should be able to rely on government records to accurately reflect the facts and should be protected from defamation if those records are wrong. The court in *Martinez* similarly reasoned that "if official records inaccurately maintained by government officials are protected by the privilege, then official records inaccurately accessed by government officials must also be protected by the privilege."

The *Martinez* court distinguished this kind of official statement or conduct from another case, *April v. Reflector-Herald, Inc.*, 46 Ohio App. 3d 95, 546 N.E.2d 466 (Ohio App. 6 Dist. 1988), in which a sheriff's description of a legislative proceeding was not protected by the statutory privilege for reports of official proceedings (O.R.C. 2317.04). In *April*, an employee of the county sheriff's department was terminated and later sued the county for age discrimination. The county settled, and the settlement was addressed at a county commissioner's meeting. The county sheriff told a reporter after the meeting that the employee had been fired for stealing from the department when, in fact, the employee had not stolen from the department and no accu-

(Continued on page 27)

Fair Report Privilege Protects Broadcast of Wrong Mug Shot

(Continued from page 26)

sation of stealing was made at the commissioner's meeting. The court held in that case that the newspaper report of the sheriff's statements was not protected from a defamation claim because the statements did not originate from the legislative proceeding, but instead were merely the sheriff's incorrect version of one of the issues raised at the meeting.

Thus, the *Martinez* court did not extend the privilege so broadly as to cover any information or mistakes made by a government officer. It was not simply because it was a police officer who provided the information to the station that gave rise to the privilege. It was because news stations must rely on a government officer to correctly access this particular kind of official record, one which is covered by the statute.

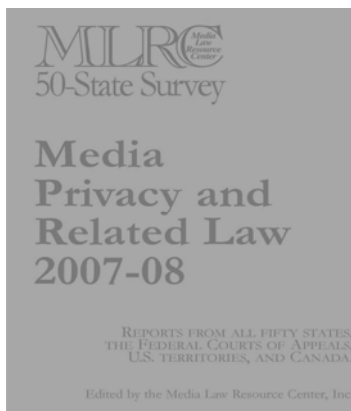
Having found that the information was privileged, the court rejected plaintiff's argument that the privilege was defeated because defendants acted maliciously. Applying the actual malice standard for qualified privileges, the court found that the station did not act with reckless disregard for the truth when it did not double-check whether or not it had the correct mug shot after plaintiff called to complain or even when the station rebroadcast the report overnight. The court found that the station could continue to rely on the information given to them by an officer charged with accessing the official record "over the statements of a caller in the middle of the night."

Conclusion

The application of the fair report privilege varies according to individual state law and the particular facts of each case. One of the trickiest areas is whether or not a reporter can rely on information provided by a public official. Here, the Ohio court carefully analyzed the particular news report to determine what official records were implicated, then considered the specific context of the officer's conduct and the specific source for the information provided by the officer to determine whether or not it fell within the statutory language, as interpreted by previous courts.

Although no such fact situation had been presented to an Ohio court before, the *Martinez* court, mindful of the strong policy underlying the privilege that permits reporters to rely on official records without independent verification, expanded the application of the privilege so that reporters can continue to rely on official records, even where a public official makes a mistake in retrieving and providing them.

Indira Satyendra of ABC, Inc., and Thomas G. Pletz and Neema M. Bell of Shumaker Loop & Kendrick LLP of Toledo represented WTVG, Inc. in this case. Ricardo Martinez was represented by Jerry P. Purcel of Toledo.



50-STATE SURVEYS

Order your copy now!

MEDIA PRIVACY AND RELATED LAW

(published annually in July)

The 2007-08 edition is currently available.

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

Fair Report Privilege Protects Article Based on Police Press Release

Plaintiff Sought to Exclude Evidence of Arrest on Summary Judgment

A Texas appellate court affirmed summary judgment for a local newspaper, holding that the paper was protected by the fair report privilege. *Goss v. Houston Community Newspapers*, No. 14-06-00719, 2008 WL 850023 (Tex. App. Apr. 1, 2008) (Yates, Fowler, Guzman, JJ.) (unpublished).

This is a fairly straight forward fair report case with an interesting wrinkle on the use of expunged arrest records. After the newspaper article was published, plaintiff's arrest was expunged. On the newspaper's motion for summary judgment, plaintiff argued that information about his arrest should be excluded as evidence. The appellate court in dicta rejected this claim, offering some guidance on the impact of a state statute which prohibits the use of expunged arrest records.

Background

At issue was an August 2004 article published in the *Kingwood Observer* entitled "Drag racers arrested by deputy." The article, based on a police press release, reported that plaintiff and another man were arrested after it appeared that they were racing and that plaintiff was taken into custody for possession of a controlled substance. Plaintiff was never charged with drag racing, and the controlled substance charge was later dismissed. Plaintiff sued the newspaper and the author of the article for libel, negligence and intentional infliction of emotional distress.

The trial court granted summary judgment to the defendants without opinion. On appeal, plaintiff challenged dismissal of the libel count, arguing that the newspaper should have conducted an independent investigation of the event. Plaintiff also argued that since the record of his arrest was later expunged, the newspaper should not be able to rely on it in defense of the libel claim.

The appeals court first held that the news article was protected by the fair report privilege. "Official statements

from law enforcement, including press releases, trigger application of the privilege," the court stated, citing, e.g., *Yohe v. Nugent*, 321 F.3d 35, 38-39 (1st Cir. 2003) (official statement by police chief). After comparing the article to the police press release, the court concluded it was fair and accurate and noted that the paper had no duty to investigate the information.

The court also rejected plaintiff's argument that the presentation of the article in a highlighted box negated the privilege. "[W]hile this may have been designed to draw readers' attention to the story, we cannot conclude that this constitutes an embellishment or otherwise creates an ambiguity in the plain language of the story as reporting on arrests in connection with a drag racing incident."

Expunged Arrest Record

Plaintiff also argued that the trial court should have excluded defendants from using any information about his arrest because after publication the record was expunged under Texas Code of Criminal Procedure Sec. 55.01-05. This statute provides that the "use of the expunged records and files for any purpose is prohibited." The court noted that plaintiff's argument was not properly preserved for appeal, but went on to address and reject the argument.

First, the court noted that plaintiff put the expunged record at issue and thus the defendants were entitled to use the information. More broadly, the court stated that "[t]he remedy of expungement was never intended as a device for a plaintiff in a lawsuit related to the expunged matter to control the availability of relevant evidence."

Plaintiff was represented by David A. Livingston and Heather N. Gordon. Houston Community Newspapers and reporter Sarah Mertins were represented by James Michael McCowan.

Fair Report Privilege and Innocent Construction Rule Defeat Lawyer's Libel Claim

Article Based on Court Proceedings; Capable of Nondefamatory Meaning

Relying on the fair report privilege and the innocent construction rule, an Illinois trial court dismissed a libel suit brought by a disbarred lawyer against the *Madison County Record*, a weekly legal journal in southern Illinois. *Cueto v. The Madison County Record*, No. 06 L 671 (Ill. Cir. Ct. April 14, 2008) (Prall, J.).

At issue in the case was a 2006 opinion article entitled "Pulling Strings," that discussed the plaintiff, Amiel Cueto, and his brother, Judge Lloyd Cueto, who was then running for reelection as a circuit court judge in Illinois. Amiel Cueto, a former high-power lawyer in the area, was convicted in 1997 of obstruction of justice and jailed for six years for interfering with the racketeering prosecution of his business partner. See *United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998).

Plaintiff sued the newspaper for libel and false light for stating that he was said to have "had 15 of 17 judges from St. Clair County in his pocket" in the mid 1990s. This statement was protected by the Illinois fair report privilege because "there was no question that witnesses made statements in official court

proceedings to the effect that plaintiff controlled judges in the mid 1990s."

Plaintiff also complained about the article's description of him as a "power broker" who was seen at a meeting of St. Clair County judges held at a local restaurant. The article then asked rhetorically "was he just dropping by?" Plaintiff alleged that this implied he was wrongfully attempting to influence the judges.

The trial court held that all these statements, as well as the article's headline, were protected by the innocent construction rule. The article did not accuse plaintiff or the judges of any illegal conduct. And while the term "power broker" was not flattering, it could be reasonably construed. "A reasonable construction of the entire article is that plaintiff was and is a politically influential person and was using his influence to support his brother's run for election at a meeting of judges," and "absent a clear assertion of criminality, accusations of political influence to obtain a benefit are not defamatory." Slip op. at 5 (quoting *DiBernardo v. Tonawanda Publishing Corp.*, 499 N.Y.S.2d 553 (1986)).

NOW AVAILABLE!

**MLRC 50-State Survey:
Employment Libel and Privacy Law 2008**

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 of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort

[Click here to access an order form](#)

ESPN Wins One From "The Gipper" *Relatives Sue After Remains of Football Legend are Exhumed*

By James E. Stewart and Eric Kemmler

Late last month, the Houghton County Circuit Court in Michigan's Upper Peninsula granted ESPN's motion to dismiss a complaint alleging invasion of privacy, trespass, "intentional conduct," and violation of a Michigan's criminal statute making it a felony to photograph a dead body. *Gipp v. Frueh, et al.*, (Mich. Cir. Ct. Mar. 26, 2008) (Hood, J.).

Although we may not have unearthed any new theories of First Amendment protection for newsgathering, the decision merits at least some mention as the facts were a bit macabre. The plaintiff suing ESPN was none other than George "The Gipper" Gipp, the Notre Dame football legend personified by Ronald Reagan in "Knut Rockne, All American" who has been dead since 1920.

Background

The real George Gipp was from Calumet in the far northwest regions of Michigan's Upper Peninsula. Things have been quiet there since the copper mines closed, but George Gipp's memory is very much alive and nurtured by some distant cousins whose grandfather was a brother of the Gipper's father. Unbeknownst to these "Michigan Gippes," there was another descendant – one living in Illinois named Rick Frueh, who was a grandnephew of the Gipper, as his grandmother was the Gipper's sister.

These branches of the Gipp family may never have known of each other if it had not been for instant-book sports book author Mike Bynum, who may know more about college football than any other living person. Bynum has been in the process of writing a book about George Gipp for years. His thesis for this book is that the real George Gipp apparently was as different from the Ronald Reagan character as could be imagined.

Unlike the Reagan character, the real Gipper apparently smoked, drank, chased women, and gambled. For good measure, and to the sheer dismay of any loyal Notre Dame alum reading this, the "win one for the Gipper" death bed conversation between Gipp and Coach Knute Rockne may have never happened. Bynum contends Rockne made it up as a ploy to fire up the team during the 1928 Army – Notre Dame game.

In any event, when Bynum came across two women posting

to a genealogical website for information about George Gipp, his curiosity was immediately aroused. According to the women, they had been told their entire life that their mother, who was born out of wedlock in December 1920, was George Gipp's daughter. Gipp had died in the hospital in South Bend in December 1920 from pneumonia. Their mother had been born in that same hospital to an 18 year old South Bend girl in December 1920. It would be a good story, but how could Bynum prove it?

DNA was his answer. He located Mr. Frueh, who submitted an affidavit to the Houghton County Medical Examiner requesting exhumation of George Gipp for "family medical and genealogical purposes." With Mr. Frueh as the closest living relative, the exhumation was approved and scheduled for October 4, 2007. Bynum contacted ESPN to offer ESPN the opportunity to report on his efforts to confirm the link between the Gipper and the two women who would be his granddaughters.

After sending crews to do background research and interviews in South Bend, the ESPN film crews arrived in Michigan's Upper Peninsula the day before the exhumation and interviewed the Michigan Gippes, who were a bit unhappy to learn that George was being exhumed and they had not been consulted.

As the exhumation proceeded with ESPN camera's recording it, things began to go wrong. First, the Michigan Gippes showed up at the cemetery, lending an air of tension to an already unusual proceeding. Then the cemetery workers, digging with a backhoe at where they thought Gipp was buried, inadvertently exhumed parts of the skeleton of his sister Bertha, who had died in 1911. Then finding the right spot, the cemetery located and removed the vault containing George Gipp's casket. The metal vault was opened with some difficulty and George Gipp's body placed in a body bag and taken to the local hospital where the medical examiner removed a femur with Frueh's permission. The femur was then sent to a DNA lab for testing. Gipp's body was returned to the vault and re-interred.

Privacy Claims

The Michigan Gippes left the cemetery in an apparent bitterness of spirit and proceeded to contact the two women, the media, and lawyers. Hearing about the exhumation from the

(Continued on page 31)

ESPN Wins One From "The Gipper"

(Continued from page 30)

Michigan Gipps, the two women were outraged and told Bynum to never come near them again. The DNA lab then reported that there was no DNA match with Gipp and the women's now deceased mother. ESPN, having expended considerable resources and effort on a story that had now lost much of its news value, broadcast none of the video of the exhumation (but tentatively plans a report on its series *E:60* this spring).

One of the Michigan Gipps had himself appointed ex parte as the personal representative of the estate of Matthew Gipp, George's father who had bought the cemetery plots in 1902; Bertha Gipp, George's sister who had died in 1911; and George Gipp. He then brought this action in his own name and as representative of these estates, along with a number of the other Michigan Gipps, their relatives and even one of their ex-spouses. Their action named as defendants everyone involved in the exhumation – Bynum and Frueh, the county medical examiner, the cemetery that had done the exhumation, the funeral director who had presided at the exhumation, the county health department, and ESPN.

Each of the defendants had their own individual defenses to the case. From the beginning, ESPN viewed the complaint as an unusual story in search of a theory of liability and filed a motion to dismiss the complaint as failing to state a claim upon which relief can be granted. Michigan follows and adopts the general rule of privacy that a person's right of privacy is personal, dies with them, and may not be asserted by any other person or family member. In their opposition papers, plaintiffs conceded the privacy claim but continued to refer to it at the hearing despite the clear Michigan precedent in *Swickard v. Wayne County Medical Examiner*, 438 Mich. 536 (1991).

To our relief, the plaintiff never found or argued *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2003), holding that the family of White House Deputy Counsel Vince Foster was able to assert a privacy right in photographs of his death scene. Although distinguishable as a unique FOIA case, the decision contains some superficially troubling thoughts by the United States Supreme Court on the right of privacy of the dead and their family members.

The trespass claim was equally weak. Our response was that ESPN was at the cemetery at the invitation of Mr. Frueh, thus negating a necessary element of a trespass claim. We also pointed out that it was an awfully strange trespass claim since the Houghton County Sheriff was there the entire time talking with the ESPN crew and others, and the Michigan Gipps who

were there never asked ESPN to leave, but instead were interviewed and photographed by ESPN, including one interview with one of the Gipps holding a name plate that had been on George Gipp's vault.

The attempt to use a criminal statute as a basis of civil liability likewise failed. In 1977, Michigan enacted legislation (MCLA 750.160a) providing that photographing or displaying a photograph of a decedent in a human grave was a felony. While the statute was probably unconstitutional on its face and was enacted to prevent divers from photographing human remains in any of the many Great Lakes ship wrecks, Michigan follows the general rule that a criminal statute may not provide a private cause of action. See generally *Ticor Title Insurance v. National Abstract Agency, Inc.*, 207 U.S. Dist. LEXIS 67639 (E.D. Mich. 2007).

Several of the co-defendants and plaintiff engaged in some initial genealogical discovery concerning the relationship of the Michigan Gipps and Frueh to George Gipp. With Frueh established as a closer relative, one of the co-defendants then filed a motion to dismiss for lack of standing as a matter of Michigan probate law, which ESPN and the other defendants joined.

On the day of hearing, the court was filled with Michigan Gipps on one side and Mr. Frueh on the other. Several days after the hearing, the trial court granted all of the defendants' motion to dismiss in a two-sentence order that simply found that the Michigan Gipps lack standing based on the genealogical ties to the Gipper, compared to Frueh's.

Although there does not appear to be a Gipp book coming out anytime soon, Bynum is now publicly threatening to sue the Michigan Gipps and their attorney and to seek the disbarment of their attorney. Keeping with the somewhat surreal tone of this case, the Michigan Gipps' attorney, when asked for comment by the local newspaper, responded that Bynum could "stick it in his ear."

For now The Gipper is at rest again (minus his femur), there is no book coming out about the Gipper's love child, presumably to the great relief of the Notre Dame faithful, and the Michigan Gipps have filed a claim of appeal with the Michigan Court of Appeals.

James E. Stewart is a partner at the Butzel Long firm in Ann Arbor, Michigan. Eric Kemmler is V.P. and Associate General Counsel at ESPN. Plaintiffs were represented by Torgar Omdahl.

Fifth Circuit Sanctions Libel Plaintiff

By Luther Munford

The Fifth Circuit has sanctioned a libel plaintiff who asserted non-libel causes of action in an attempt to get around the Texas one-year statute of limitations for defamation. *Hamad v. Center for Jewish Studies*, No. 07-50165, 2008 WL 444563 (5th Cir. Feb. 19, 2008) (Higginbotham, Stewart, Owen, JJ.) (not officially published).

The plaintiff, Riadelsoh Hamad, sued the Center for Jewish Community Studies and other defendants for defamation. Hamad complained that the defendants falsely linked his charity, the Palestinian Childrens' Welfare Fund, with terrorists in the West Bank and Gaza. Though his complaint arose from internet postings initiated in 2003 and 2004, he didn't sue until 2006.

In December 2007, the Fifth Circuit made an *Erie* guess that Texas would apply the single publication rule to internet publications. *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137 (5th Cir. Dec. 21, 2007). Hammad's defamation claims were then barred as a result.

Perhaps foreseeing this development, Hamad had also asserted claims that did not have to be brought within one year such as tortious interference with a business contract. The Fifth Circuit, however, agreed with the district court that under Texas law, changing the name did not change the tort. It held that the defamation limitations statute applies whenever the gravamen of the complaint is injury to the plaintiff's reputation because of an alleged defamatory statement. Because that was the gravamen of Hamad's complaint, it affirmed the dismissal of his other claims as well.

The Fifth Circuit also sanctioned Hamad under Fed.R.App.P. 38 for pursuing a frivolous appeal. It noted that the defendants had twice asked him to voluntarily dismiss his claim, that the district court had threatened Hamad with sanctions, and that Hamad had a history of filing frivolous suits in the Fifth Circuit. The court awarded \$32,944.50, the full amount requested by the defendant who sought sanctions.

Luther Munford is a partner at Phelps Dunbar LLP in Jackson, Mississippi. Plaintiff represented himself pro se. Defendants were represented by Randy Ray Howry, Herman, Howry & Breen, Austin; Ashley Ivy Kissinger, Levine, Sullivan Koch & Schulz LLP; and Jonathan Cline Wyatt, Thompson, Coe, Cousins & Irons, Dallas.

MLRC MediaLawLetter Committee

Jay Ward Brown (Chair)

David Tomlin (Chair)

Dave Heller (Editor)

Robert D. Balin

Katherine M. Bolger

Thomas M. Clyde

Robert J. Dreps

Jon Epstein

Rachel E. Fugate

Michael A. Giudicessi

Charles J. Glasser

Richard M. Goehler

Karlene Goller

Shelley M. Hall

S. Russell Headrick

Russell T. Hickey

David Hooper

Jonathan Katz

Leslie Machado

John Paterson

Deborah H. Patterson

Bruce S. Rosen

Indira Satyendra

Florida Court Finds No Jurisdiction Over Washington Website *Website Did Not Target Florida*

A Florida federal court dismissed, for lack of personal jurisdiction, a libel case brought by a Florida business against a Washington State blogger. *Internet Solutions Corp. v. Marshall*, No. 6:07-cv-1740-Orl-22KRS, 2008 WL 958136 (M.D. Fla., Apr. 7, 2008) (Conway, J.).

Background

Tabatha Marshall runs a website, www.tabathamarshall.com, which is devoted to exposing online “phishing” scams – attempts to fraudulently gain sensitive information such as credit card numbers or personal identification information. Marshall posts information about various alleged phishing scams on her website in an attempt to warn others.

Internet Solutions Corporation (ISC), a Florida based company, operates various websites on employment recruiting and internet advertising. ISC was displeased to find itself and other companies it operates included in Marshall’s “PhishBucket” on her website. The *PhishBucket* is a list of companies that Ms. Marshall suspects are conducting job related phishing scams. In an article on her website, Ms. Marshall also described one of the company’s websites, www.veriresume.com, and its practices as being suspicious.

Claiming the information was false, ISC asked Marshall to remove all references to it and its companies and websites from her website. When Marshall refused, ISC brought suit in a Florida federal court.

Jurisdiction Issue

To establish personal jurisdiction over Marshall, a Washington resident, ISC argued that she had contacted Florida through her allegedly defamatory postings. These postings, according to ISC, hurt its business in Florida.

The court examined whether personal jurisdiction existed under both Florida’s long-arm statute and the federal constitution. The court began with Florida’s long-arm statute which only requires a tort committed in Florida. Although Marshall pointed out her lack of contacts with the state, she failed to argue that she had caused no injury to ISC in Florida.

Thus, under the pleadings the court concluded that personal jurisdiction did exist under the state’s long-arm statute. However, the court went on to find that jurisdiction did not exist under the federal constitution.

To establish jurisdiction under the Due Process Clause, a

person must have “purposeful contacts” with the state. ISC alleged that Marshall’s comments target Florida residents and thus constitute contacts with the state. The court disagreed, noting that the com-

ments were available to the country at large and made no specific reference to Florida or Floridians.

Furthermore, the court found that Marshall had no reason to anticipate that her postings would lead to her being sued in Florida courts. The court found convincing Marshall’s claim that she lacked sufficient contacts with the state. Finding that ISC failed to establish the requisite minimum contacts necessary under the federal constitution, the court ruled that personal jurisdiction did not exist over Marshall.

Plaintiff was represented by Alex Finch, Orlando: and Dennis F. Wells, Webb, Wells & Williams, PA, Longwood, Fla. Defendant was represented by Jennifer Bowen Pinto, Matthew T. Farr, The Law Offices of Farr & Bowen, PL, Orlando.



Maine's Anti-SLAPP Statute and "Actual Injury" Court Strikes Libel Claim Over Letter to the Editor

By John Osborne

The Maine Supreme Judicial Court, Maine's highest appellate court, reversed the denial by a state trial court of a defendant's special motion to dismiss a defamation lawsuit under Maine's Anti-SLAPP statute, holding that a claim of emotional distress was sufficient to meet the statute's requirement of demonstrating "actual" injury only when a claimant has demonstrated sufficiently severe emotional damages as to be independently compensable under Maine law. *Schelling v. Lindell*, 942 A.2d 1226 (Me. Mar. 20, 2008) (Saufley, C.J., Clifford, Alexander, Levy, Gorman, JJ.).

Background

The defamation action was based on a letter to the editor of the *Belfast Republican Journal* written by the defendant, Ken Lindell, on the issue of government contracting parameters. Lindell, who at the time of his letter was a state representative, had published his letter in response to a letter to the editor written by the plaintiff, Joyce Schelling, dealing with the same subject.

Schelling had been an active supporter of a "fair-trade" government contracting bill and had been a representative of the business community in the committee that drafted the bill. At the time of the bill's drafting, Schelling was working for a company that supplied office products made of 100% post-consumer recycled material. Lindell had voted against the bill, LD 1769, because, as a fiscal conservative interested only in government contracting standards that focused on price, terms and quality, he considered the bill to improperly grant special status to companies based on non-objective criteria. Despite Lindell's opposition, LD 1769 ultimately passed in early 2006.

Shortly after passage of the bill, Schelling published her letter to the editor in the *Belfast Republican Journal*, taking issue with Lindell's vote on the bill. Lindell published a responsive letter to the editor of the same newspaper, defending his vote on that bill, questioning Schelling's motives in supporting the bill, and seeking to rally opposition to what he considered to be special-interest government

contracting.

Prior to submitting his letter, Lindell had conducted factual research regarding Schelling and her professional and ideological affiliations, reviewing Schelling's testimony in support of LD 1769 and performing additional research on her political and business activities. His letter, in addition to explaining his opposition to LD 1769 and similar laws, suggested that Schelling might have had business incentives to support the bill. Schelling's response to Lindell's letter was to demand an apology. After Lindell declined to offer one, instead suggesting that they continue their policy debate publicly, Schelling filed a defamation suit against Lindell in September of 2006. Six weeks later, Lindell lost his re-election bid.

Maine Anti-SLAPP Motion to Strike

Lindell filed a special motion to dismiss the defamation suit pursuant to Maine's Anti-SLAPP statute, which protects citizens' rights to petition government for redress of grievances. To survive a special motion to dismiss, assuming that the court finds that the anti-SLAPP statute applies to the dispute, a non-moving party must demonstrate that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party. 14 M.R.S.A. § 556.

The trial court found that Lindell's letter to the editor was an exercise of his right to petition, triggering application of the statute. However, the trial court found that the letter was devoid of reasonable factual support and arguable basis in law, and found that the letter had caused Schelling actual injury.

Supreme Court Decision

Lindell's appeal to the Supreme Judicial Court raised multiple issues with the trial court's ruling, including its findings of no reasonable factual support and no arguable legal basis, as well as its ruling on actual injury. Schelling filed a cross appeal arguing that the statute should not apply

(Continued on page 35)

Maine's Anti-SLAPP Statute and "Actual Injury"*(Continued from page 34)*

to Lindell's letter in the first place. The Supreme Judicial Court agreed with the trial court regarding the applicability of the statute, holding that the letter was a "statement likely to enlist public participation in encouraging a government body to consider a particular issue," which is protected by the act.

On the issue of whether Lindell's letter caused Schelling actual injury, however, the Supreme Judicial Court parted ways with the trial court. Schelling had alleged harm to her reputation, humiliation and emotional distress in her complaint. In her affidavit supporting her opposition to the special motion to dismiss, she alleged damage to reputation, embarrassment, loss of sleep, anxiety and loss of concentration. The trial court found that Schelling had made a showing of mental suffering and damage to reputation. Schelling also relied on the *per se* damages associated with defamation relating to one's trade or business in both her opposition to the special motion to dismiss and her appellee brief.

The Supreme Judicial Court found that Schelling had failed to demonstrate actual injury arising from Lindell's letter. The court reiterated its rule that a party opposing a special motion to dismiss must show a reasonably certain monetary valuation of the injury she has suffered although it declined to go so far as to require an actuarial analysis of damages. The court quickly rejected *per se* damages as meeting the "reasonably certain monetary valuation" requirement.

The court then ruled that an allegation of emotional damage would only constitute actual injury under the statute if the non-moving party could demonstrate the kind of emo-

tional damages independently compensable under Maine law. Expanding on this rule, the court engaged in a review of the development of the compensability of emotional damages in Maine.

The court laid out the current state of affairs on emotional damages in Maine, holding that "serious" mental distress without physical symptoms could be compensable where "a reasonable person, normally constituted, would be unable to cope with the mental stress engendered by the circumstances of the event." The court reiterated an earlier holding that, based on the reasonableness standard, minor emotional injuries such as hurt feelings are not compensable.

Employing this logic to Schelling's claims of embarrass-

ment, loss of sleep and mental suffering, the court found that Schelling had failed to demonstrate actual injury under 14 M.R.S.A. § 556. The court held

The letter was a "statement likely to enlist public participation in encouraging a government body to consider a particular issue," which is protected by the act.

"[d]istress, irritation, and emotional upset may, in fact, be a regular result of public pronouncements, particularly in the rough and tumble of words related to governing and politics." The court conceded that it was possible in rare occasions that such distress could constitute the kinds of damages so severe that a reasonable person could not be expected to carry on, but that this was not the case with Lindell's letter.

John Osborn and John Patterson of Bernstein Shur in Portland, Maine, represented the defendant in this matter. Plaintiff was represented by Joseph M. Bethony, Gross, Minsky & Mogul, P.A. in Bangor.

Criminal Libel: An Acquittal in Florida, Charges in Minnesota

There are 17 American jurisdictions – 16 states and one territory – with criminal defamation statutes on the books that have not been held unconstitutional. These statutes remain alive, as shown by a handful of prosecutions under these statutes each year.

Recently, there was an acquittal after a trial on criminal defamation and other charges in Florida; while in Minnesota a man was charged with criminal libel for a posting on Craigslist.

Criminal Libel Acquittal in Florida

A Broward County, Fla. jury acquitted Hance Adams of criminal libel and other charges in a case stemming from flyers disclosing that his former girlfriend has herpes. *Florida v. Adams*, No. 062004CF014250A88810 (Fla. Cir. Ct., Broward County verdict April 22, 2008).

The flyers appeared in May 2003 at the girlfriend's son's middle school, were sent to her neighbors, and were faxed to the hospital where the woman works as a registered nurse. The flyers, which had the headline "Disease Carrier," showed a picture of the woman having sex and gave her full name, address and phone numbers.

The picture was taken from a video that that woman consensually made with the defendant during their one-and-a-half year relationship.

Adams, who contracted herpes from the woman, was charged with two counts of criminal libel, in addition to charges of maliciously disseminating information of sexually transmitted disease, stalking, battery, trespass, and two counts of child abuse (based on the girlfriend's son viewing the flyers).

The criminal libel charges were made under Fla. Stat. § 836.11, which prohibits anonymous publication if it "tends to expose any individual or religious group to hatred, contempt, ridicule or obloquy." The charges were prosecuted even though the provision was held facially unconstitutional in *State v. Shank*, 795 So.2d 1067, 29 Media L. Rep. 2532 (Fla. App., 4th Dist. 2001). A motion to dismiss the criminal libel charges was denied July 24, 2007, although it is unclear whether the constitutionality of the provision was argued.

After deliberating for three hours, the jury acquitted Adams of all charges.

Although there have been a handful of attempted criminal libel prosecutions in Florida before this case, MLRC is unaware of any other case since 1965 in which charges under the state's criminal defamation statutes have gone to trial. See 2003 MLRC Bulletin No. 1 (all four criminal libel cases in Florida since 1965 dismissed before trial).

Criminal Charges Over Craigslist Posting

A Rochester, Minnesota man was indicted for criminal libel in April over a posting he allegedly made to Craigslist. *Minnesota v. Klebel*, No. 55-CR-08-3574 (Minn. Dist. Ct., Olmstead County filed April 11, 2008).

The posting, which appeared on Dec. 27, 2007 in the "Rants and Raves" section of the local craigslist site, stated that "[Kasson, Minn.] Police Chief Dave Johnson deals smack. Fact Dodge County Court Judge Lawrence Agerter does cocaine. Fact. Try and stop these people."

Kasson police officer Don Cassidy told KTTC-TV that "we felt these comments were particularly defamatory and really crossed that boundary beyond what a person normally would be allowed to use."

Mitchell Klebel, who allegedly posted the comment, was indicted under Minn. Stat. sec. 609.765, which provides:

Defamatory matter is anything which exposes a person or a group, class or association to hatred, contempt, ridicule, degradation or disgrace in society, or injury to business or occupation. Subd. 2. Whoever with knowledge of its defamatory character orally, in writing or by any other means, communicates any defamatory matter to a third person without the consent of the person defamed is guilty of criminal defamation and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both. Subd. 3. Violation of subdivision 2 is justified if: (1) The defamatory matter is true and is communicated with good motives and for justifiable ends; or (2) The communication is absolutely privileged; or (3) The communication consists of fair comment made in good faith with respect to persons participating in matters of public concern; or (4) The

(Continued on page 37)

(Continued from page 36)

communication consists of a fair and true report or a fair summary of any judicial, legislative or other public or official proceedings; or (5) The communication is between persons each having an interest or duty with respect to the subject matter of the communication and is made with intent to further such interest or duty. Subd. 4. No person shall be convicted on the basis of an oral communication of defamatory matter except upon the testimony of at least two other persons that they heard and understood the oral statement as defamatory or upon a plea of guilty.

Klebel's first appearance in the case is scheduled for May 15. Johnson, who is retiring in a few weeks, told KTTC-TV that he was mainly interested in Klebel publicly renouncing

the comment.

MLRC is aware of two other cases under the Minnesota criminal defamation statute: a conviction in 2001 that was vacated in post-trial motions, and a 2004 indictment with unknown result.

In the 2004 case, a man was charged with five counts of criminal defamation and one count of distribution and exhibition of obscene materials after he allegedly transposed pictures of the faces of his mother-in-law's sister, three of his sisters-in-law, and a family friend onto pornographic images and posted the resulting pictures on the Internet.

The 2001 case involved a man who made false complaints to the dentistry board, alleging that a neighbor who was a dentist had practiced while drunk. The defendant was convicted and sentenced to probation and fined \$1,530, but the court vacated the conviction on the grounds that "people must feel free to communicate openly with quasi-judicial entities such as the State Board of Dentistry."

Published This Month!

THE REPORTERS PRIVILEGE CAN IT BE PRESERVED IN A CIVIL LAWSUIT AGAINST THE PRESS?

Brought to you by the MLRC Pre-Trial Committee

A broad overview of the protections that might be afforded journalists as parties in civil actions and identifies strategic considerations that arise in such cases examining the varying protections journalists enjoy for confidential sources and materials and how those protections apply in media cases.

For more, please visit our website WWW.MEDIALAW.ORG

Drug Manufacturer's Product Disparagement Lawsuit Against Pharmacy Information Publisher Results in a Series of Significant Decisions

By Michael Berry

Since late 2006, drug maker Schering Corporation aggressively pursued litigation for product disparagement against First DataBank, Inc. ("FDB"), a publisher of pharmacy information owned by The Hearst Corporation. In its lawsuit, Schering sought to enjoin FDB from publishing information about an asthma inhaler manufactured by Schering and to recover millions of dollars in damages allegedly caused when pharmacists substitute two cheaper asthma inhalers for Schering's, purportedly based on the information published by FDB. In response, FDB successfully transferred the case from New Jersey to California; defeated Schering's motion for a preliminary injunction; had the case stayed while its special motion to strike under California's anti-SLAPP statute was litigated and appealed to the Ninth Circuit; and withstood a jurisdictional challenge to interlocutory appeals of SLAPP orders in federal court. Although the case is now over, Schering's lawsuit left in its wake four district court decisions and two Ninth Circuit orders of significant interest to media law practitioners.

Schering's Lawsuit is Transferred to California

The lawsuit was originally filed in October 2006 in the United States District Court for the District of New Jersey, where Schering is headquartered. But Schering had subscribed to FDB's publication, and the license agreement expressly provided that "any dispute concerning this Agreement or the Licensed Product" must be brought in a California court, so FDB moved to dismiss or in the alternative to transfer the case to the Northern District of California. Even though Schering contended that its product disparagement claims were not intended to be covered by the California forum selection clause, the New Jersey court granted the motion and transferred the case pursuant to 28 U.S.C. § 1404(a). *See Schering Corp. v. First DataBank, Inc.*, 479 F. Supp. 2d 468 (D.N.J. 2007).

Schering's Motion for a Preliminary Injunction is Denied

The California court inherited two motions that had been filed in New Jersey prior to the transfer order: Schering's motion for a preliminary injunction seeking to enjoin FDB from continuing to publish the allegedly disparaging information, and FDB's special motion to strike Schering's claims under California's anti-SLAPP

statute. Without reaching the First Amendment issues presented by Schering's request for a prior restraint, the Court (Judge William H. Alsup) found that Schering could not satisfy the general standards for obtaining a preliminary injunction. *See Schering Corp. v. First DataBank, Inc.*, 2007 WL 1068206 (N.D. Cal. Apr. 10, 2007).

Schering had advanced three theories of liability: product disparagement, negligent publication, and tortious interference with economic advantage. To prevail under any of these theories, Schering was required to prove that FDB's publication was false. To understand Schering's claims, it is therefore necessary to understand the information published by FDB. Drugs are considered "pharmaceutically equivalent" if they share four traits – active ingredient, strength, dosage form, and route of administration. In contrast, drugs are considered "therapeutically equivalent" if they (1) are *pharmaceutically* equivalent, and (2) have been shown through clinical studies to produce the same clinical response in patients.

FDB accurately reported that the three asthma inhalers at issue are pharmaceutically equivalent and that the pharmaceutically equivalent inhalers are available from more than one manufacturer. Schering contended, however, that FDB's accurate reporting of these facts falsely implied that the three drugs are also therapeutically equivalent and substitutable, even though FDB also prominently reports that the FDA does not consider the three drugs to be therapeutically equivalent.

Based on these facts, the Court ruled that Schering had "not established any of the factors that would favor granting" a preliminary injunction. Specifically, the court ruled that FDB is "accurately report[ing] . . . true facts" about the three inhalers; that Schering had "not shown that First DataBank is publishing false information about Proventil HFA;" and thus that Schering had not demonstrated a likelihood of success on the merits. The court further recognized that "no negligence liability... can attach" because a publisher owes no "legal duty to the subject of its publication separate from any duty imposed by the law of defamation and product disparagement," and that Schering had failed to meet its burden with respect to its tortious interference claim because it had failed to offer any evidence that FDB acted maliciously or wrongfully.

Drug Manufacturer's Product Disparagement Lawsuit Against Pharmacy Information Publisher Results in a Series of Significant Decisions

(Continued from page 38)

FDB's Anti-SLAPP Motion is Denied

Despite this ruling on Schering's preliminary injunction motion, Judge Alsup denied FDB's anti-SLAPP motion. See *Schering Corp. v. First DataBank, Inc.*, 2007 WL 1176627 (N.D. Cal. Apr. 20, 2007). The court rested its ruling on two grounds. First, it held that California's SLAPP statute did not apply because Schering originally filed suit in New Jersey, the Court was required to apply the law of the transferor forum, and New Jersey courts would not enforce the substantive immunity granted under the California statute. Second, on the same record on which it previously had concluded that Schering had no likelihood of success on the merits, the court held that, "while perhaps not likely to succeed," Schering had met its burden under the SLAPP statute by presenting "enough facts" to establish that its claim was "not frivolous" – even though the anti-SLAPP statute requires the plaintiff to establish a probability of prevailing on the merits. In particular, the Court found that FDB "may be implying the products are substitutable," despite the fact that the publication prominently reported that the FDA had not determined the three inhalers to be therapeutically equivalent.

The District Court Claims Ongoing Jurisdiction Even After FDB Appealed

After FDB appealed the district court's SLAPP decision to the Ninth Circuit, Schering asked the district court to certify FDB's appeal as frivolous so that discovery and pre-trial proceedings could go forward during the course of the appeal. The district court denied Schering's motion, finding that FDB's arguments on appeal were plausible and holding that FDB had the right to an immediate appeal because the SLAPP statute's protections "are in the nature of an immunity." Nevertheless, the district court held that it retained jurisdiction during the ongoing appeal to "decide discovery issues, rule on pretrial motions, and set dates leading up to a trial." See *Schering Corp. v. First DataBank, Inc.*, 2007 WL 1747115 (N.D. Cal. June 18, 2007). In other words, the court directed the case to proceed in the trial court at the same time it proceeded in the Court of Appeals.

Emergency Stay Proceedings in the Ninth Circuit

FDB immediately filed a petition for a writ of prohibition and/

or mandamus challenging the district court's exercise of jurisdiction, together with an emergency motion seeking to stay further proceedings in the district court pending the outcome of the writ petition. Two days later, the Ninth Circuit granted the stay and ordered Schering to file a response to the writ petition. See *In re First DataBank, Inc.*, No. 07-72455 (9th Cir. June 22, 2007).

Schering's Jurisdictional Challenge to Interlocutory Appeals of Anti-SLAPP Orders

In addition to opposing the writ petition, Schering filed a motion to dismiss the appeal for lack of jurisdiction. In that motion, Schering argued that the Ninth Circuit decision that authorizes an immediate appeal from the denial of an anti-SLAPP motion in federal court, *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), was implicitly overruled by the Supreme Court in *Will v. Hallock*, 546 U.S. 345 (2006) (district court's refusal to apply the Federal Tort Claim Act's judgment-bar defense is not an immunity from suit that is immediately appealable under collateral order doctrine). The Ninth Circuit denied Schering's motion without prejudice and maintained the stay it previously had entered. See *Schering v. First DataBank, Inc.*, No. 07-15895 (9th Cir. Aug. 27, 2007). While the Ninth Circuit ordered expedited briefing and argument, the Ninth Circuit effectively continued the stay and permitted the appeal on the merits to proceed.

The parties proceeded to brief the appeal, and multiple amicus briefs were filed on both sides. Oral argument was scheduled for the week of February 11, 2008.

Schering's Dismissal of its Claims

After more than a year of litigation that had not proceeded beyond preliminary motions, Schering agreed to dismiss its claims as part of a non-monetary settlement with FDB. Under the settlement, FDB is not required to pay any money and is permitted to continue publishing the information that was challenged in the lawsuit, which throughout the case FDB had steadfastly refused to change because it is accurate. To address Schering's concern that FDB's publication was being misunderstood by pharmacists, FDB agreed to issue an editorial bulletin to its subscribers reminding them of the distinction between pharmaceutical equivalence and therapeutic equivalence, already explained in FDB's manual,

(Continued on page 40)

Drug Manufacturer's Product Disparagement Lawsuit Against Pharmacy Information Publisher Results in a Series of Significant Decisions

(Continued from page 39)

and urging them to consult the relevant FDA ratings in making substitution decisions. So that pharmacists using FDB's publication have complete information about both pharmaceutical equivalence and therapeutic equivalence of drugs, FDB also agreed to bundle both fields together and to use commercially reasonable efforts to require subscribers involved in dispensing medications to display the therapeutic equivalence codes whenever they display the pharmaceutical equivalence codes.

On April 8, 2008, the Ninth Circuit entered an order granting the parties' motions to dismiss the appeal and withdraw the writ petition, thereby officially ending the case.

Plaintiff Schering Corporation was represented by Paul D. Fogel, Dennis Peter Maio, Scott D. Baker, Sonja Weissman, and Eugenia S. Chern of Reed Smith LLP; William S. Eggeling and Aaron M. Katz of Ropes & Gray LLP; and David S. Sager of Day Pitney LLP. Defendant First DataBank, Inc. was represented by Eve

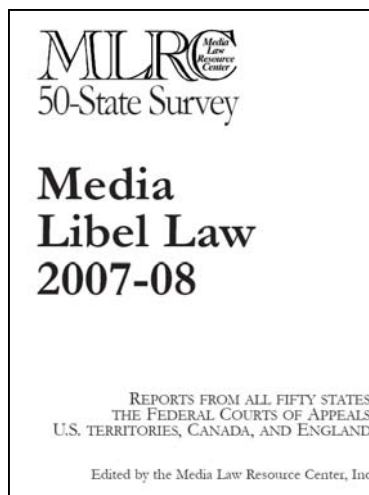
Burton, Jonathan Donnellan, Mark Redman, and Robert Hawley of The Hearst Corporation, and David A. Schulz, Seth D. Berlin, Celeste Phillips, Michael Berry, and John O'Keefe of Levine Sullivan Koch & Schulz, L.L.P.

On appeal, amicus briefs in support of First DataBank were filed by a coalition of media entities represented by Bruce E.H. Johnson, Kelli L. Sager, and Rochelle L. Wilcox of Davis Wright Tremaine LLP; and by the Center for Medical Consumers, which was represented by Michael M. Berger, Barry S. Landsberg, Lara M. Krieger, John P. Kern, and William S. Bernstein of Manatt, Phelps & Phillips, LLP.

Amicus briefs in support of Schering Corporation were filed by the Washington Legal Foundation, which was represented by the Foundation's Daniel J. Popeo and Richard A. Samp; and by the National Community Pharmacists Association, which was represented by the Association's John M. Rector and by David M. Axelrad, David S. Ettinger, and Felix Shafir of Horvitz & Levy LLP.



Order your 2007-08 edition now!



MEDIA LIBEL LAW

2007-08 EDITION NOW AVAILABLE

(published annually in November)

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 • Summary Judgment

MLRC Newsgathering Committee: “Managing Materials” What Some News Organizations Have Done

By Steve Zansberg

In response to recent events concerning subpoenas and search warrants by prosecutors aimed at documents and other records reflecting unreported news information (e.g., phone records, e-mails, etc.), news organizations have adopted a variety of measures to limit or reduce the generation and availability of such records.

Below is a list of some of the practices that news organizations have either adopted or considered adopting, and have announced publicly. The MLRC does not take any position on these methods of conducting news gathering and reporting; it merely offers this information to its members for their own use. Every news organization must decide its own policies and practices for newsgathering (or whether to adopt any policy), taking into account the needs of journalists, and the countervailing interests of transparency, archiving, libel defense, file storage, etc.

- Route all reporters’ phone calls (both incoming and outgoing) through a central switchboard or other “bundling” device, so that no individual reporter’s phone records are maintained by the news organization.
- Investigative reporters have employed disposable cell phones (or pay phones) for contacting and interviewing sensitive sources.
- Investigative reporters have adopted the practice of never leaving their names with a receptionist or secretary at any company or government agency asking to have someone there return their call. Also, reporters no longer visit a source at his or her place of work, to avoid having to sign a visitor log or be videotaped by a security camera.
- Reporters have been instructed not to identify (by name or specific position) any confidential source in an e-mail or other electronic record maintained on a news organization’s computer system.
- Reporters have also ceased naming a confidential source in an expense report (e.g., “took source to lunch”).
- When dealing with highly sensitive subject matters (e.g., national security), reporters have destroyed all notes of all interviews, etc., the moment the article is published or broadcast. Some news organizations have adopted a regime that automatically deletes any e-mail 30 days old unless it is designated to be saved longer.
- A news organization has demanded a contractual commitment from its phone services provider/vendor that if the provider/vendor receives a subpoena to produce any phone records of the news organization, the provider/vendor shall notify the news organization immediately so they may file a motion in court to challenge the subpoena.
- Some news organizations have provided reporters with portable hard drives and have instructed reporters not to keep such drives in the office, subject to a subpoena on the news organization.

Steve Zansberg is a partner with Levine Sullivan Koch & Schulz in Denver, Colorado.

Maine Enacts Shield Law To Protect Confidential Sources

On April 18, 2008 Maine Governor John Baldacci signed into law a shield law to protect journalists against compelled disclosure of confidential sources of information, information that identifies confidential sources, confidential information and certain data by journalists. The law took effect upon the Governor's approval.

The law was supported by the Maine Press Association, the

Maine Association of Broadcasters and the state chapter of the Society of Professional Journalists. It provides qualified protection. To overcome the law's protections, the information sought must be highly relevant, critical to the case, unobtainable from other sources and there must be an overriding public interest in disclosure of the information.

Next month's newsletter will contain a more detailed article on the effort to pass the law.

An Act To Shield Journalists' Confidential Sources

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, recent events involving the jailing of journalists in other jurisdictions creates doubts that journalists can legally protect their confidential sources, giving rise to a chilling effect in the ability of journalists to conduct their jobs; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 16 MRSA §61 is enacted to read:

§ 61. Shielding journalist's confidential sources

1. Compelled disclosure prohibited. A judicial, legislative, administrative or other body with the power to issue a subpoena may not compel a journalist to testify about, produce or otherwise disclose or adjudge the journalist in contempt for refusal to testify about, produce or disclose:

- A. The identity of a confidential source of any information;
- B. Any information that could be used to identify a confidential source;
- C. Any information obtained or received in confidence by the journalist acting in the journalistic capacity of gathering, receiving, transcribing or processing news or information for potential dissemination to the public; or
- D. Data, including, but not limited to, notes, drafts, outtakes, photographs, video or sound tapes, film or other data of any sort in any medium.

2. Exceptions allowing compelled disclosure. A court may compel disclosure of the identity of a source or information described in subsection 1 if the court finds, after the journalist has been provided notice and the opportunity to be heard, that the party seeking the identity of the source or the information has established by clear and convincing evidence:

(Continued on page 43)

(Continued from page 42)

A. In a criminal investigation or prosecution, based on information obtained from a source other than the journalist, that there are reasonable grounds to believe that a crime has occurred;

B. In a civil action or proceeding, based on information obtained from a source other than the journalist, that there is a prima facie cause of action; or

C. In all matters, whether criminal or civil, that:

(1) The identity of the source or the information is highly material and relevant;

(2) The identity of the source or the information is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material to the claim or defense;

(3) The identity of the source or the information is not obtainable from any alternative source; and

(4) There is an overriding public interest in the disclosure.

3. Compelled disclosure from 3rd parties. The protection from compelled disclosure contained in subsection 1 also applies with respect to any subpoena issued to, or other compulsory process against, a 3rd party that seeks records, information or other communications relating to business transactions between the 3rd party and the journalist for the purpose of discovering the identity of the source or obtaining information described in subsection 1. Whenever a subpoena is issued to, or other compulsory process is issued against, a 3rd party that seeks records, information or other communications on business transactions with the journalist, the affected journalist must be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated and an opportunity to be heard. In the event that the subpoena issued to, or other compulsory process against, the 3rd party is in connection with a criminal investigation in which the journalist is the express target and advance notice as provided in this section would pose a clear and substantial threat to the integrity of the investigation, the governmental authority shall so certify to such a threat in court and notification of the subpoena of compulsory process must be given to the affected journalist as soon as it is determined that the notification will no longer pose a clear and substantial threat to the integrity of the investigation.

4. Waiver. Publication or dissemination by the journalist of information described in subsection 1, or a portion thereof, does not constitute a waiver of the protection from compelled disclosure that is contained in subsection 1. Notwithstanding the provisions of this section, a person entitled to claim the exemption provided under subsection 1 waives the exemption by voluntarily disclosing or consenting to disclosure of the specific information sought to be disclosed to any person not otherwise entitled to claim the exemption.

5. Inadmissibility. The source of any information obtained in violation of this section is inadmissible in any action, proceeding or hearing before any judicial, legislative, administrative or other body.

6. Definition. For the purposes of this section, "journalist" means any person or entity professionally or regularly engaged in gathering, preparing, collecting, writing, editing, filming, taping, photographing or disseminating written, oral, pictorial, photographic or electronically recorded information or data concerning events or matters of public concern or interest or affecting the public welfare or a person supervising or assisting that person or entity.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.

Protecting Confidential Sources in Canada – Good News and Not So Good

By Brian MacLeod Rogers

In the first Canadian appellate decision on use of contempt powers against a journalist refusing to disclose a confidential source at trial, the Ontario Court of Appeal recognized the importance of protecting journalists' sources and reversed a contempt citation and \$31,600 penalty. The case, *St. Elizabeth Home Society v. Hamilton (City) (Citation of Kenneth Peters)*, [2008] ONCA 182, released March 17, 2008, also established a clear procedural path for dealing with journalists' claims of privilege for confidential sources in court proceedings. The Court explicitly recognized that protecting sources was an aspect of freedom of expression that should receive protection under the *Canadian Charter of Rights and Freedoms*.

However, just a few weeks earlier, a different panel of the same court ruled that protection of sources should give way to a police investigation of an alleged crime. In *R. v. The National Post*, [2008] ONCA 139, the Ontario Court of Appeal reversed a lower court decision that had been based on journalists' right to protect confidential sources on constitutional grounds. The Court said that an original envelope and copy of a forged document sent to a journalist provided real evidence that could help police find the perpetrator of the alleged forgery. As a result, the need for the evidence outweighed the desirability of protecting the source, and a search warrant and assistance order for the documents were enforceable against the newspaper. Leave is being sought by *The National Post* to appeal the decision to the Supreme Court of Canada.

Ken Peters Case

In the *Ken Peters* case, the journalist (Peters) had been subpoenaed to testify at a 2004 civil trial because of stories published in *The Hamilton Spectator* in 1995. The stories concerned an investigation by municipal health authorities into allegations, such as patient abuse, negligence and reuse of food, against a nursing home run by the plaintiff, a religious non-profit organization. The stories were based on confidential municipal reports that had been leaked to Peters by a source, on the basis that "you didn't get them

from me."

In its lawsuit, the plaintiff claimed that the municipality was negligent and abusive in exercising its powers and that it was liable for damages arising from the defamatory newspaper articles. To establish the link, the plaintiff sought to prove the municipality responsible for leaking the documents – that is why the identity of the confidential source became a crucial issue at trial. No attempt had been made to obtain the information prior to the subpoena being served on Peters right at the end of the plaintiff's trial evidence after many months of trial.

The trial judge rejected a motion to quash the subpoena but held off deciding whether the source would have to be revealed. However, when testifying, Peters refused to answer a question that he believed would lead to his source, and he was immediately cited for contempt by the trial judge. Subsequently, Peters met with his source to help determine what questions could be answered, but the next day the source was independently identified by a municipal politician.

Then the source, a retired city councillor, testified at trial and admitted his role. Despite the fact that Peters' evidence was no longer required, the trial judge went ahead with a hearing on short notice and found him in contempt, imposing a penalty of \$31,600 to compensate the parties for their added costs. This was three times higher than any previous fine in a media contempt case.

In overruling the trial judge, the Court of Appeal accepted that journalists cannot claim a "class" privilege but rather one decided on a case-by-case basis, applying the traditional four-part Wigmore test. This test was developed by U.S. legal scholar, John Henry Wigmore, to determine when privilege should apply on a case-by-case basis and has been endorsed by the Supreme Court of Canada for that purpose. In four steps, the test looks at the confidentiality of the communication, the need for confidentiality for the relationship in which it was made, the desirability for society in protecting that relationship and, finally, a balancing of the harm to the relationship and the benefit for the correct disposal of the litigation caused by disclosure.

However, for the first time, the Court explicitly ruled

(Continued on page 45)

Protecting Confidential Sources in Canada – Good News and Not So Good

(Continued from page 44)

that protecting confidential sources was an essential part of freedom of expression and that this should be taken into account when applying the Wigmore test, acknowledging that “it is sufficiently apparent that the likely effect of revealing a journalist’s confidential source would be to discourage from coming forward other potential sources who, for whatever reason, need to conceal their identity”.

The Court also accepted that the approach developed by the Supreme Court of Canada in a series of cases involving publication bans and sealing orders (*Dagenais v. CBC*, [1994] S.C.J. No. 104; *R. v. Mentuck*, [2001] S.C.J. No. 73; *R. v. Toronto Star Newspapers*, [2005] 2 S.C.R. 188) should be extended to this situation where the Charter values of freedom of expression and fair trial rights again appear to clash. As a result, the Court urged that contempt powers should be used most cautiously and as a last resort after exploring all alternate means, and it established a procedure respectful of the rights involved:

1. The court should first make an express ruling under the Wigmore test that the confidential source had to be revealed;
2. There should then be an opportunity to explore alternatives, so that the journalists can consider his or her position and consult with the source, if possible;
3. A contempt hearing should be postponed until the end of the trial when the impact of the journalist’s refusal would be clear;
4. If the evidence is provided through alternative means, there is no need for contempt proceedings;
5. Where there is no open defiance of the court, the trial judge should not initiate contempt proceedings, leaving them to the parties or the Attorney General; and
6. Any penalty imposed should carefully recognize all of the circumstances and not be disproportionate.

Since Peters had been polite and co-operative at all times and had taken a principled position in making his re-

fusal, and since the evidence came out through other means, contempt proceedings should never have been initiated by the judge, and the penalty imposed was clearly excessive. The contempt finding and penalty were set aside. No appeal to the Supreme Court of Canada is being sought.

National Post Case

The *National Post* case focused on a plain brown envelope and enclosed document that appeared to be a copy of a bank loan authorization from the Business Development Bank of Canada that suggested a link to then Prime Minister Jean Chretien. *The National Post* had been pursuing related stories for some two years through the efforts of investigative reporter Andrew McIntosh and with the help of confidential sources; the Prime Minister’s involvement in dealings with the bank was the primary focus of the series. In April 2001, the envelope arrived anonymously to McIntosh, who attempted to verify the document by sending copies to the bank, the Prime Minister and his lawyer.

All claimed the document was a forgery, and the *Post* decided against publishing details from it. Soon after, one of McIntosh’s existing confidential sources advised him that he/she sent the document and asked him to destroy the envelope in case DNA or fingerprints might help identify the source. McIntosh refused to do so but took steps to secure the documents and confirmed his commitment to confidentiality as long as he believed the source was not trying to mislead him through the forgery.

At the bank’s request, the Royal Canadian Mounted Police launched an investigation into the alleged forgery and the related offence of “uttering a forged document”, based on the allegation that the *Post* was meant to rely on it as if it was genuine. The RCMP obtained the search warrant and assistance order to require the *Post*’s editor to turn over the original documents on the basis they represented the actual criminal act of the second crime and could provide forensic evidence that would help lead to their source. The *Post* and McIntosh then successfully challenged the warrant and order, with the support of media interveners. That ruling was appealed by the Crown.

The Court of Appeal held that: “the gathering and dis-

(Continued on page 46)

Protecting Confidential Sources in Canada – Good News and Not So Good

(Continued from page 45)

semination of news and information without undue state interference is an integral component of the respondents' constitutional right of freedom of the press under s. 2(b) of the Charter... However, this does not mean that press organizations or journalists are immune from valid searches under s. 8 of the Charter. And s. 2(b) does not guarantee that journalists have an automatic right to protect the confidentiality of their sources."

The Court again turned to the Wigmore test and found the first three criteria were met, accepting that confidential sources

were essential to journalists but pointing out that "journalists can never guarantee confidentiality" and "refusing to recognize the privilege in appropriate cases will not, in our view, cause media sources to 'dry-up.'"

However, the case for privilege was lost on the fourth criterion - the balancing of competing interests. The Court was convinced by the Crown's contention that the envelope and document represented the actual act of "uttering a forged document", available from nowhere else, and that the potential identifying forensic information was critical to the police investigation. The Court found the alleged offence was "an especially grave and heinous crime" – "if the document was forged, it would be evidence of a criminal conspiracy to force a duly elected Prime Minister from office." As a result, "the respondents are shielding a potential wrongdoer from prosecution for a serious crime by refusing to deliver to the authorities the items representing the *actus reus* of the offence." In sum, the Court stated:

We do not diminish the press' important role in uncovering and reporting an alleged wrongdoing. But in our society it is the police who are charged with a crucial role of investigating and prosecuting crime. And, to paraphrase what White J. said

in *Branzburg v. Hayes* at p. 692, it is not necessarily better to write about crime than to do something about it.

Fortunately, the Court rejected the Crown's position that law enforcement interests should always trump any claim to journalist/source privilege, but the breadth of the ruling's application to alleged criminal activity remains to be seen.

Could any whistleblower's release of confidential documents now lead to a police investigation? Will journalists best be advised to destroy any original

documents they receive (after making a copy) in order to protect their confidential sources? If so, will there be consequences in the event of a libel suit? In the meantime, at least reporters will know that if they are called upon to identify a source in court, the law of contempt is a little less the bludgeon that it once was, and they may have a better chance of protecting their confidential sources.

... reporters will know that if they are called upon to identify a source in court, the law of contempt is a little less the bludgeon that it once was...

Brian MacLeod Rogers (Toronto) was counsel for the Appellant, Ken Peters. In St. Elizabeth Home Society v. Hamilton (City), Sara Blake, Robin Basu and Sophie Nunnelley were counsel for the intervener, Attorney General for Ontario. Trisha Jackson and Charles Finlay were counsel for the intervener, Canadian Newspaper Association, John Norris was counsel for the interveners, Canadian Association of Journalists and Canadian Journalists for Free Expression. In R. v. The National Post, Robert Hubbard was counsel for the Appellant, Attorney General for Ontario. Marlys Edwardh and John Norris were counsel for the Respondents, The National Post, Matthew Fraser and Andrew McIntosh. Peter Jacobsen and Adrienne Lee were counsel for the intervener, Bell Globemedia Inc. Daniel Henry was counsel for the intervener, Canadian Broadcasting Corp.

Able to Terminate Transfers in a Single Bound

Reflecting on the Superman Copyright Termination Case

By Toby Butterfield and Lisa Digernes

After years of litigation and attempted settlements, the heirs of Jerome Siegel, one of the original creators of “Superman,” finally had their day in court. A California federal district court ruled that Siegel’s widow and daughter, Joanne and Laura Siegel, had successfully terminated the copyright in the original Superman material published in the Detective Comics’ *Action Comics Vol. 1* by serving termination notices on defendants Warner Bros. Entertainment Inc., Time Warner Inc. and DC Comics, Detective Comic’s successors in interest. *Siegel v. Warner Bros. Entertainment, et al.*, No. 04-8400, 2008 WL 906718 (C.D. Cal. Mar. 26, 2008) (Larson, J.).

Background

The court’s 72 page opinion reviews Superman’s creation in detail, and finds its original story writer Jerome Siegel’s heirs validly terminated prior grants despite the technicalities of exercising termination rights under Section 304(c) of the Copyright Act. (The Siegel heirs are also separately pursuing the rights to Superboy in another case before Judge Larson in *Siegel v. Time Warner Inc.*, 496 F. Supp. 2d 1111 (C.D. Cal. 2007). And according to a footnote, the estate of the illustrator Joseph Shuster also recently filed

termination notices seeking rights to Superman.)

Siegel and Shuster had unsuccessfully attempted to terminate their grant to Detective Comics before, upon expiration of the first term of copyright under the 1909 Copyright Act.

The Second Circuit found that the creators had assigned their rights not only to the initial term of copyright, but also the renewal term,

and that the copyright grant was therefore still in effect. *Siegel v. National Periodical Publications, Inc.*, 364 F. Supp. 1032 (S.D.N.Y. 1973), *aff’d*, 508 F.2d 909 (2d Cir. 1974).

After that decision, the *New York Times* published an article describing Siegel and Shuster as “destitute” as a result. The bad publicity led DC Comics’ parent company Warner Communications to promise to provide the creators with annual payments and medical insurance, to credit them as the “creators of Superman,” and to provide survival spouse benefits to Siegel’s wife. Warner specifically stated that the payments were voluntary and would terminate if the creators or their representatives sued asserting any rights to Superman. Jerome Siegel died on January 28, 1996.

Right to Terminate

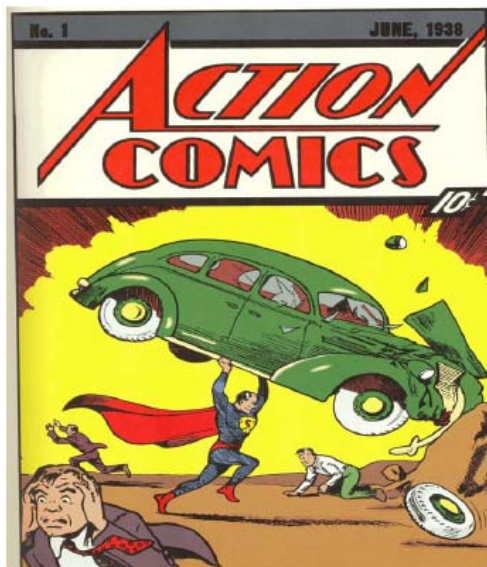
The Siegel heirs got another opportunity to reclaim the rights Jerome Siegel granted to defendants under Section 304(c) of the 1976 Copyright Act, which provided authors and their heirs the right to terminate grants of rights in their works executed before January 1, 1978 (the effective date of the Act), even if the grants were for the full term of copyright.

Section 304(c) provides that the termination of the grant may be effected any time during a five year period, starting at the end of 56 years from when the copyright in work was secured. The termination notice must be served within a window of no less than two years and no more than 10 years before the effective termination date. As the court described, the specific requirements for the termination notice and for recording it with the Copyright Office are “intricate” and “oftentimes create unexpected pitfalls that thwart or blunt the effort of the terminating party to reclaim the full measure of the copyright in a work of authorship.” The decision offers a primer of those pitfalls and of the wide-ranging results if a plaintiff avoids them.

For example, the heirs’ termination notice had an effective termination date of April 16, 1999. Therefore, it did not terminate any copyrights secured before April 16, 1938, 56 years earlier. Defendants found a promotional announcement of the upcoming *Action Comics Vol. 1*, published only a few days before the April 16, 1938 date, and therefore outside of the termination notice.

The court thus concluded that defendants retain their exclusive rights to exploit the material first published in that announcement. The court mechanically dissected the announcement and compared

(Continued on page 48)



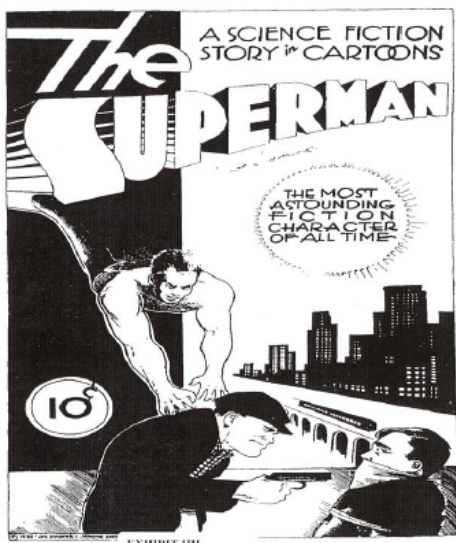
Able to Terminate Transfers in a Single Bound

(Continued from page 47)

it to the various elements in the subsequently copyrighted Superman material covered by the termination notice, in order to determine what rights the Siegel heirs validly terminated.

As the announcement showed just a black and white illustration of Superman lifting a car, without any storyline, the Court concluded that defendants could continue to exploit “the image of a person with extraordinary strength who wears a black and white leotard and cape.” However, copyright in the entire storyline developed later, plus Superman’s distinct blue leotard with the red “S” on a yellow background, his red cape and boots and his Superman abilities, were all subject to termination. The court therefore effectively ruled without analysis that the announcement did not fully articulate the Superman character, and so did not publish the character.

Defendants’ many other attacks on the termination notices failed. For example, the court ruled that defendants’ argument that Siegel’s drawing was “work made for hire” (and therefore not terminable) was heard and rejected in the 1970s Superman renewal litigation, and therefore was collaterally estopped. The court also rejected defendants’ statute of limitations arguments.



Rights Upon Terminating

The Siegel heirs have various rights by virtue of their valid termination notice. First, the original Superman material is a joint work authored by Siegel and Shuster, so until the Schuster heirs obtain a valid termination of their grant, the Siegel heirs and the defendants are now co-owners of that work. As co-owners, they may separately grant non-exclusive licenses, subject to their duty to account to the other party. Apparently the Siegel heirs have already teamed up with ComicMix to publish new Superman stories.

On the other hand, under Section 304(c)(6)(A), defendants

continue to have the right to exploit derivative works they prepared before April 16, 1999, the effective date of the termination notice. The Siegel heirs are only entitled to participate in ongoing profits from exploitation of new works defendants prepared after April 16, 1999. Therefore, the income from the 1978 “Superman” film and the three sequels in the 1980s are unaffected by this decision. However, defendants’ profits from the “Superman Returns” sequel and related income from other post-1999 projects will presumably be included in the accounting to the heirs.

In a useful clarification, the court ruled that the terminating party only recaptures the domestic rights of the copyright grant, not profits from defendants’ foreign exploitation. Similarly, defendants’ Superman trademarks are not subject to copyright termination, so any accounting must parse out profits deriving from such exploitation.

In a final blow to defendants, the court also ruled that all the intricacies of inter-corporate transactions within the Time Warner empire may be reviewed to determine whether there were any “sweetheart deals” which could diminish recoverable profits. For example, the Siegel heirs could possibly share directly in the profits derived by DC Comics’ corporate sibling Warner Brothers Entertainment, Inc. (“WBET”) and its corporate parent, Time Warner, Inc. The court questioned whether the entities, which are closely related in ownership, entered into a “sweetheart” deal netting less than market value. This question of fact, along with many others, could not be answered on summary judgment.

While this decision arguably does not break much new ground, it is an object lesson in the many issues which arise in a copyright termination claim. If tried, the case may yet expose many arguments about the way inter-corporate negotiation and accounting operates within an entertainment industry giant. Copyright termination lawyers will stay tuned for another action packed episode.

Toby Butterfield, is a partner, and Lisa Digernes, an associate, at Cowan, DeBaets, Abrahams & Sheppard LLP in New York. Plaintiffs were represented by Marc Toberoff, Nicholas Calvin Williamson, Los Angeles. Defendants were represented by James D. Weinberger, Roger L. Zissu, Fross Zelnick Lehrman and Zissu, New York; Anjani Mandavia, Michael Bergman, Weissmann Wolff Bergman Coleman Grodin & Evall, Beverly Hills; and Patrick T. Perkins, Cold Spring, NY.

Northern District of Illinois Again Holds Police Disciplinary Files Produced In Civil Case Not Confidential; Media Await Seventh Circuit's Decision On The Subject

By Natalie J. Spears and Gregory R. Naron

The Northern District of Illinois has issued another strong ruling rejecting the City of Chicago's attempt to conceal police disciplinary files – so-called “Complaint Register” or “CR” files -- from public scrutiny. *Talbert v. City of Chicago, et al.*, No. 03 C 7571 (N.D. Ill. March 20, 2008) (Andersen, J.).

In *Talbert*, the plaintiff alleged that, in an exercise of unlawful, excessive force, a Chicago police officer pistol-whipped and shot to death plaintiff's son, and that other officers conspired to “cover up the unjustifiable use of deadly force.” Hundreds of CR files were produced by the City in the course of discovery in *Talbert*; ultimately, the case settled.

After the case had settled, the *Chicago Tribune* moved to intervene and sought an order modifying the agreed Protective Order that was entered in *Talbert*, to remove any confidentiality designation over the CR files. Last month, District Judge Wayne Andersen granted the *Tribune's* motion in its entirety.

Judge Andersen agreed with the *Tribune* that the Seventh Circuit Court of Appeals “has condemned overbroad protective orders and unnecessary designations of confidentiality because the work of the federal judicial system is ‘presumptively public business,’” and in recognition of this presumption, “has strictly enforced the requirement of a ‘good cause’ finding to support any protective order.” (Mem. Op., p. 2.)

The court followed the prior cases of *Bond v. Utreras*, No. 04 C 2617, 2007 WL 2003085 (N.D. Ill., July 2, 2007), *Doe v. Marsalis*, 202 F.R.D. 233 (N.D. Ill. 2001), and *Wiggins v. Burge*, 173 F.R.D. 226 (N.D. Ill. 1997), all of which “found that CR files are public documents and subject to a presumption of openness even if not filed with the court.” (Mem. Op., p. 2.)

Judge Andersen specifically adopted Judge Lefkow's reasoning in the *Bond* case, concluding that “there is no good cause for keeping CR files under the secrecy of a protective order,” where, as here, “[t]he documents at issue in this case involve allegations of police misconduct . . . and thus touch upon matters of grave public concern.” (Mem. Op., p. 2, quoting *Bond*, at *4.)

The court also agreed with the *Tribune* that the police officers' privacy interests were “diminished by their status as public officials.” Indeed, the court observed, consonant with “the policy favoring the public's right to be informed of the conduct of public servants,” the Illinois Freedom of Information Act (5 ILCS 140/7(1)(b)) expressly provides that “disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.” (Mem. Op., pp. 2-3.)

“Balancing all of these issues,” the court found “good cause does not exist to shield the CR files from public inspection.” (Mem. Op., p. 2.) Accordingly, the protective order was modified “to exclude CR files from the confidential designation.” (Id., p. 3.)

Notably, Judge Andersen rendered his decision while noting that the City had appealed from Judge Lefkow's decision in *Bond*. See *Bond v. Utreras*, Nos. 07-2651 and 07-3644 (7th Cir. filed Nov. 1, 2007). The Seventh Circuit's pending decision in that case may address the nature of the presumption of access articulated in its prior decisions and referenced in the *Talbert* order.

A group of media organizations, including The Associated Press, CL Chicago, Inc., The Sun-Times Company, Chicago Tribune Company, GateHouse Media, Inc., Gannett Co., Inc., The Illinois Press Association, Lee Enterprises, Inc., and The New York Times Company, filed a brief *amicus curiae* in support of the intervenor in *Bond*, an independent journalist named Jamie Kalven.

Interestingly, a group of Chicago aldermen seeking disclosure of police disciplinary files intervened in the *Bond* appeal and were also granted leave to file a brief. Oral argument in *Bond* is expected to be scheduled in the summer of 2008.

Natalie J. Spears is a partner, and Gregory R. Naron of counsel at Sonnenschein Nath & Rosenthal LLP in Chicago. They represented the Chicago Tribune in its motion to intervene in the Talbert case, and the media amici curiae in the Bond appeal.

Reasonable Expectation of Privacy in ISP Subscriber Information

Probable Cause Standard for Law Enforcement

By Kathleen Hirce

Supreme Court Decision

In a privacy decision this month, the New Jersey Supreme Court continued its prior treatment of the state's constitution to hold that Internet users have a reasonable expectation of privacy in the subscriber information they submit to their internet service providers ("ISP"s). *State v. Reid*, A-105-06, April 21, 2008 (Rabner, C.J. for the unanimous Court).

The Court also ruled, however, that law enforcement investigators need not meet a heightened probable cause standard to obtain this subscriber information; a grand jury subpoena will suffice, just as it has in the past for similar investigations seeking bank records or utility bills.

Background

This privacy issue reached the Supreme Court by way of a dispute between Timothy Wilson, owner of a company named Jersey Diesel, and his employee, Shirley Reid. Wilson learned from a supplier company with whom he had been working that

New Jersey's constitution, provides more protection from unreasonable searches and seizures than does the Fourth Amendment.

someone had accessed the supplier's website, logged on with Jersey Diesel's username and password, and changed Jersey Diesel's password and shipping address.

The supplier gave Wilson the IP address, registered to Comcast, that had been used to change Jersey Diesel's information, and Wilson contacted Comcast. Comcast refused to provide Wilson with any user information without a subpoena. Consequently, Wilson went to the local police, explained the situation, and stated that he suspected Reid, who was the only employee with Jersey Diesel's online information, and with whom he had had an argument.

The police responded by serving a subpoena duces tecum on Comcast, pursuant to the case *Timothy C. Wilson, Plaintiff, vs. Shirley Reed [sic], Defendant*, which did not, actually, exist. Comcast responded, implicating Reid, who was later charged with second-degree computer theft pursuant to a grand jury indictment.

The Supreme Court began its treatment of this issue by noting that federal courts have failed to find an expectation of privacy in Internet subscriber information because that information has been voluntarily submitted to a third party. New Jersey's constitution, however, provides more protection from unreasonable searches and seizures than does the Fourth Amendment. In addition, the Court noted that it had already expanded privacy expectations to include protection of individuals' telephone records and bank records, finding, contrary to the federal courts' reasoning, that the voluntary submission of this information was for a "limited business purpose" and "[t]he disclosure is done to facilitate financial transactions, not to enable banks to broadcast the affairs of their customers."

The Court bolstered its holding by looking to the New Jersey Wiretapping and Electronic Surveillance Control Act ("Wiretap Act"), N.J.S.A. 2A:156A-1 to -34, which provides that ISP subscriber information may only be divulged to law enforcement pursuant to a grand jury, trial, or State Commission of Investigation subpoena.

While the establishment of a privacy interest in ISP subscriber information is a natural progression from the Court's earlier decisions regarding telephone records and banking information, the Court noted that its holding in this instance could change. As technology advances, Internet users—who are currently anonymous while online—may become identifiable and no longer able to claim a *reasonable* expectation of privacy in their ISP information. For example, the Court explained, new "reverse directory" software may become available, allowing individuals to type in an IP address and discover the name of the Internet user.

Finally, the Court examined the extent of the privacy interest in ISP information in the context of a legitimate law enforcement investigation. In previous decisions, the Court had held that privacy interests in bank records and electric utility records were not violated by the issuance of grand jury subpoenas, subject to a showing of relevance. The New Jersey Court has continually supported the "expansive investigatory power" of the grand jury, and it similarly found that no greater probable cause standard was necessary to obtain ISP information.

Interestingly, the Court also declined to impose a "notice

(Continued on page 51)

Reasonable Expectation of Privacy in ISP Subscriber Information

requirement”, which had been sought by Defendant Reid and the various information privacy advocacy amicus groups. If an ISP provided notice to the Internet user that his information was being subpoenaed, “unscrupulous individuals . . . could delete or damage files on their home computer and thereby effectively shield them from a legitimate investigation.”

The Court’s application of its ruling to Reid’s case indicates the extent of the power granted to law enforcement in these circumstances. The municipal subpoena served upon Comcast was held to be defective and invalid, and therefore subject to exclusion. However, the Court made clear that Comcast’s records of Reid’s

behavior, though improperly obtained in this situation, were not “lost in [their] entirety.” Law enforcement could still use a properly issued grand jury subpoena to obtain the information from Comcast. Since Wilson suspected Reid, and knew the IP address of the user infiltrating the supplier’s website, “[u]nder any reasonable interpretation, the subscriber information attached to that particular IP address bore ‘some possible relationship’ to the investigation underway.” (quoting *State v. McAllister*, 184 N.J. 17, 34 (2005)).

Kathleen Hirce is an associate at McCusker, Anselmi, Rosen & Carvelli PC in New Jersey.

MLRC Calendar

PLEASE VISIT WWW.MEDIALAW.ORG FOR MORE INFORMATION

May 15-16, 2008
 Legal Frontiers in Digital Media
 2008 MLRC/Stanford Digital Media Conference
 Stanford University, Stanford, CA

September 17-19, 2008
 NAA/NAB/MLRC Media Law Conference
 Chantilly, VA

November 12, 2008
 MLRC ANNUAL DINNER
 New York City

November 13, 2008
 MLRC Defense Counsel Section Annual Meeting and LUNCH

Ethics Corner

Ethics Consulting Within Law Firms and the Attorney-Client Privilege

By Bradley H. Ellis

As law firms have grown, so too have the number and complexity of issues regarding conflicts of interest. When such issues arise, the natural and prudent reaction is to consult with others concerning the nature of the conflict or potential conflict, and the duties the lawyer owes to the client. Most often, the consultant is the partner in the office next door, or perhaps the firm's in-house general counsel.

But what if the conflict is between the lawyer and client, and ultimately litigation ensues between them? Are those internal communications shielded from disclosure pursuant to the attorney-client privilege? A recent decision from the U.S. District Court, Northern District of California, answers that question in the negative, at least as to some of those internal communications.

In *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071, 2007 WL 578989 (N.D. Cal. Feb. 21, 2007), Francois

Marland entered into an agreement with Thelen Reid & Priest to represent him in a *qui tam* action against Credit Lyonnais, alleging that

by means of an undisclosed fronting agreement, or "contrat de portage," Credit Lyonnais had illegally acquired the assets of Executive Life Insurance Company, an insolvent insurance company sold at auction conducted by the California Department of Insurance ("CDOI"). Marland claimed he possessed the portage. The agreement between Thelen and Marland provided that Marland would receive a percentage of any recovery in the matter.

At about the same time, CDOI also filed suit. This led to a flurry of activity, including that Thelen and CDOI entered into an agreement calling for Thelen to represent CDOI in its action and the dismissal of Marland's action. Thelen and Marland then amended their February 1999 agreement to provide that Thelen would share fees it received from CDOI with Marland and Marland's European counsel.

By December 2001, the CDOI lawsuit had proved much more expensive to prosecute than anticipated, so Thelen approached Marland to renegotiate the financial terms of his agreement with the firm. Marland then disclosed that, in

fact, he did not have the portage, but instead had destroyed it. Contending Marland had breached their agreement, Thelen gave notice of its intent to withdraw from its representation of Marland. Thelen asserted that its attorney-client relationship pursuant to the June 1999 agreement with Marland ended after August 30, 2002, and that any obligation it had to Marland under the June 1999 agreement had been excused.

Later, in December 2002, Thelen entered into a second agreement with Marland and Marland's European counsel pursuant to which Thelen agreed to pay Marland and his European counsel 35 percent of the fees paid to Thelen by CDOI.

The obviously rocky relationship between Marland and Thelen eventually fell apart, with Marland claiming that Thelen had used the cost of litigation and the destruction of the portage as a pretense to reduce his share of the recovery from the litigation. (One might pause in wonder that under

As the court framed it, "the issue is whether the attorney-client privilege applies where a law firm is attorney to both an outside client and to itself."

the December 2002 agreement Marland had already been paid \$19 million for his efforts.) After Marland commenced an arbitration

proceeding against Thelen, Thelen sued Marland seeking to enforce the terms of the December 2002 agreement and to enjoin Marland from pursuing the arbitration.

Behind the scenes, at the same time it was still representing Marland, Thelen had been consulting internally with its executive committee and its general counsel – a partner in the firm – as to the firm's legal options in light of Marland's destruction of the portage, the proposed terms of the December 2002 agreement with Marland, and the ramifications of not reaching an agreement with him. When discovery ensued in the litigation between Thelen and Marland, Marland sought access to documents reflecting these communications. Thelen resisted production, relying on the attorney-client privilege as to communications between members of the firm and its general counsel. The court ordered some of the documents produced.

As the court framed it, "the issue is whether the attorney-client privilege applies where a law firm is attorney to

(Continued on page 53)

Ethics Corner: Ethics Consulting Within Law Firms and the Attorney-Client Privilege

both an outside client and to itself.” *Marland* at 6. To support its position that the documents were privileged, Thelen relied on *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996) in which the Ninth Circuit held that communications concerning a law firm’s internal investigation of one of its own attorney’s handling of client funds were privileged from disclosure to the government in connection with a grand jury investigation. The court was not persuaded, noting that in *Rowe*, the assertion of the privilege was against a third party, not a firm client. Instead, the court relied on *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 595 (E.D. Pa. 1989) in which the court recognized the theoretical existence of an attorney-client privilege between the law firm as attorney and itself as client, but held that:

law firm’s consultation with in house counsel may cause special problems which seldom arise when other businesses or professional organizations consult their in house counsel. A law firm’s representation of a client, and its ability to meet its ethical and fiduciary obligations to that client, may be affected by its representation of another client, even if the second client is the law firm itself. So, for example, when a law firm seeks legal advice from its in house counsel, the law firm’s representation of itself (through in house counsel) might be directly adverse to, or materially limit, the law firm’s representation of another client, thus creating a prohibited conflict of interest.

The court in *Marland* worried that a strict rule requiring disclosure of all communications relating to a client would discourage attorneys from seeking advice concerning ethical problems from their partners or other in-house advisors such as general counsel. Therefore, the court declined to require disclosure of all communications between the firm and its in-house ethics advisors. Instead, the court required Thelen to produce “any communications discussing claims that Marland might have against the firm or discussing known errors in its representation of

Marland,” as well as “any communications discussing known conflicts in its representation of Marland or other circumstances that triggered Thelen’s duty to advise Marland and obtain Marland’s consent.” Thus, only those communications needed to be produced that took place after the law firm learned that Marland may have a claim against the firm or that the firm needed Marland’s consent in order to commence or continue another client representation. *Marland* at 7.

New York State Bar Ethics Opinion

Similar issues are discussed in a 2005 opinion from the New York State Bar Association Committee on Professional Ethics. *Consultation with a Law Firm’s In-house Counsel on Matter of Professional Ethics Involving One or More Clients of the Law Firm*, Op. No. 789 (Oct. 26, 2005). The specific question addressed by the Committee, which it noted had not been answered by any other ethics committee, was whether an impermissible conflict between the interests of the law firm and those of the client arose merely by virtue of the communications within the firm about the firm’s legal and ethical obligations in connection with representing the client.

In an opinion that is a ringing endorsement and encouragement of ethical structures within firms, such as designated ethics lawyers and in-house general counsels, the Committee determined that the mere fact of consultation did not give rise to a conflict. However, the Committee also

... when a law firm learns that a client may have a claim against the law firm arising out of the law firm’s rendition of legal services... then the firm may need to disclose to the client the firm’s conclusions with respect to the ethical issue.

concluded that “when a law firm learns that a client may have a claim against the law firm arising out of the law firm’s rendition

of legal services, or that the firm may need client consent in order to commence or continue another client representation, or in other circumstances where the client is called upon to act or decide, then the firm may need to disclose to the client the firm’s conclusions with respect to the ethical issue.” *Id.* at 4 (emphasis added).

In other words, while consideration of ethical issues by itself need not be disclosed to the client, the firm may have

(Continued on page 54)

Ethics Corner: Ethics Consulting Within Law Firms and the Attorney-Client Privilege

a duty “to disclose the products of that consideration” depending on the circumstances. *Id.* at 5.

The *Marland* court cites this opinion and notes its limitation that disclosure is limited to the “conclusions” of a firm’s internal deliberations. Yet, the court went beyond that limitation by ordering the production of “any communications” discussing claims Marland might have against Thelen, known errors in its representation of Marland, and known conflicts or other circumstances triggering Thelen’s duty to advise Marland and obtain his consent.

Given the Court’s inconsistent reference within the same paragraph to production of “conclusions” and production of “any communications” it is entirely possible this is just a case of sloppy draftsmanship. However, the court itself characterized the exception from the production sought by Marland to be “limited.” *Marland* at 8. It is likely, then, that courts will read *Marland* and understand it to mean what it says – production is not limited to just the conclusions reached, but the deliberations themselves.

In fact, relying on *Marland*, the Bankruptcy Court in *In re Sonicblue Incorporated v. Portside Growth & Opportunity Fund, et al.*, No. 03-51775, 2008 WL 170562 (Bkr. N.D. Cal. 2008) ordered production of *communications* with in-house counsel as of the point in time when the law firm became aware of an actual conflict of interest with its client. The court concluded: “[A] law firm cannot assert the attorney-client privilege against a current outside client when the communications that it seeks to protect arise out of self-representation that creates an impermissible conflicting relationship with that outside client.”

Of course, there is a world of difference between disclosure of the deliberations and the conclusions reached from those deliberations, that brings to mind the old saying about watching sausage get made. And in today’s email world, the ingredients may indeed be hard to stomach.

The lesson, however, is not to avoid the internal consultations or to run out and hire outside counsel whenever a conflict between lawyer and client arises.

Rather, when consulting with partners and their own in-house counsel, lawyers need to heed the advice commonly given to clients – consider that every email or memo sent could find its way in front of judge or jury, and act accordingly.

Bradley H. Ellis is a partner at Sidley Austin LLP in Los Angeles.

©2008

MEDIA LAW RESOURCE CENTER, INC.
520 Eighth Ave., North Tower, 20 Fl.
New York, NY 10018

BOARD OF DIRECTORS

Ralph P. Huber (Chair)
 Dean Ringel
 Dale Cohen
 Stephen Fuzesi, Jr.
 Henry S. Hoberman
 Marc Lawrence-Apfelbaum
 Karole Morgan-Prager
 Kenneth A. Richieri
 Elisa Rivlin
 Susan E. Weiner
 Kurt Wimmer

STAFF

Executive Director: Sandra Baron
 Staff Attorney: David Heller
 Staff Attorney: Eric Robinson
 Staff Attorney: Maherin Gangat
 MLRC Fellow: Carolyn Conway
 MLRC Institute Fellow: Jennifer Liebman
 MLRC Administrator: Debra Danis Seiden
 MLRC Publications Assistant: Philip J. Heijmans